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*poster by Fred Moore for the
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3 December 2020

FOIA Appeals
Deputy Archivist of the United States (ND)
National Archives and Records Administration (NARA)
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(by e-mail to <foia@nara.gov>)

FOIA Appeal of denial in full of FOIA request: National Commission on Military, National, and Public Service (NCMNPS) FOIA tracking number “2020-SP-33”

Dear Deputy Archivist:

This is an appeal of the denial in full of a FOIA request which I originally made to the National Commission on Military, National, and Public Service (NCMNPS), for records of the NCMNPS as a temporary Federal executive agency. Custody of this request (a copy of which was already in the possession of, and known to, NARA’s FOIA office), custody of all potentially responsive records, and responsibility for completing processing of this request (including any appeals and any action on remand following appeals) was transferred from the NCMNPS to NARA at the expiration of the statutory mandate for the NCMNPS on 18 September 2020.

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I submitted this request to the NCMNPS by e-mail on 25 August 2020, and included a request for expedited processing. On 4 September 2020, I was notified by e-mail that this request was assigned tracking number 2020-SP-33, and that it was denied in full.¹

My request sought all records of the NCMNPS. It was denied on the following basis:

[Y]our request does not meet the requirements set out in the Commission’s FOIA regulations, which require “[a] description of the records sought in enough detail to allow the records to be located with a reasonable amount of effort.... Requests such as yours do not meet the responsibility of a requestor “to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome.”

This claim is in error. There is no reason to think that the NCMNPS would not have been able to identify all of its records; indeed, it was presumably already required to do so, and was doing so, in the course of determining which records to transfer to NARA.

Whether a “large” volume of records (whatever that might mean) might be responsive to a request is irrelevant to the validity of the request. I know of no case law upholding the denial of a request solely on the basis of the volume of responsive records.

With respect to the alleged burdensomeness of the search, the denial letter states:

[T]his information is spread across multiple different email accounts, individual cloud drives, and shared server space, so that just organizing the review process would be extremely time intensive.

Whatever truth (if any) this may have had, it is both irrelevant (the statutory and regulatory criteria for a request pertain to the amount effort required to search for identity which records are responsive, not to subsequent processing of records once the search is completed) and no longer applicable, and likely was already inapplicable at the time that this request was denied. All of the potentially responsive records that were not destroyed have now, presumably, been gathered together and delivered to NARA, and are presumably identified and readily identifiable to NARA as “records of the NCMNPS”. The process of inventorying these records was likely already underway, and likely mostly complete, by the

1. This request is available on my Web site at <<https://hasbrouck.org/draft/FOIA/NCMNPS-FOIA-25AUG2020.pdf>>, and the notice of denial is available at <<https://hasbrouck.org/draft/FOIA/OGC-FOIA-2020SP33-response-final.pdf>>. According to an e-mail message I received on 9 September 2020 from Peter Morgan, Director of Operations and FOIA Public Liaison for the NCMNPS, “Pursuant to the General Records Schedule, all FOIA case files will be retained for six years, and as such will be transferred to NARA at the end of the Commission’s existence.” Accordingly, I assume that this request and all related records, including my correspondence (some of which is specifically cited in this appeal) with NCMNPS FOIA staff concerning this request, are now in NARA’s possession and available to NARA’s FOIA appeals officer, and I hereby incorporate them by reference in this appeal to avoid cluttering your file with duplicate copies. If these records are not readily available to NARA’s FOIA appeals officer, I will be happy to supplement the record supporting this appeal by providing another set of copies of that correspondence. Failure by the NCMNPS to preserve these records and transfer them to NARA would, of course, be evidence of bad faith by the NCMNPS.

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NCMNPS and/or NARA by the time of this request. A search now, by NARA, to identify and retrieve those records now in NARA's custody that were received from the NCMNPS would presumably, be almost trivial and could likely be completed quickly and easily.

For NARA (or its predecessor the NCMNPS) to identify all those records transferred to NARA by the NCMNPS, without having to engage in any further, record-level, or record content review to identify responsive or potentially responsive records, would be vastly simpler, quicker, and less burdensome than to conduct any search for some subset of those records. "All" is the simplest and most unambiguous possible search criterion. By requesting "all" NCMNPS records, I deliberately made the search criteria as simple and unambiguous as possible, to minimize the burden of the search for the NCMNPS (or NARA).

It is much quicker and easier for a farmer to shovel a haystack into a hay wagon, and deliver it in its entirety to a recipient such as myself who can then search the contents of the pile for a needle on the recipient's own time at their own expense, than for the farmer to be asked to find and retrieve a needle that might be located somewhere in that haystack.

The FOIA statute makes no mention of the burdensomeness of "review" of records, following the completion of the search. "Review" is often mentioned in FOIA case law, but in many cases this "review" is to determine whether potentially responsive records are in fact responsive to the request. Since all NCMNPS records are responsive to this request, no review by the NCMNPS or NARA would be necessary to determine which records are responsive.

With respect to the volume of responsive records and burdensomeness of review to determine the possible applicability of exemptions (and without conceding that this is even relevant to the statutory criteria, which are limited to the burdensomeness of search), the denial letter states as follows:

Based on our current estimates, there is approximately a terabyte of information that the Commission would need to retain and review as part of this request, which is generally accepted to be approximately 75 million pages. The Commission currently has only seven staff members, and only three are working full-time. If we assume an individual could review an average of 100 pages an hour, then it would take 750,000 hours to complete the review process, there by monopolizing all of the staff's time for years.

A terabyte of data is the capacity of single typical hard drive in a desktop or laptop computer. If the NCMNPS had only a terabyte of records as of 4 September 2020, that is a small and likely readily reviewable amount, and suggests that the NCMNPS had generated few records, or that most of the records of the NCMNPS had either been improperly omitted from the NCMNPS records inventory, or had already been deleted or destroyed.

It's not surprising that the volume of records generated by the NCMNPS would be, as the denial letter indicates, small (although that it is as small as a terabyte is somewhat

surprising). The NCMNPS was a small, temporary agency that was in existence for less than four years, with a total lifetime budget of \$15 million. While list of NCMNPS staff or contractors has been disclosed, they likely numbered only a few dozen.

No basis is given for the claim that a terabyte of data “is generally accepted to be approximately 75 million pages”, and I do not accept this claim or concede that it is generally accepted. In fact, there is no reason to believe that any significant portion of the volume of NCMNPS records, measured by bytes, consists of “pages” or paginated records. The sizes of video and audio files relative to those of text files or word-processor files, and the implausibility of the claim that the small staff of the NCMNPS, in its short life, could have generated 75 million pages of text, makes it highly likely that most of the volume of NCMNPS records consists of multimedia files. The denial letter gives no indication of the breakdown of NCMNPS records by file type, but there is every reason to think that the text fraction is small.

The NCMNPS held fourteen formal public hearings, each of which was scheduled for three hours.² Each of these hearings, as well as numerous other “informal” public NCMNPS events, was recorded (and in many cases livestreamed) by the NCMNPS.

A typical bitrate for 1080p video recorded or streamed by DSLR cameras or many smartphones is 8 megabytes/second. At this bitrate, a terabyte of data corresponds to a little less than 35 hours of digital video files.

If we assume that an individual could review video files at least in real time, then a terabyte of video could be reviewed in 35 hours. In practice, the time required for review would be much less. No exemptions would apply to video of public events, so the only purpose of the review would be to confirm that the video was, in fact, video of public events. That review could be conducted on “fast forward” playback at a multiple of the recording speed, and in a fraction of the recording time.

Even at a much lower video resolution and bitrate, the NCMNPS video and audio records likely constitute most of a terabyte, leaving only a much smaller (but unspecified) volume of text files, consistent with the small size and short life of the NCMNPS.

In short, the available record including the facts cited by the NCMNPS in its denial letter strongly support the conclusion that volume of responsive records is small, that the responsive records were and are readily identifiable without “review” for responsiveness, and that review for potential exemptions would not be unreasonably burdensome.

If the NCMNPS had genuinely believed that the request was so complex or the volume of responsive records would be so large that it would not be able to respond to the request in a

2. “Notice of Public Hearings”, NCMNPS Docket No. 04-2019-01, Federal Register Document Number 2019-00095, National Commission on Military, National, and Public Service, 84 *Federal Register* 801, 31 January 2019.

timely manner, both the FOIA statute and the NCMNPS FOIA regulations (and NARA's FOIA regulations, if the request were subject to NARA's regulations once the records were transferred to NARA) would have required the NCMNPS to notify me of that fact, to give me an opportunity to narrow my request, and to notify me of the availability of the FOIA Public Liaison to assist me in narrowing my request.

The NCMNPS did none of these things. The NCMNPS failed to comply with its statutory FOIA obligation and its own FOIA regulations requiring it to make a FOIA Public Liaison available to the public, failed to comply with its obligation to establish telephone or online mechanism by which requesters could obtain estimated dates of completion of action with respect to FOIA requests (which I needed to inform my decisions with respect to possible narrowing of my requests), and failed to provide me with an opportunity to confer regarding possible narrowing of my request.

According to the denial letter from the NCMNPS Chief FOIA Officer:

On September 1, 2020, in an effort to clarify your request and assist you in narrowing it to comport with the requirements of the Commission regulations and U.S. law, and to enable our limited staff to identify potentially responsive records, we reached out to you by e-mail. In your response, you made clear that you had no intention to further delineate your request.

This "reaching out" consisted of sending an e-mail message containing an invalid phone number. I immediately replied, stating with respect to this issue:

If you would like to discuss possibly narrowing this request, please call me at 415-824-0214 in San Francisco, or let me know a phone number and time when you are available. I have made repeated attempts to call Ms. Rikleen [the Chief FOIA Officer] at 703-571-3760, and Mr. Morgan [the FOIA Public Liaison] at 202-819-3488, the phone numbers you provided in your e-mail signatures, but neither of those phone numbers has been answered or accepts voicemail messages. I have been leaving messages daily for either or both of you at the main Commission phone number, 703-571-3742, but have received no return call.

I was actively and explicitly seeking, as I had been diligently but unsuccessfully seeking for months, and as the Chief FOIA Officer and FOIA Public Liaison already knew, to confer with and obtain the assistance of the FOIA Public Liaison, to find out the estimated dates of completion of action with respect to each of my pending FOIA requests (in particular to find out whether they would be completed before the expiration of the NCMNPS), and to find out how FOIA requests and appeals pending at the expiration of the NCMNPS would be handled, so that I could make decisions including with respect to whether to narrow some or all of my requests.

The claim that I “made clear that you had no intention to further delineate your request” was knowingly and materially false, and made in gross bad faith with the intent to construct a materially false and misleading record, in order to deceive subsequent reviewers of this case. I explicitly and unambiguously invited the NCMNPS to suggest how they thought I might narrow my request. They never made any attempt to do so.

I had no assistance, and no opportunity to confer, regarding possible narrowing of my request. I received no proposal or suggestion as to how I might narrow my request.

As should be evident from the records of previous versions of the NCMNPS Web site transferred to NARA³, the NCMNPS never identified or provided contact information for its FOIA Public Liaison on its Web site. The designation of the FOIA Public Liaison was repeatedly changed, without notice to those who were awaiting responses from the FOIA Public Liaison, and while keeping the e-mail addresses and direct phone numbers and voicemail boxes of the former FOIA Public Liaisons – no longer employed by the NCMNPS – active, and without checking those e-mail or voicemail boxes. Even when the currently-employed FOIA Public Liaison was identified to FOIA requesters, requests for assistance were routinely ignored for weeks or months. So it was typically impossible for FOIA requester either to obtain the assistance of the FOIA Public Liaison, or to tell whether voicemail or e-mail messages to the last-known FOIA Public Liaison were being deliberately ignored (as usual), or going into a black hole (also as usual).

My last attempt to obtain the assistance of the NCMNPS FOIA Public Liaison (in order to obtain the estimated dates of completion of action with respect to my pending FOIA requests, find out the procedures to be followed with respect to any requests or appeals pending on the expiration of the NCMNPS, and confer regarding possible narrowing of any of my requests if that might facilitate faster responses) began on 12 May 2020, after all of the estimated dates of completion I had previously been provided has passed without further responses or updates, much less completion of action.⁴

Over the next four months, there were at least three successive designees (that I know of – there may have been more) as NCMNPS FOIA Public Liaison. None of them ever answered at any of the phone numbers I was provided for them, or returned any of my calls and voicemail messages. I was given no opportunity to confer with any of them.

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3. In part in order to develop the record supporting this and others of my pending FOIA requests and appeals to the NCMNPS and to NARA for NCMNPS records, I requested these historical Web site records from the NCMNPS on 15 September 2020 and from NARA on 21 September 2020. The NCMNPS confirmed receipt of this request but refused, without basis in law or regulation, to “accept” or act on this request. The deadline for NARA’s response has passed, but NARA has not yet responded to the request made to the NCMNPS or to this portion of my request to NARA.
 4. “Action” with respect to a request includes processing of appeals and any action required on remand following appeals. One of my previous FOIA appeals, of the interim response to NCMNPS 2020-SP-08, had been denied as not yet ripe until the initial response was complete, and the NCMNPS Chief FOIA Officer knew that appeals of some of its responses to my requests would be inevitable as soon as the initial responses were complete.

I was first informed of Mr. Morgan's designation as FOIA Public Liaison on 5 August 2020 (after months of unanswered messages to the previous FOIA Public Liaison). After attempting to contact Mr. Morgan by phone and e-mail, I received a reply by e-mail from him on 20 August 2020, not answering any of my questions but stating that, "I have received your email and am checking on the status of the items mentioned below. I hope to have a response back to you early next week." But despite repeated follow-up calls and e-mail and voicemail messages, I received no further communication of any sort from Mr. Morgan until 9 September 2020, after this request had been denied:

I am happy to assist you but will not be available for a phone call.... Please feel free to email me and I will get a response to you as soon as possible. We would be especially interested in any ways you would like to narrow a request.

The claim that Mr. Morgan would be "happy to assist" me was patently false, deliberately withheld until after this request was denied, and made in gross bad faith. I was never able to speak with, confer with, or obtain any assistance from Mr. Morgan, before or after this message. Although I did respond immediately to Mr. Morgan by e-mail on 9 September 2020, I never received any further communication from him.

Offering me the opportunity, with respect to the others of my FOIA requests that had not yet been denied, but after a final denial of this request, to submit a blind guess at a proposed reformulation or narrowing of those requests, without any assistance or consultation, does not satisfy the requirement to consult with requesters and to make the FOIA Public Liaison available to assist them – before a request is denied – in narrowing each of their their requests that is deemed excessively broad or burdensome.

The NCMNPS letter denying my request also claims that:

Your description of the records you sought through the request includes no record beyond those that the Commission has made publicly available, has produced to you in connection with prior FOIA requests, or is in the process of preparing for release to you in connection with prior FOIA requests.

This claim is false – which falsehood is irrelevant to my rights pursuant to the FOIA statute and regulations, but relevant as further evidence of gross bad faith on the part of the NCMNPS FOIA staff in processing this request.

My appeal to NARA of the denial of expedited processing of my request to NARA, NGC20-638 and NARA-NGC-2020-001111, incorporated here by reference, details numerous categories of NCMNPS records that were never disclosed by the NCMNPS.⁵

5. Available at <<https://hasbrouck.org/draft/FOIA/NARA-NGC20-638-appeal-expedited-4OCT2020.pdf>>.

This request was improperly denied, and should be reinstated. There is no evidence in the record to supporting a decision that it would be unduly burdensome to identify responsive records, or that I was afforded the assistance of the FOIA Public Liaison and a meaningful opportunity for consultation regarding narrowing the request.

If NARA determines on remand that review of responsive records would be unduly burdensome, or that the volume of responsive records would be such as to preclude timely processing (although I do not concede that either of these conditions exists or would be a lawful basis for denial of this request), than at a minimum, I must on remand be afforded the assistance of the FOIA Public Liaison, an estimated date of completion of action, and an opportunity to confer regarding possible narrowing of this request.

This appeal is timely made. The notice denying my request was sent by email on 4 September 2020. The FOIA statute, the NCMNPS FOIA regulations, and the NARA FOIA regulations all unambiguously provide that a FOIA appeal may be submitted at any time within 90 days of the notice of the adverse decision or of final action on the request.

The NCMNPS denial letter stated, “Normally, you would have 90 days from the date of this notice to appeal; however, given that the Commission will cease to exist on September 18, 2020, we ask that you submit your appeal no later than September 11.”

That request for me to submit my appeal within just a week had no basis in law or regulation. In an abundance of caution, however, I gave notice of this appeal by e-mail to the NCMNPS, with a copy to the NARA FOIA office, on 7 September 2020.⁶

On 14 September 2020 I received an e-mail message from the NCMNPS⁷, purporting to deny my appeal (notice of which appeal had been given, but which appeal was not yet complete or ripe for decision) but stating that, “Out of an abundance of caution, NARA intends to retain these temporary records until December 7, 2020, for the purpose of allowing you to address any further legal rights related to this specific FOIA request.” My legal rights with respect to this request include, of course, the right to appeal at any time within 90 days of the notice of denial.

My request included a request for expedited processing. The denial letter did not mention my request for expedited processing. According, that request for expedited processing will remain pending on remand following this appeal. I look forward to your expeditious consideration of this appeal of the denial of my request, so that processing can resume (or belatedly begin) on remand. To avoid unnecessary delays, please contact me immediately by telephone or e-mail should you have any questions regarding this appeal and/or request.

6. Available on my Web site at <<https://hasbrouck.org/draft/FOIA/NCMNPS-FOIA-2020-SP-33-appeal-7SEP2020.pdf>>.

7. Available at <<https://hasbrouck.org/draft/FOIA/OGC-FOIA-2019SP04-AppealResponse-091420.pdf>>.

I certify under penalty of perjury that the statements above are true and correct to the best of my knowledge and belief.

Sincerely,

Edward Hasbrouck