



**Refuse to Register**  
**NO REGISTRAR**  
**CONSCRIPCION NO**

*poster by Fred Moore for the  
National Resistance Committee*

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FOIA Appeals  
National Commission on Military, National, and Public Service  
2530 Crystal Drive, Suite 1000, Box No. 63  
Arlington, VA 22202

(by e-mail to <[FOIA@inspire2serve.gov](mailto:FOIA@inspire2serve.gov)>)

**Re: FOIA request 2018-SP-01**

## **FREEDOM OF INFORMATION ACT APPEAL**

Dear FOIA Appeals Officer (Commission Chair or designee):

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552, of the Commission's response to a FOIA request which I submitted by e-mail on 4 May 2018, and which was assigned Commission reference number 2018-SP-01.

On 15 October 2019, more than 15 months after the statutory deadline for the Commission to respond to this request, I was notified by e-mail by the Commission's Chief FOIA Officer that "the Commission is considering this matter closed".

I appeal (1) the adequacy of the search for responsive records; (2) the form in which records were produced, including the substitution of newly-created files for responsive records; (3) the withholding in their entirety of responsive records for which newly-created files were substituted, without any claim that the original records are exempt from disclosure; and (4) the withholding of an unspecified quantity of responsive records for unspecified reasons.

My request included the following categories of records:

(1) Any records of meetings (by whatever name they may be described) or in-person, telephonic, or online gatherings of a quorum of members of the Commission, including any agendas, minutes, motions or proposals, votes, decisions, documents or electronic presentations or files distributed or shown to the Commission, notes, transcripts, audio and/or video recordings, records that classified information was to be discussed, or records of any objections made by member(s) of the Commission to allowing members of the public access to any such meeting; and

(2) The most recent and most complete final or approved versions and the most recent and most complete tentative or draft versions of any agenda, schedule, calendar, or plan of work for meetings, gatherings, and/or activities of the Commission or of a quorum of members of the Commission, including any list, spreadsheet, database, or other record of dates, times, and places where a quorum of members of the Commission are expected to be gathered in person or by telephone or other means....

I also request (3) the entirety of any document or electronic file containing any responsive records (so that no portion of any document or file containing any responsive portions should be withheld as “unresponsive”).

With respect to the form of production of requested records, I requested as follows:

I request that all responsive records be provided in text-searchable electronic form. With respect to any records held in electronic form, I request that they be provided in the original electronic form in which they are held, as complete bitwise digital copies of the original word processor files, PDF files, or other electronic files, including any file headers, embedded metadata, and all other file content.

I request that any responsive records of e-mail messages be produced as copies of the raw “message source” files, including full addresses and all headers and attachments, as those message source files are held on mail servers or backup or archival digital storage media.

I specifically request that you not create new documents or files in response to this request, not create “documents” such as page-view images or print views from digital records, and not substitute such newly-created “documents”, images, or views for requested records held by you as digital files.

Beginning 1 June 2018 and continuing through 4 December 2018, I received a series of files in response to my request, most of them PDF files containing metadata showing that they were created from other files by the Commission’s FOIA Officer after the date of my request.

None of the responsive digital records from which these new files were derived were disclosed. No records have been produced in response to this request since 4 December 2018.

No exemption was claimed with respect to all or any portion of any of the original responsive files from which the files released were derived. No mention was made as to whether any of these original files contained any segregable non-exempt portions.

File system metadata in the responsive records was removed or replaced with new metadata pertaining to the newly-created PDF files which were substituted for the responsive records. No exemption was claimed with respect to any of the withheld metadata.

The Commission's response to this request raises the following issues for this appeal:

### **1. Adequacy of the search for responsive records.**

As the first step in responding to a FOIA request, an agency must conduct a search reasonably calculated to retrieve responsive records. The Commission did not do so.

This request included records which, in the normal course of operations of any agency, would be expected to be sent and received within the Commission and between members and other staff of the Commission and third parties by e-mail. Nothing in this request excluded records consisting of e-mail messages or attachments to such messages. Any conceivable ambiguity as to whether the scope of this request included records of e-mail messages was removed by my explicit discussion in the initial request of the requested form of production of responsive records found in e-mail messages and attachments to such messages, and by my subsequent repeated, explicit, written and telephonic explanations to the Chief FOIA Officer and FOIA Public Liaisons that this request included records in all formats including e-mail.

Nothing in this request or any of my subsequent communications provided any conceivable basis for a good-faith belief that this request did not include e-mail records.

My request explicitly included "any agenda, schedule, calendar, or plan of work for meetings", including "any database or other record of dates, times, and places". No plausible good-faith interpretation of this portion of my request would exclude computerized calendars, such as those maintained on workstations or servers in Microsoft Exchange or similar software, or schedules disseminated to members and/or other staff of the Commission by e-mail.

Any search reasonably calculated to retrieve responsive records would have included searches of e-mail archives (including e-mail servers and backups and archives of ".mil" and "gmail.com" addresses used for some Commission staff and activities) and electronic calendars. But the Chief FOIA Officer adamantly refused to conduct any search of e-mail, even after any conceivable good-faith misunderstanding of the scope of the request was removed.

The necessity for an adequate search to include a search of e-mail records became hugely greater when some copies of responsive records were improperly altered or destroyed.

As I wrote in an e-mail message to the FOIA Officer on 19 June 2018, memorializing a telephone conversation earlier that day, “You stated that all of the Commission's electronic files were migrated to a new server on 30 May or 1 June while my request was pending, and that this resulted in changing or deleting some metadata including file dates.... You also stated that you had searched for, but had not yet been able to find, any of the original records, such as Microsoft Word files, from which the files you sent me had been created. This suggests an extraordinary and unusually successful obsession with purging records. You also stated, however, that you had not yet begun to search e-mail messages or attachments to such messages for responsive records. It seems likely that some of the original responsive records would have been sent by e-mail, and that copies exist as attachments to e-mail messages.”

When I inquired as to the status of the search for responsive records contained in e-mail archives and electronic calendaring systems, the Chief FOIA Officer initially claimed in an e-mail message on 21 June 2018 – implausibly and in patently bad faith – to believe that all such records were “not covered by the First FOIA Request,” *i.e.* this request.

I responded as follows in an e-mail message on 28 June 2018:

I do not consent to the exclusion of calendars, notes, and e-mail messages from my request, or to treating my request for records in these formats as a new request. A search that excluded calendars, notes, and e-mail messages would plainly not be reasonably calculated to retrieve all responsive records.

The claim that calendars, notes, and e-mail messages were excluded from, or outside the scope of, FOIA request 2018-SP-01 is plainly false, and made in patently bad faith.

I requested records of Commission meetings. There is no plausible good-faith interpretation of "records of meetings" that would exclude notes taken by Commission members or other Commission employees or contractors.

You concede that this request included agendas, calendars, and schedules of Commission meetings. There is no plausible good-faith interpretation of agendas, calendars, or schedules of Commission meetings that would exclude calendars of Commission members or other Commission employees or contractors. This request explicitly included "calendars", and calendars -- including electronic calendars -- are obviously one of the most common formats in which schedules and lists of meetings are kept.

There is no basis on which you plausibly could have believed in good faith that this request was intended to exclude all records maintained in the form of e-mail messages or attachments, especially since the original request included explicit specifications regarding the form of production of responsive records found in the form of e-mail messages.

Many of the records of any agency today are held in the form of e-mail messages, and it would be unusual for a FOIA request to exclude such records. Searching of e-mail

messages and attachments should be as routine a part of responding to FOIA requests as searching paper files or searching electronic files maintained in formats other than e-mail.

Even after I had thus pointed out the lack of any exclusion of e-mail or electronic calendar records from this request, and the explicit mentions of calendars and of e-mail messages and attachments, the Chief FOIA Officer claimed in an e-mail message on 2 July 2018 – equally implausibly and in continued bad faith – that “We read your message to be seeking e-mails other than what would be covered by your requests (copied below). The same is true to the extent you are seeking calendars or notes.” The Chief FOIA Officer continued to refuse to conduct any search for responsive records in those forms.

The Chief FOIA Officer also claimed, equally implausibly, not to have enough information to identify responsive records included in e-mail archives or electronic calendars. According to her e-mail message of 21 June 2018: “In order to process this request, consistent with the Commission's FOIA regulations, we will require ‘[a] description of the records sought in enough detail to allow the records to be located with a reasonable amount of effort.’ Particularly with respect to a search for e-mail records across numerous custodians, a detailed description is essential. Once we receive additional information from you on what records you are seeking, we will begin processing your request to identify any records that may be responsive and provide you with an estimated response date.”

I responded in an e-mail message on 28 June 2018:

You acknowledge that I have provided a description of the requested records sufficient to enable you to search for responsive files held in formats other than that of e-mail messages.

Most e-mail storage systems provide search and query tools for retrieving e-mail messages at least as powerful as the tools typically available for searching for and retrieving other sets of files, often more so. And since e-mail messages are typically sent, received, and stored as ASCII text, standard files search tools and tools for searching for text strings within files can typically be applied to e-mail message archives as easily and effectively, and typically more so, than to groups of files held in proprietary formats such as MS-Word files.

What specific information is that you believe you require in order to perform the same search for responsive e-mail messages and attachments that you already performed for responsive files in other formats?

If you believe that you need additional information in order to complete processing of this request, please let me know precisely what additional information you believe you require.

Despite my diligent efforts to find out what “additional information” the Chief FOIA Officer thought would be needed and my explicit written offer to provide any requested information, the Chief FOIA Officer never told me what additional information she thought she

needed, and never conducted any search for responsive records in these forms. Her refusal to specify what information necessary to conduct a search for e-mail or electronic calendaring records was missing from this request strongly suggests that her request for (unspecified) additional information was merely a pretext for refusing to conduct such a search at all.

The failure to search for records in e-mail messages and attachments and electronic calendaring systems was in violation of the FOIA statute, and should be reversed on appeal.

## 2. Form in which records were produced.

Since the 1996 FOIA amendments, the FOIA statute has required that, “In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” (5 U.S.C. § 552(f)(2), effective March 31, 1997).

It is obvious that digital files are readily reproducible by the Commission (or anyone else) in the form of bitwise digital copies. But few, if any of the responsive records were provided in that form, despite my explicit, unambiguous, written request (as quoted above) for files in native format. As noted above, most of the records produced were PDF files created by the Commission FOIA Office from other, pre-existing responsive digital records, after those responsive records were identified and retrieved by the FOIA Office.

For example, the file sent to me as “8-Denver CO\_Public Meeting Program.pdf” contains the embedded metadata shown below, indicating that it was created from Microsoft Word (presumably from a pre-existing responsive record in the form of a Microsoft Word file) by Rachel L. Rikleen, the Commission’s Chief FOIA Officer, on 1 June 2018:



(Note also that, despite the claim quoted above that moving files from one server to another might have altered *file system* metadata, this *internal* metadata would not be altered by copying the files or moving them from one server to another, just as it was unaltered, except for the path to the file in my filesystem, when these files were compressed into a .zip archive and sent to me by e-mail.)

My request with respect to the form of production of responsive records, including my request that newly-created derivative files not be substituted for responsive files in native format, was explicit and unambiguous, as is the requirement of the FOIA statute. There is no plausible good-faith interpretation of this request or of the FOIA statute that would permit this substitution. The attempt to pass off sanitized substitute files for actual agency records – or properly redacted versions of them – is a grave and deliberate FOIA violation that undermines the fundamental goals of the FOIA statute, and must be reversed and corrected on appeal.

### **3. Withholding of responsive records for which newly-created files were substituted, without any claim that the original records are exempt from disclosure.**

Independently of the violation of the FOIA provisions regarding the form of production of responsive records, the substitution of newly-created files for responsive records results in FOIA violations through the withholding of portions of the informational content of the responsive records in native format that are not included (or are altered) in the derivative files, without disclosing the amount of material withheld (or altered), where in the file it was located, or what if any exemption is claimed to justify each withholding or alteration.

For example, the Commission has created separate digital files containing “public” minutes and “internal” minutes. But only versions of the “public” minutes have been produced in response to this request, although both versions are unquestionably responsive to this request. It is also likely that both of these versions are derived from other responsive records created by Commission staff directed to take minutes of Commission meetings and events.

It is possible that portions of the “internal” minutes or the earlier meeting notes are exempt from disclosure, although it is highly likely that any such portions are readily segregable. But such determinations can only be made after the responsive records are retrieved and reviewed by a FOIA Officer. If they are determined to be exempt, the “internal” minutes and other withheld records must be identified in the FOIA response, with the exemption claimed as the basis for their withholding, and each such record must be further reviewed to determine whether it contain segregable non-exempt portions.

The Commission may wish to appear more transparent than it is, and not to have the amount of information withheld from disclosure be apparent by inspection of released records. But the FOIA statute does not give the Commission, or any agency, that option. Like substituting new files for responsive records, deliberately hiding the extent of redactions or of withholdings of entire records is a gross breach of FOIA and of the duties of a FOIA Officer.

A sanitized “public” document, from which portions of the responsive record have been invisibly excised so that the reader has no way to know how much has been withheld, or why, is not a permissible substitute for a properly redacted file indicating at each point of redaction the amount of data withheld from the original record and the exemption claimed as the basis for each such withholding.

All of the “internal” minutes or other original versions of files, or all non-exempt segregable portions thereof, must be disclosed, and the amount of material withheld and the exemption claimed as the basis for withholding of all or any portion of a file must be stated.

#### **4. Withholding of an unspecified quantity of responsive records for unspecified reasons.**

In an e-mail message to me on 21 June 2018, the Chief FOIA Officer stated, “You expressed concern that the Commission's response to the First FOIA Request did not include Word versions of some documents. Please note that the documents provided to you constitute Commission records responsive to your request. In many cases, draft documents do not constitute records that may be released pursuant to FOIA and/or may be subject to one or more exemptions under FOIA.”

A response that “there might be some other responsive records that might be exempt” is not a response sufficient to satisfy the requirement of the FOIA statute.

As I responded to the Chief FOIA Officer by e-mail on 28 June 2018, “If any responsive files or items of associated metadata are deemed by you -- after you have searched for, retrieved, and reviewed them for exemptions and for segregability of non-exempt portions -- to be subject in their entirety to one or more exemptions, I expect that you will list those files or items of metadata in your response, identifying fully what responsive records were found and the exemption(s) claimed as the basis for withholding each such record or portion of a record. FOIA does not permit silent withholding of unspecified records.”

However, no list of the source files or other responsive records claimed to be exempt, much less of the basis for any exemption claim or the result of any determination with respect to the segregability of non-exempt portions, was ever provided to me.

All such non-exempt records or segregable non-exempt portions of records, including but not limited to source files in native format and whatever records were alluded to by the Chief FOIA Officer in her message of 28 June 2018, must be produced, or an accounting of the amount of material withheld, the exemption claimed as the basis for each withholding, and whether each record contains segregable non-exempt portions must be provided.

As the FOIA statute requires, I expect that you will act on this appeal and produce responsive records within 20 working days.

Sincerely,

Edward Hasbrouck