



UNITED STATES DEPARTMENT *of* JUSTICE

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# Advanced Procedural Requirements



## Topics Covered

- *Search*: Reasonableness; Not Reasonably Described Request v. Burdensome Search; Search Terms; Custodians; Personal Email/Texts; Compiling Information v. Records Creation; Databases
- *Review*: Defining a Record; Non-Responsive Material
- *Response*: Active Track Management; Unusual Circumstances



## Search Reasonableness

An agency must conduct a reasonable search, one “*reasonably calculated to uncover all relevant documents.*”



## Search Reasonableness

- “Reasonableness” will vary from case to case
- Interpretation of scope of request must be reasonable
- Adequacy – not perfection – is the standard for a reasonable search



## Search Reasonableness

These are two distinct, often conflated concepts that impact whether a request is reasonably described and whether a search can be conducted:

- Vague Words and Descriptions
- Unreasonably Burdensome Search

While these concepts should be distinctly understood, both are a form of a 'not reasonably described' request and should be closed as such.



## Search Reasonableness

### *Not Reasonably Described Request*

- Can an agency reasonably ascertain which records are being requested and locate them with a “reasonable amount of effort?”
- If no, request is not reasonably described.
- If yes, then conduct search (assuming the request is perfected).



# Search Reasonableness

## *Burdensome Search*

- Agencies are not required to conduct unduly burdensome searches
- What is “burdensome” depends on agency resources
- Agency must justify how search would unreasonably burden office/agency



## Search Reasonableness: Search Terms

- Agency should detail list of search terms used
- Terms identified by subject matter experts
- Terms were reasonably likely to return responsive records
- Agency best positioned to identify terms

*Porup v. CIA*, No. 17-72, 2020 WL 1244928, at \*5 (D.D.C. Mar. 16, 2020);  
*Heffernan v. Azar*, 417 F. Supp. 3d 1, 9-10 (D.D.C. 2019)





## Search Reasonableness: Custodians

- Agency should detail list of offices/custodians searched
- Custodians identified by subject matter experts
- Custodians were reasonably likely to return responsive records
- Agency best positioned to determine which custodians are likely to have records

*Heffernan v. Azar*, 417 F. Supp. 3d 1, 12 (D.D.C. 2019)



## Searches of Personal Email and Texts

- Presumption of agency compliance with federal records retention laws, but can be rebutted
- To rebut, requester must show personal e-mails and texts used for work and employee did not comply with record retention laws and policies



## Search: Compiling Information v. Record Creation

- Agency is not required to create record in response to a FOIA request
- Extraction of records from an agency database is not creating a new record



## Database Searches

- If record is retrievable from a database, then agency needs to provide it
- Important distinction between (1) manipulating data in a database in compiling records v. (2) performing research or creating records



## Database Searches

- Agency does not need to create a new database or reorganize its method of archiving data
- If requester seeks information about database (not actual content) + agency does not maintain index/listing → requires the creation of a new record



## Defining an “Agency Record”

Two-part test:

1. Created or obtained by agency,  
**AND**
2. Under agency control when agency receives request.



# Agency Records: Factors Considered

- Determining whether a record is an “agency record” can require looking at the totality of the circumstances related to the document's creation, use, possession, or control.



## Agency Records: Factors Considered

- When determining control, four factors, while not exclusive, are helpful to consider:
  - Intent of document's creator,
  - Agency's ability to use document,
  - Extent to which agency personnel have read/relied on document, and
  - Degree to which document has been integrated into agency files





# Agency Records: Lessons from Cases

- Court found “use is the decisive factor”

*Cause of Action Inst. v. OMB*, No. 18-1508, 2019 WL 6052369, at \*9-11 (D.D.C. Nov. 15, 2019)

- “Our cases recognize that the Burka factors are not an inflexible algorithm.” “In determining whether a document is an agency record in light of the 'totality of the circumstances,' any fact related to the document's creation, use, possession, or control may be relevant.”

*Cause of Action Inst. v. OMB*, 10 F.4th 849 (D.C. Cir. 2021)



## Defining a Record

### *Privacy Act Definition of “Record”*

- Each “item, collection, or grouping of information” on the topic of the request can be considered a distinct “record.”
- Thus, a “record” is an entire document, or could be a section of a multi-page document, or a single e-mail in an e-mail thread.



## Defining a Record

### *Link Record to Subject Matter of Request*

- Look to content of a document *and* the subject matter of request for guidance
- Individual sentence is generally not a distinct record.



## Defining a Record

- When marking records for disclosure, the agency should mark distinct records clearly.
- When possible, the agency should release headings, bullets, and other textual content that illustrate that the document contains multiple subjects.

**OIP Guidance:** *Defining a “Record” Under the FOIA (January 11, 2017)*



## Defining a Record: Lessons from Cases

- Generally, an agency should treat an email chain as a single record
- Don't be “too literal or stingy” interpreting the request

*Am. Oversight v. HHS*, 380 F. Supp. 3d 45 (D.D.C. 2019)



## Defining a Record: Lessons from Cases

- Be consistent when defining an agency record throughout the course of processing the request
- Consider emails and their attachments together, if emails refer to attachments

*Judge Rotenberg Educ. Ctr., Inc. v. FDA*, 376 F. Supp. 3d (D.D.C. 2019)



## Defining a Record: Lessons from Cases

- Unrelated email attachments can be non-responsive, if outside scope of request

*Brady Ctr. to Prevent Gun Violence v. DOJ*, 410 F. Supp. 3d 225 (D.D.C. 2019)



## Review: Non-Responsive Material

- If record identified as responsive to request, then agency must disclose with redactions
- Important for agency, at the outset, to carefully and consistently define what it considers to be the “records” responsive to request





## Review: Non-Responsive Material

- Once agency identifies record as responsive to request, then agency must process the entire record
- Caution against “non-responsive” record marking in record identified as responsive by agency

*Cause of Action Inst. v. DOJ*, 999 F.3d 696 (D.C. Cir. 2021)



## Active Track Management

- Group requests into queues “based on the amount of work or time (or both) involved in processing requests”
- Focus both on the raw numbers of requests processed and the age of the oldest requests pending



## Active Track Management

- First-In-First-Out Processing
- Adjust track determination as needed during processing
- Give requesters opportunity to narrow request for faster processing time

**OIP Guidance:** *Processing Reminders for the Last Quarter of Fiscal Year 2017 (July 20, 2017)*



## Active Track Management

*Example:* Requester seeks ten years of correspondence between agency and a member of Congress.

A search of electronic correspondence system locates no records, and agency can respond within a short period of time.



## Unusual Circumstances

Extend 20 days by an additional 10 days, if “unusual circumstances” exist + provide written notice to the requester.

- Search separate offices
- Examine voluminous records
- Consult with another agency or two or more agency components



## Unusual Circumstances: Voluminous Records

- “16,000 pages of records and 15 CDs” was voluminous
- “Approximately 400 pages of records” was not voluminous
- Needing to examine hundreds of pages may not qualify, mid-hundreds might, and thousands of pages usually will



## Case Citations

*Am. Immigr. Laws. Ass'n v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016)

*Am. Oversight v. HHS*, 380 F. Supp. 3d 45 (D.D.C. 2019)

*Brady Ctr. to Prevent Gun Violence v. DOJ*, 410 F. Supp. 3d 225 (D.D.C. 2019)

*Cause of Action Inst. v. DOJ*, 999 F.3d 696 (D.C. Cir. 2021)

*Cause of Action Inst. v. OMB*, 10 F.4th 849 (D.C. Cir. 2021)



## Case Citations

*Cause of Action Inst. v. OMB*, No. 18-1508, 2019 WL 6052369, at \*9-11 (D.D.C. Nov. 15, 2019)

*Competitive Enter. Inst. v. Office of Sci. and Tech. Policy*, 827 F.3d 145, 149 (D.C. Cir. 2016)

*Davis v. DHS*, No. 11-203, 2013 WL 6145749, at \*2 (E.D.N.Y. Nov. 20, 2013)

*DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015)





## Case Citations

*Heffernan v. Azar*, 417 F. Supp. 3d 1, 9-10 (D.D.C. 2019)

*Hunton & Williams LLP v. EPA*, 248 F. Supp. 3d 220, 238 (D.D.C. 2017)

*Jennings v. DOJ*, 230 F. App'x 1, 1 (D.C. Cir. 2007)

*Judge Rotenberg Educ. Ctr., Inc. v. FDA*, 376 F. Supp. 3d (D.D.C. 2019)



## Case Citations

*Munger, Tolles & Olson LLP ex rel. Am. Mgmt Servs. v. Dept. of Army*, 58 F. Supp. 3d 1050, 1055 (C.D. Cal. 2014)

*Nat'l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233 (D.D.C. 2012)

*Porup v. CIA*, No. 17-72, 2020 WL 1244928 (D.D.C. Mar. 16, 2020)



## Case Citations

*Shapiro v. CIA*, 170 F. Supp. 3d 147 (D.D.C. 2016)

*Sierra Club v. Dept. of Interior*, 384 F. Supp. 2d 1 (D.D.C. 2004)

*Tereshchuk v. BOP*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014)

*Wright v. Admin. for Children and Families*, No. 15-218, 2016 WL 5922293, at \*7-9 (D.D.C. Oct. 11, 2016)



# OIP Guidance

- Defining a "Record" Under the FOIA (January 11, 2017)  
[https://www.justice.gov/oip/oip-guidance/defining\\_a\\_record\\_under\\_the\\_foia](https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia)
- Processing Reminders for the Last Quarter of Fiscal Year 2017 (July 20, 2017) [https://www.justice.gov/oip/oip-guidance/Processing\\_Reminders\\_As\\_Agencies\\_Enter\\_Last\\_Quarter\\_of\\_Fiscal\\_Year\\_2017](https://www.justice.gov/oip/oip-guidance/Processing_Reminders_As_Agencies_Enter_Last_Quarter_of_Fiscal_Year_2017)



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**Questions?**