



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO:
5720
Ser 14/078
February 16, 2022

SENT VIA FOIA ONLINE AND EMAIL

Mr. John Greenewald
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SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY-2021-005381; FOIA APPEAL DON-NAVY-2022-003916

This responds to your FOIA appeal received by my office on January 28, 2022, which was assigned tracking number DON-NAVY-2022-003916. Your underlying request, DON-NAVY-2021-005381 was submitted to the Commander, Naval Surface Forces Pacific (COMNAVSURFPAC) FOIA Office, the initial denial authority (IDA), on April 9, 2021. In your request, you sought a copy of the July 2019 deck logs from the USS RUSSELL (DDG-59) and information pertaining to the USS RUSSELL's potential encounters with "unknown drones" while in the San Diego operational area in July 2019. The IDA responded to you on September 21, 2021 and provided records responsive to your request.

In your appeal, you generally challenge the adequacy of the IDA's search and, more particularly, you also complain that the search was inadequate because of the numbers and quality of responsive documents you received and because you have not received any deck logs.

Your appeal is a request for a final determination under the FOIA. For the reasons stated below, your appeal is granted in part and remanded to the IDA for further action.

Under the FOIA, the adequacy of an agency's search for information requested is determined by a "reasonableness" test. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). As a general rule, an agency must undertake a search that is reasonably calculated to locate the requested information. *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). Courts have found agencies satisfy the "reasonableness" test when they properly determine where responsive records are likely to be found and search those

locations. *Lechliter v. Rumsfeld*, 182 F. App'x 113, 115 (3rd Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it determined to be the only ones likely to possess responsive documents (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 55–56 (D.D.C. 2012) (concluding that agency's search was reasonable because agency determined that all responsive records were located in a particular location created for express purpose of collecting records related to subject of request and searched that location).

Moreover, an agency's inability to locate a responsive record does not undermine an otherwise reasonable search. *Moore v. FBI*, 366 F. App'x 659, 661 (7th Cir. 2010) (noting that although agency had years earlier destroyed some potentially responsive records, that fact does not invalidate the search). Additionally, the mere speculation that requested documents exist does not undermine the finding that the agency conducted a reasonable search. *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004) (“Likewise, the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.”).

Following receipt of your appeal, my office contacted the IDA regarding your request. The IDA informed us that your request was a high-visibility case that required review by Department of Defense FOIA. After recently receiving approval to release the records, the IDA confirmed to my office that, on February 1, 2022, you received all records responsive to your request, including the deck logs from the USS RUSSELL. Accordingly, your appeal with respect to these deck logs is denied as moot.

Turning to your other contentions concerning the adequacy of the IDA's search, I find the IDA's search for other potentially responsive records to be inadequate. Specifically addressing your other contentions, my office inquired with the IDA as to the file named “brief.” The IDA informed my office that the USS RUSSELL had provided it a PowerPoint slide that demonstrated drone paths, with timestamps of ship locations and encounters as a separate file. The IDA further informed my office that it had titled the slide as “brief” to help differentiate it from the image file that you also received. The IDA later renamed the files “FLIR Photo/Brief.” However, and despite the IDA stating to my office that that the USS RUSSELL and its strike group both reported that the copy of the photograph you received was the only copy that existed and that the photo was released unaltered, it was unable to provide my office with the particulars of the search that was conducted for potentially responsive records. In particular, the IDA had no knowledge of the search terms that were used or how the search was otherwise conducted. As the IDA was unable to adequately inform my office regarding its search for potentially responsive records, there is no way for me to evaluate whether or not its search was adequate. Accordingly, I grant your appeal on those limited grounds.

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By copy of this letter, I am remanding this case to the IDA and directing it to complete a second search and/or provide you a detailed accounting of its search for responsive records. I further direct the IDA to inform you of the status of its review of any potential responsive documents, and to complete its review within 20 working days from the date of this letter. If the IDA is unable to complete its review of all documents within that period, then I am directing the IDA to provide a status update and/or rolling release of documents to you as of the date of the 20-working-day deadline after this letter. The IDA is directed to provide you with subsequent status reports or document releases every 15 days thereafter. Upon the IDA's final action, if you are dissatisfied with the response, you retain the right to appeal that response to this office on whatever grounds you deem appropriate.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for its partial denial. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. Government and is therefore unable to assist you in this process.

You have the right to seek dispute resolution services by contacting the Department of the Navy's FOIA public liaison, Mr. Christopher Julka, at christopher.a.julka@navy.mil or at (703) 697-0031. You may also seek dispute resolution services from the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, at (202) 741-5770 or ogis@nara.gov.

If you have further questions or concerns for my office, my point of contact is Lieutenant Nate Bosiak, USN, who may be reached at nathaniel.a.bosiak.mil@us.navy.mil or (202) 685-5452.

Sincerely,




S. D. SCHROCK
Director
General Litigation Division

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