

HARDIN LAW OFFICE

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APPEAL UNDER THE FREEDOM OF INFORMATION ACT

August 8, 2023

Army General Counsel
c/o U.S. Army Corps of Engineers
Jacksonville District
Attention: Office of Counsel (FOIA Officer)
701 San Marco Blvd.
Jacksonville, FL 32207

cc: FOIA OFFICER
U.S. Army Corps of Engineers
Jacksonville District
P.O. Box 4970
Jacksonville FL 32232-0019

RE: Freedom of Information Act Appeal -- FOIA No. FP-23-017884

Dear General Counsel or other FOIA Appeals Officer,

I represent Robert H. Mooney with reference to the Freedom of Information request described herein. I write to appeal the adverse determination and lack of a determination with respect to the above-cited and re-attached May 16, 2023 request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and 32 CFR § 286.11, *et seq.*

This appeal is of the Army Corps of Engineers' denial, constructive denial, or failure to lawfully process a request seeking the Herbert Hoover Dike Expert Panel Report from 1998 and related materials. It is made without prejudice to Mr. Mooney's right to seek judicial review of the Corps of Engineers' failure to make the required determination(s) or of the adverse determination(s) it has made. In this appeal, we challenge the Army Corps of Engineers' process adopted in responding to this request, including but not limited to:

1. The failure to provide the requested document; and

2. The failure to provide segregable portions of the requested document, or to make any attempt at redacting any lawfully exempt information which might be contained within the requested document; and
3. The failure to timely make a “determination” within the meaning of the Freedom of Information Act, including but not limited to after a June 30 request for the report in a redacted form and after the Corps of Engineers’ July 5 email to Mr. Mooney stating that the Corps would “see if any part of the report can be released.”

A proper processing of the request in a manner that satisfies the agency’s FOIA obligations requires *de novo* review of the request.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552 *et seq.* Your June 30, 2023, letter represents an adverse determination, as described below.¹ As noted above, the response does not fully engage with the request itself or with the law as it pertains to the Government’s twin obligations to provide a determination and to provide segregable information to a requester even when a determination is in part adverse. All procedural rules have been complied with as this request is: (1) in writing, (2) properly addressed, (3) clearly identified as an “Appeal under the Freedom of Information Act” and includes a copy of the underlying request (Ex. 1), (4) sets forth grounds for reversal, and (5) was filed within 90 days of February June 30, 2023, which is the date we received what appears to be or purports to be your initial determination.

¹ To the extent subsequent correspondence seems to indicate that the Army Corps of Engineers may not have made any determination at all with respect to whether the report contains segregable or redactable information, this is also an appeal of the Corps of Engineers’ failure to make a determination.

II. PROCEEDINGS BELOW

This appeal involves one FOIA request sent by electronic mail to the Army Corps of Engineers' FOIA officer on May 16, 2023, seeking the Herbert Hoover Dike Expert Panel Report from 1998

On June 30, 2023, the Army Corps of Engineers responded with a one-page letter, in which the Corps simultaneously stated that it was the Department of the Army's policy to release the maximum amount of information that it could release in response to FOIA requests and that it had concluded that Mr. Mooney's request must be denied due to "homeland security concerns."

The Army Corps of Engineers' June 30, 2023 "Determination Letter" was silent with respect to how the diametrically oppose positions it contained could be reconciled. The Corps made no attempt to explain why the report must be withheld in its entirety, instead of being provided in redacted form. Nor did the Corps explain how the maximum amount of information it could provide was no information at all. Nor did the Corps explain what ostensible "homeland security" concerns applied to the document, portions of the document, or the entire document, or how. The Corps also made no effort to address the volume of responsive records it was withholding or the general subject matter of those records.

III. THE ARMY CORPS OF ENGINEERS HAS FAILED TO SATISFY ITS OBLIGATIONS UNDER FOIA

This is an administrative appeal arising from the Corps of Engineers' improper denial of a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 in ways described, *supra*. Mr. Mooney challenges the Army Corps of Engineers determination in full, while also arguing that the "determination" he has been provided is a faux determination and noncompliant with the text of the Freedom of Information Act and with *Citizens for Responsibility and Ethics in Washington (CREW) v. Federal Election Commission*, 711 F.3d 180 (D.C. Cir. 2013).

Transparency in government is the subject of high-profile promises from the president and attorney general of the United States arguing forcefully against agencies failing to live up to their legal recordkeeping and disclosure obligations. These promises go back over many years and administrations.

Former Attorney General Holder stated, *inter alia*, “On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA ‘should be administered with a clear presumption: In the face of doubt, openness prevails.’” OIP Guidance, President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a “New Era of Open Government,” <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>.

This and a related guidance elaborate on President Obama’s memorandum. The Army Corps of Engineers’ letter to Mr. Mooney facially confirms that the government’s policy is to provide the “maximum” amount of information to FOIA requesters, notwithstanding that the Corps has provided Mr. Mooney no information at all, and not even an explanation for why the decision was made not to provide the requested report in redacted form.

A) The Army Corps of Engineers Owes Mr. Mooney a Reasonable Search of All Locations Likely to Hold Potentially Responsive Records, and a “More than Cursory” Response.

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. See e.g., *Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). The cursory nature of the Army Corps of Engineers’ reply letter and subsequent correspondence to Mr. Mooney, in which the Corps appears to recognize it did not even consider redaction and may have been acting entirely on the “consultation” provided by the “Engineering Division” in withholding records requested by Mr. Mooney, gives rise to reasonable concerns that the government may not have seriously engaged with the request Mr. Mooney filed or its own

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obligations, including the obligation to search for records rather than simply consulting with a governmental component regarding such records.

The term “search” means to “review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. § 552(a)(3). See also *Iturralde*, 315 F.3d at 315; *Steinberg*, 23 F.3d at 551.

A search must be “reasonably calculated to uncover all relevant documents.” See, e.g., *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is “reasonable,” courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. See *Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (“reasonableness” is assessed “consistent with congressional intent tilting the scale in favor of disclosure”).

The search must be “adequate” on the “facts of this case.” *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986) (internal citations omitted). See also, e.g., *Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5 (summary judgment precluded due to inadequate search where “EPA did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff,” but rather only searched only “accounts that were in its possession and control,” despite the existence of “evidence that upper-level EPA officials conducted official business from their personal email accounts”) (italics in original); *id.* at *8 (noting that “the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA.”); Michael D. Pepson & Daniel Z. Epstein, “Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?,” 13 *Engage J.* 4, 4 (2012) (FOIA covers emails sent using private email accounts); Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA’s FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 (FOIA “includes emails sent or received on an employee’s personal email account” if subject “relates to official

business”), accord *Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.C mwlth 2011) (officials’ private email addresses covered under open-records laws); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96 (Pa.Cmwlth 2012) (same).

The reasonableness of the search activity is determined *ad hoc* but nevertheless must be sufficient and sufficiency requires that a search cannot be cursory.² See *Citizens For Responsibility and Ethics in Washington v. U.S. Department of Justice*, 2006 WL 1518964 *4 (D.D.C. June 1, 2006). “Reasonable” in the context of a search means that “all files likely to contain responsive materials . . . were searched.” *Cuban v. SEC*, 795 F.Supp.2d 43, 48 (D.D.C. 2011). The Army Corps of Engineers’ search also should be free from conflict. See e.g., *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999).

It appears that the Army Corps of Engineers did not search for the record Mr. Mooney requested, but simply consulted with one of its Divisions regarding such record, and acted on the basis of the “consultation” it received from that Division. Had the Corps searched for the record, it likely would not have responded as it did by issuing a blanket denial.

B) All Doubts Must be Resolved in Favor of Disclosure.

If there is any doubt at all that a FOIA exemption applies to shield a particular record or portion of a record, that record must be disclosed. Here, the Army Corps of Engineers appears to have taken the opposite presumption, and assumed that because it had undefined “concerns” regarding “homeland security”, an entire document must be withheld. The Corps has the law in this respect exactly backwards.

² It stands to reason that if a search cannot be cursory and reflexive, neither can a purported “determination.” To the extent that the Corps appears to admit it has not even assessed whether the records Mr. Mooney requested can be provided in redacted form, Mr. Mooney respectfully submits that the Corps has not made anything other than a “cursory” response to Mr. Mooney’s request.

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As President Obama once emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, agencies have been directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

The Corps of Engineers must resolve any doubts in favor of disclosing to Mr. Mooney the records he has requested.

c) The Army Corps of Engineers Failed to Explain its Determinations that the Information Withheld is Properly Withheld as Exemption 7 “Homeland Security” Material; Context Suggests These Claims are Generally Implausible.

In its final determination letter, the Corps conclusorily stated that Exemption 7 protects the report from being disclosed in its entirety due to “homeland security.” But the agency failed to explain how the exemption applied at all, and also failed to apply the exemptions narrowly. Here, Mr. Mooney challenges the wholesale and indiscriminate application of the b7 exemption to the entirety of the report, including but not limited to such purely factual information as the names of its authors and the date, which are necessarily in the public domain and do not in any way impact homeland security.

Exemption 7 of the Freedom of Information Act protects six distinct categories of law enforcement information from disclosure, specifically: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."

In this case, the Corps appears to have made no effort to satisfy its burden of explaining how Exemption 7 protects each and every jot and tittle of the requested record from disclosure, let alone how discrete portions of a record are exempt or do not contain purely factual information which has been in the public domain for approximately 25 years. Numerous publicly-available items reference the “Expert Review Panel Findings and Recommendations, October 1998” and incorporate such findings in more modern references to the dam, such that any perceived harm from releasing this 25 year old report in its entirety is difficult to comprehend. But even assuming, *arguendo*, that Exemption 7 conceivably applied to some portion of the record, the Corps made two further failures to comply with the law: First, the Corps failed to consider whether redaction would address any “homeland security” concerns. Second, the Corps failed to conduct a “foreseeable harm” analysis as required by the FOIA Improvement Act of 2016. 5 USCS § 552 (a)(8)(A).

The FOIA Improvement Act required the agency to make specific factual findings. Under USCS § 552 (a)(8)(A), “An agency shall withhold information... only if... the agency reasonably foresees that disclosure would harm an interest protected by an exemption ...” And even if disclosure would harm such an interest, the agency nevertheless must “ consider whether partial disclosure of information is possible” and “take reasonable steps necessary to segregate and release nonexempt information.” On information and belief, and based on the circumstances as set forth herein, including the volume of post-1998 references in various public documents to the 1998 records Mr. Mooney requested and the age of the information itself, the Corps failed entirely to comply with its legal obligations under FOIA, including its obligations to establish that Exemption 7 applied to the record requested by Mr. Mooney at all, and its obligation to conduct an analysis of foreseeable harm and redactability under the FOIA Improvement Act of 2016.

V. CONCLUSION

The Army Corps of Engineers owes Mr Mooney a *de novo* review of its apparent failure or refusal to engage with Mr. Mooney's request as described herein. At a minimum, the Corps should:

1. Conduct a search for the requested record, and certify that an appropriate search has taken place.
2. Identify the volume of records located.
3. Analyze the records located to determine whether Exemption 7 applies.
4. Analyze whether foreseeable harm would result from disclosure of the requested record.
5. Analyze whether any foreseeable harms can be mitigated by way of redacting the record(s) and releasing segregable portions thereof.
6. Disclose all nonexempt information to Mr. Mooney.

We look forward to your response. If you have any questions, please do not hesitate to contact me. Please confirm receipt of this appeal pursuant to 32 CFR § 286.11.

Sincerely,



Matthew D. Hardin
Counsel for Robert Mooney

cc: client



**DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, JACKSONVILLE DISTRICT
P. O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019**

June 30, 2023

Mr. Robert Mooney
5302 Fountains Dr. S.
Lake Worth, FL 33467

Dear Mr. Mooney:

This letter is in response to your Freedom of Information Act (FOIA) request that was received by our office on May 16, 2023 and was assigned FOIA Number FP-23-017884. You requested a copy of the 1998 Herbert Hoover Dike Expert Panel Report.

It is the policy of the Department of the Army to release the maximum amount of information under the FOIA, unless the information is exempt from release and a significant reason exists for non-disclosure. I have reviewed your request and have concluded that it must be denied due to homeland security concerns. My decision not to release this information is based on Exemption 7(F) of the FOIA, 5 U.S.C. § 552(b)(7)(F).

As the District Counsel, Jacksonville District, U.S. Army Corps of Engineers, I have been delegated the authority to issue denials by the South Atlantic Division Counsel. If you consider my response to be a denial of this request, you have the right to appeal this decision to Army General Counsel. The appeal letter must be addressed to the Army General Counsel and submitted to this office at U.S. Army Corps of Engineers, Jacksonville District, Attention: Office of Counsel (FOIA Officer), 701 San Marco Blvd., Jacksonville, FL 32207 for forwarding. An appeal must be postmarked or electronically transmitted within 90 days of the date of the final response to your request. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal."

I trust that this information fully satisfies your FOIA request. If you need any further assistance or would like to discuss any aspect of your request, please do not hesitate to contact our office by phone at 904-232-2477 or by e-mail at FOIA-SAJ@usace.army.mil. You can also contact the U.S. Army Corps of Engineers FOIA Public Liaison by e-mail at foia-liaison@usace.army.mil or by phone at 202-761-4791. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

2023.06.30
08:30:13 -04'00'

Elizabeth O. Vavrica
District Counsel

Fwd: [Non-DoD Source] Re: FOIA FP-23-017884

From Bob Mooney <rhmooney3@gmail.com>
To MatthewDHardin<MatthewDHardin@protonmail.com>
Date Wednesday, July 5th, 2023 at 8:05 AM

Begin forwarded message:

From: FOIA-SAJ <FOIA-SAJ@usace.army.mil>
Date: July 5, 2023 at 7:41:47 AM EDT
To: Bob Mooney <rhmooney3@gmail.com>
Subject: RE: [Non-DoD Source] Re: FOIA FP-23-017884

Good morning Mr. Mooney,

While Exemption 7(F) has historically been used to withhold names and other identifying information concerning individuals at risk of retaliation and harm, the plain language of the statute indicates that it can also be used to withhold any type of information that creates a risk of harm or retaliation to individuals, not just identifying information. For example, courts have upheld the use of Exemption 7(F) to withhold inundation maps because they show which areas downstream from dams are at risk for flooding in the event a dam is damaged.

The Engineering Division advised that this report needs to be withheld. We will consult with them to see if any part of the report can be released.

Thank you,

FOIA ADMINISTRATOR
U.S. Army Corps of Engineers, Jacksonville District
701 San Marco Blvd.
Jacksonville, FL 32207-8175
ph: 904-232-2477

ATTENTION: PLEASE CONTACT OUR OFFICE DIRECTLY BY E-MAIL AT FOIA-SAJ@USACE.ARMY.MIL WITH ANY QUESTIONS OR CONCERNS. TO ENSURE YOUR REQUEST IS RECEIVED AND PROCESSED EXPEDITIOUSLY, IT IS RECOMMENDED THAT FOIA REQUESTS BE E-MAILED TO OUR OFFICE AT FOIA-SAJ@USACE.ARMY.MIL.

-----Original Message-----

From: Bob Mooney <rhmooney3@gmail.com>
Sent: Friday, June 30, 2023 12:54 PM
To: FOIA-SAJ <FOIA-SAJ@usace.army.mil>
Subject: [Non-DoD Source] Re: FOIA FP-23-017884

Thank you for an expedient response to my request.

To aid me in giving consideration to an appeal of this initial response to my request, I ask these clarifications:

Is the (b)(7)(F) exemption based solely on protecting investigatory records?

Is it not possible to redact sections of the requested materials?

With appreciation,

Bob

On Jun 30, 2023, at 8:55 AM, FOIA-SAJ <FOIA-SAJ@usace.army.mil> wrote:

Good morning Mr. Mooney,

This message is in regard to a FOIA request you submitted on May 16, 2023 in regard to a 1998 Herbert Hoover Dike Expert Panel Report. Please find attached our office's final response to your FOIA request.

If our office can be of further assistance, please let us know.

Thank you,

FOIA ADMINISTRATOR

U.S. Army Corps of Engineers, Jacksonville District

701 San Marco Blvd.

Jacksonville, FL 32207-8175

ph: 904-232-2477

ATTENTION: PLEASE CONTACT OUR OFFICE DIRECTLY BY E-MAIL AT FOIA-SAJ@USACE.ARMY.MIL WITH ANY QUESTIONS OR CONCERNS. TO ENSURE YOUR REQUEST IS RECEIVED AND PROCESSED EXPEDITIOUSLY, IT IS RECOMMENDED THAT FOIA REQUESTS BE E-MAILED TO OUR OFFICE AT FOIA-SAJ@USACE.ARMY.MIL.

<20230609_EX_7F_Letter.pdf>

From: Bob Mooney
Date: May 16, 2023
To: FOIA-SAJ@usace.army.mil
Subject: Request for 1998 report

In accordance with FOIA, I am requesting the following document and related materials:
Herbert Hoover Dike Expert Panel Report, 1998