

July 14, 2023

**Freedom of Information Act APPEAL RE: Request EPA-R9-2023-004598**

Via email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov); [Lakin.matthew@Epa.gov](mailto:Lakin.matthew@Epa.gov)

To EPA's National FOIA Office:

THIS IS A FREEDOM OF INFORMATION ACT APPEAL.

We are in receipt of what Region 9 has characterized as final production for FOIA request EPA-R9-2023-004598. We write to appeal the decision to produce just six documents to this request. With this appeal we hope to clarify the amount of relevant records EPA may possess, for the purpose of reporting information in and about these records to the public.

To begin, we reproduce the language in the original request here:

***All communication regarding exceptional event submissions, including, but not limited to, approvals, denials or requests for more information, as described in 40 C.F.R. 50.14 between September 30, 2016, through May 5, 2023. This request was originally part of EPA-R9-2023-002468. (emphasis added)***

In response to this language, Region 9 has provided six documents: two initial notification related forms, 2 PowerPoint presentations, and written communications between CARB and EPA (one letter each, to the other).

We emphasize that we intended for the phrase "all communication" to be construed liberally, to include any and all e-mails, faxes, notes, memoranda, phone records, video recordings, and the like, regarding exceptional events submissions. We believe that should include correspondence made throughout the process of individual events, and correspondence made discussing exceptional events generally. And we believe that because, in response to this same language submitted to other EPA regions, we have received email correspondence from an array of circumstances, and that correspondence included emails found with keyword searches.

Under the federal Freedom of Information Act ("FOIA"), a request for records must generally be one that "reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). As one court has said, "Although a requester must 'reasonably describe[]' the records sought, an agency also has a duty to construe a FOIA request liberally." *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citation omitted).

Whenever "an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth." *Truitt v. Department of State*, 897 F.2d 540, 544 (D.C. Cir. 1990). Congress amended FOIA in 1974 to change the previous language of "request for identifiable records" to the current language of "request for

records which ... reasonably describes such records." *Id.* The amendment was intended to prevent the government from "attempting to use the identification requirements as an excuse for withholding documents" & ensure agencies did not "obstruct public access to agency records." *Id.* Accordingly, the amendments confirmed Congress's intent that agencies shall construe requests under a "liberal standard," although FOIA does not "authorize broad categorical requests where it is impossible for the agency reasonably to determine what is sought." *Id.*

Under FOIA, "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)(D). An agency receiving a FOIA request must generally show that its "search was reasonably calculated to uncover all relevant documents." *Transgender Law Ctr. v. Immigration & Customs Enf't*, 46 F.4th 771, 779 (9th Cir. 2022) (citation & quotation marks omitted). The issue of reasonableness "depends, not surprisingly, upon the facts of each case." *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 571 (9th Cir. 1985).

As the Ninth Circuit recently said, "under FOIA, agencies bear the burden of demonstrating the adequacy of their search beyond a material doubt." *Transgender Law Ctr.* 46 F.4th at 780. The adequacy of the search depends on factors including but not necessarily limited to whether the agency had "positive indications of overlooked materials" or followed "leads that emerge[d]" during the search. *Id.* Generally, an agency must make "a diligent search for ... documents in the places in which they might be expected to be found." *Id.* at 781.

Our request clearly describes records that a government employee can find, and has found, in other regions, via a reasonable search. On this basis we ask for reconsideration.

Very truly yours,

Dillon Bergin (Muckrock) and Molly Peterson (California Newsroom)

CC: Matthew Lakin, Director Air and Radiation Division