poster by Fred Moore for the National Resistance Committee

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4 February 2020

Brig. Genl. Joseph Heck
Chair and FOIA Appeals Officer
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>)

Re: FOIA request 2020-SP-08

FREEDOM OF INFORMATION ACT APPEAL

Dear Brig. Genl. Heck (or designated FOIA Appeals Officer):

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552, of the Commission's interim response to a FOIA request which I submitted by e-mail on 1 January 2020, and which was assigned Commission reference number 2020-SP-08.

On 31 January 2019, I received a letter (as a PDF file attached to an e-mail message) related to this request. The filename for that letter contained the word "final" ("OGC-FOIA-2020SP08-response-final.pdf"), but nothing in the letter included the word "final" or indicated that it was intended to constitute a final determination with respect to this request or any portion thereof. The letter contained no mention of the right of judicial review, as would apply to any final determination and as would be required in any notice of final disposition of a request.

Accordingly, I infer, in the absence of any explicit notice of finality, that this letter constituted an interim response and not the final response to this request.

In your response of 30 January 2020 to my appeal of the Commission's final response to my FOIA request 2018-SP-01, you claimed that an administrative appeal of an interim response to a FOIA request must be filed within 90 days of that interim response, regardless of the date of the eventual final response to the request.

That position is contrary to the FOIA statute, case law in this district, and the guidance of the Office of Information Policy of Department of Justice for the interpretation of the FOIA statute and the adjudication of administrative appeals under the FOIA.

"A plain reading of the FOIA statute and the DOJ regulations do not support defendants' claim that Rosenfeld must appeal interim releases. Indeed, a FOIA claimant cannot be expected to assess the adequacy of a search that is not yet final. The FOIA statute does not require, and defendants do not point to any DOJ regulations, that a FOIA claimant appeal every interim release. Thus, the particular administrative scheme requires appeal only upon a final adverse determination." (Memorandum Order Re: Cross-Motions for Summary Judgment, *Rosenfeld v. U.S. Department of Justice*, No. C 07-03240 MHP, U.S. District Court, Northern District of California, 22 August 2008).

"While agencies should provide the opportunity to appeal each interim response, it is important to note that the requester does not lose the ability to raise an issue from an earlier interim response if he or she does not appeal at that time. After the final determination is made on a request, the requester should have ninety days to file an appeal on any aspect of that request." (U.S. Department of Justice, Office of Information Policy, "OIP Guidance: Adjudicating Administrative Appeals under the FOIA", updated 14 February 2019, <https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA>.)

I have to date received no notice of finality with respect to any of the Commission's interim responses to this request or any of my other pending FOIA requests 2018-SP-01 (on remand following appeal), 2018-SP-03, 2019-CP-01, 2019-SP-01, and 2019-SP-04. To the best of my knowledge and belief, after diligent effort to ascertain the status of these requests including my unanswered written request by e-mail to the Chief FOIA Officer on 30 January 2020 – which I hereby reiterate – for immediate, explicit written notice of any determinations construed by the Commission to be final, all of these requests are still pending and not final.

However, in an abundance of caution in light of the Commission's interpretation of the FOIA statute with respect to appeals of interim responses, and to avoid further delay, I hereby appeal any adverse determinations in the Commission's interim response of 31 January 2020 to my FOIA request 2020-SP-08 which you construe to be final, including but not limited to: (1) the adequacy of the search for responsive records; (2) the form of production of responsive

records; (3) the withholding in full of records containing portions claimed to be exempt, including but not limited to "internal minutes" of Commission meetings, without releasing segregable non-exempt portions of those records; and (4) the withholding of records claimed to be exempt under FOIA exemption 5, including but not limited to potential questions prepared and distributed to witnesses before Commission hearings, when any such record or any portion thereof has been disclosed to any non-Federal individual or entity.

I reserve my right to appeal any or all other aspects of this interim response, and any subsequent interim or final response, until 90 days after I am notified explicitly that the Commission considers its response to this request as final.

1. Adequacy of the search for responsive records.

A search reasonably calculated to retrieve responsive records includes a search of any data sets, record locations, search keywords, or other record identifiers that are identified during the review of records retrieved as likely to retrieve additional records. For this reason, as the U.S. District Court for the Northern District of California (in which I reside, and which would have jurisdiction over this request) has noted, it is impossible to assess the adequacy of the search until the search has been completed. It is *per se* error to make a final determination with respect to the completion or adequacy of the search until the search and review of all retrieved records to see if they indicate the need for additional searching has been completed.

2. Form in which records will be produced.

As with the adequacy of an as-yet-incomplete search, it is impossible to assess whether the form or format in which records have been produced complies with the FOIA statute until the records have been produced. It is *per se* error to make any final determination with respect to the form in which responsive records will be produced until they have been produced.

3. Withholding in full of segregable non-exempt portions of responsive records containing some claimed exempt portions, including "internal minutes".

The FOIA statute requires the release of all segregable non-exempt portions of records containing exempt portions. However, according to the interim response, certain responsive records including "internal minutes" are being withheld "in full" as exempt. There is no mention in the interim response of whether any of the records being withheld in full were reviewed to determine whether they contain segregable non-exempt portions. This is error.

It is apparent from the release of "public minutes" of the same Commission meetings as are covered by the "internal minutes" that some portions of the "internal minutes" – including but not necessarily limited to those portions included in the "public minutes" – are non-exempt. And since these minutes are in text, word processor, and/or PDF format, it is apparent that the non-exempt portions would be readily segregable.

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. This desire to combine secrecy with the appearance of openness may be especially strong with respect to minutes of Commission meetings. But the FOIA statute does not give the Commission, or any agency, that option. 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.

Each record claimed to contain exempt material, including but not limited to the "internal minutes", must be reviewed to determine whether it contains segregable non-exempt portions, and all such segregable non-exempt portions must be released.

4. Withholding of records claimed to be exempt under FOIA exemption 5, including questions prepared and distributed to witnesses before Commission hearings, when any such record has been disclosed to any non-Federal individual or entity.

According to the interim response, "some records responsive to your request are exempt from FOIA disclosure in their entirety under FOIA exemption 5. Those documents are indicated below in yellow." The indicated records (which actually appear to all be digital files, not "documents"), include questions prepared by the Commission and/or its staff and/or contractors, and sent to the panels of witnesses invited to testify at Commission hearings.

FOIA exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Many of these records, including any of the questions for panelists shared with non-Federal panelists or disclosed to any non-Federal individual or entity, are not exempt from disclosure under FOIA exemption 5, because (a) if any of them have been disclosed to any non-Federal individual or entity, they are neither "inter-agency" nor "intra-agency" records, and (b) any arguable privilege was waived when they were so disclosed.

Privilege is waived when records are voluntarily disclosed to non-Federal individuals or entities. See e.g. *State of North Dakota ex Rel. Olson v. Andrus*, 581 F.2d 177 (8th Circuit, 1978): "In order to claim that the documents are exempt: 'It must… be demonstrated that the information is confidential. If the information has been or is later shared with third parties, the privilege does not apply.' [*Mead Data Cent., Inc. v. U.S. Dept. of Air Force*] 184 U.S. App. D.C. at 361, 566 F.2d at 253 (footnotes omitted)…. The government has already indicated a diminished expectation of privacy concerning these documents through its prior voluntary disclosure. The selective disclosure exhibited by the government in this action is offensive to

the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate." See also *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246 (U.S. District Court, District of Columbia, 2005): "Because the 2004 training manual was made available to individuals not associated with the executive branch, it cannot be 'inter-agency or intra-agency' communication, and thus does not satisfy the requirements for application of the deliberative process privilege of Exemption 5."

It is apparent that many of these records have been disclosed to non-Federal individuals and/or entities. I can personally attest, of course, to the fact that I was provided by Commission staff with a copy of the questions prepared for the panel of witnesses on which I was included. I am not an employee, agent, or contractor of any Federal agency. I am not a party to, nor was I asked to agree to, any non-disclosure agreement with respect to this record.

Withholding of these records was plain error. Each responsive record withheld pursuant to FOIA exemption 5 must be reviewed to determine whether all or any portion of the record has ever been disclosed to any non-Federal individual or entity, and is therefore non-exempt. Each such non-exempt record, or all such segregable non-exempt portions, must be disclosed.

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