



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

April 30, 2015

IN REPLY REFER TO:
Appeal No. 2015-021

Susan Hlywa Topp
Topp Law PLC
213 East Main Street
P. O. Box 1977
Gaylord, MI 49734

Dear Ms. Topp:

This responds to the November 18, 2014, Freedom of Information Act (“FOIA”) appeal (“appeal”) that you filed with the Department of the Interior (“Department”), which it received on November 19, 2014, and that the Department assigned as **Appeal Number 2015-021**. Your appeal concerns an October 24, 2014, FOIA request that you submitted to the Fish and Wildlife Service (“FWS”) that seeks three categories of documents generally regarding the “Heritage Sustainable Energy Wind Turbine Project (Heritage Garden Wind Farm)” (“Project”) located in the Garden Peninsula, Delta County, Michigan.

In response to the FOIA request, the FWS advised you that “your request, as it stands, is very broad [and] it does not adequately describe the records sought.” As a result, the FWS found that it was “unable to process [the request] at this time” and requested that you “provide additional detail that will aid[] [it] in determining the specific information you seek.” You filed this appeal to challenge the FWS’s determination.

Your appeal is **GRANTED**, as there was no basis for the FWS to conclude that the October 24, 2014, FOIA request does not reasonably describe the documents that you seek.

In order to trigger the right of access to agency records under the FOIA, a requester must reasonably describe the records requested,¹ which requires requesters to “reasonably describe the records sought...[in] sufficient detail to enable bureau personnel familiar with the subject matter of the request to locate the records with a reasonable amount of effort.”² The courts have found that the “linchpin inquiry” on whether a request reasonably describes the records sought “is whether the agency is able to determine ‘precisely what records [are] being requested.’”³ However, “[e]ven where a request ‘identif[ies] the documents requested with sufficient precision to enable the agency to identify them,’ the request may still fail to ‘reasonably describe[]’ the records sought if it is ‘so broad as to impose an unreasonable burden upon the agency.’”⁴

¹ 5 U.S.C. § 552(a)(3)(A).

² 43 C.F.R. § 2.5(a).

³ *Nat’l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (quoting *Yeager v. DEA* 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (alteration in original)).

⁴ *Nat’l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 163 (D.D.C. 2013) (quoting *Am. Fed’n Gov’t Emps., Local 2782 v. U.S. Dep’t of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) and, to illustrate the point, using the example “if a FOIA requester sought ‘all CIA records printed in the English language,’ the agency certainly

Here, the contours of the October 24th FOIA request are not so undefined that the FWS cannot reasonably determine what documents you seek -- particular categories of documents regarding a specific project. Nor is the request so unfocused that the FWS cannot determine with a reasonable amount of effort where responsive documents are likely to be located or who the likely possessors of responsive documents might be -- the files related to the Project and personnel in the FWS who are working on or involved in the Project or the aspects of the Project that are the subject of the categories of documents listed in the request. Further, the scope of the documents sought in the request is not so broad and sweeping as to impose an undue burden on the FWS by requiring it to conduct the type of search for responsive documents that the courts have deemed as unreasonable, e.g., a search of every file of every employee in the region or across the country.⁵

Because the October 24, 2014, FOIA request reasonably describes the records sought and its processing is not unduly burdensome, the Department concludes that the FWS's response to this matter was in error. Therefore, to resolve the appeal, **by copy of this letter, the Department will REMAND the October 24, 2014, FOIA request to the FWS for it to:**

- **Conduct a search of the paper and electronic files (including e-mails) of the FWS offices that are most likely to contain responsive documents, ensuring that the search encompasses any responsive documents that are in its possession and control on the date it begins the search.**⁶
 - If the FWS locates documents that are responsive to FOIA request, it will either release the requested documents or invoke a FOIA exemption as a basis to withhold them in full or in part.
 - Should the FWS determine to invoke a FOIA exemption to deny the Appellant access to any portion of any responsive documents that it may locate, it will advise the Appellant of this determination and ensure that its letter to her contains all of the information the Department's FOIA regulations require a bureau to include when it makes such a determination.⁷
 - If the FWS determines that it does not have or cannot locate responsive documents, it will inform the Appellant of this determination and provide a "brief statement of the reasons for the denial."⁸

would know what the requester was asking the agency to produce. The problem with such a request, however, is its breadth, rather than its opaqueness.").

⁵ See, e.g., *Id.* (finding request for "all [CIA] records pertaining to the IBM supercomputer 'Watson'" was overly broad and fulfilling it "would require the [agency] to search every office for any documents containing the word 'Watson' because "any component is equally likely to have responsive records."); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (finding that a search requiring review of twenty-three years of unindexed files would be unreasonably burdensome); *Guance v. Burnette*, 849 F.2d 1475 (9th Cir. 1988) (finding a request that sought "every scrap of paper wherever located within the agency" was too broad to be processed).

⁶ 43 C.F.R. § 2.12(b).

⁷ 43 C.F.R. § 2.24.

⁸ 43 C.F.R. § 2.24(b)(2).

- **Complete its processing of the remand within 20 workdays from the date of this decision, including releasing the non-exempt portions of any responsive documents that it locates.**

Please be aware that if the FWS's search of its files for responsive documents uncovers a voluminous amount of materials, it may be necessary for it to stagger the release of the documents to you as they become available. Employing such a practice of staggering the release of voluminous responsive documents fully comports with the requirement in the FOIA for agencies to "make [] records promptly available" to a requester.⁹

- **Should the FWS determine that it is necessary for it to stagger the release of the responsive documents, it will advise the Appellant of this need in the correspondence that it sends to her regarding the remand and ensure that its first release of any responsive documents (or portions thereof) that may exist occurs no later than 20 workdays from the date of this decision.**
 - Any such correspondence from the FWS will also include the anticipated schedule it plans to follow in releasing the materials.

The FWS will correspond directly with you regarding the remand of the October 24, 2014, FOIA request (with a copy to this Office) and the FWS's letter to you will apprise you anew of your right to file an appeal with the Department.

This completes the Department's response to your appeal. If you have any questions regarding this matter, please call the FOIA Appeals Office at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Melissa Allen, FOIA Officer, FWS (**FOR ACTION**)
Mark Hogeboom, FOIA Coordinator, FWS-Region 3
Cindy Cafaro, Departmental FOIA Officer

⁹ 5 U.S.C. § 552(a)(3)(A).