

The background of the slide is a blue-tinted photograph of several people in business attire standing in a conference room or hallway, engaged in conversation. The image is semi-transparent, allowing the text to be overlaid clearly.

13th Annual FOIA[®]Xpress[®] User Conference & Technology Summit

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Search Issues

“Where Are My
Records?”



Search Issues: The Statute

- **Request must “reasonably describe[] records” sought. 5 U.S.C. § 552(a)(3)(A)(1)**
- **The key to determining whether a request satisfies this requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and where to locate them**

Search Issues: Policy

- **OGIS FOIA Federal Advisory Committee 2018 Recommendations for Improving FOIA Searches**
 1. **OIP to collect search information in Chief FOIA Officers' report**
 2. **Chief FOIA Officers Council to work with CIOs to better understand technology**
 3. **Archivist to recommend FAR be revised to consider FOIA electronic searches**

Search Issues: Case Law

- **Sai v. TSA, No. 14-403 (D.D.C. Sep. 25, 2018) (amended opinion) – finding request for all “TSA policy and/or procedures documents that were not already available through the agency’s electronic reading room, including both old and current versions of those documents” not reasonably to describe records**



Search Issues: Case Law

- **Muckrock, LLC v. CIA, No. 14-997 (D.D.C. Feb. 28, 2017) – ruling CIA’s per se policy of “refusing to process any requests for electronic communications that do not include [all] four specific pieces of information,” . . . [the]‘to’ and ‘from’ recipients, time frame, and subject” because they do not**

reasonably describe records is unlawful and granting declaratory relief prohibiting agency from continuing to employ it.



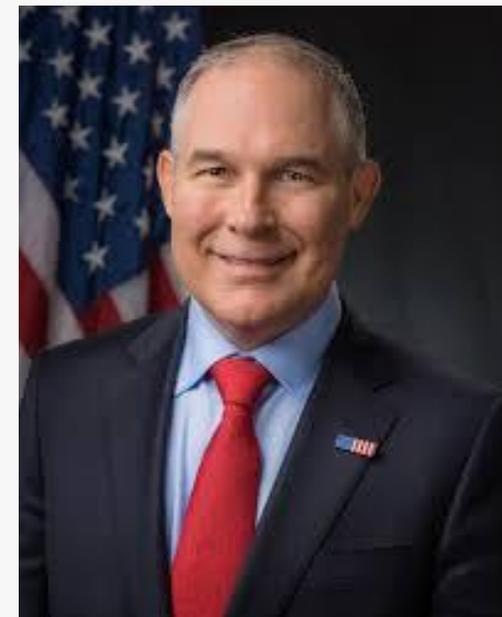
Search Issues: Case Law

- **Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321 (D.C. Cir. 1999) – finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing records, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record."**



Search Issues: Case Law

- **PEER v. EPA, 314 F.Supp.3d 68 (D.D.C. 2018)** – where EPA Administrator Pruitt stated on TV that he “would not agree that [carbon dioxide created by human activity is] a primary contributor to the global warming,” and “there’s a tremendous disagreement about the impact” of “human activity on the climate,” and where requester sought all EPA documents relied upon by the Administrator in making these statements, ruling that the request “reasonably describes” records, and those records could be located by asking the Administrator which records he relied on.



Search Issues: Case Law

- **Hemenway v. Hughes, 601 F. Supp. 1002 (D.C.C. 1985) – disapproving “no records” response for a “list” of information where other records contained the information because “requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester.”**



Search Issues: Case Law

- **American Oversight v. GSA, No. 17-1267, 2018 WL 2088286 (D.D.C. May 3, 2018) – where responding to a request for all “records . . . including emails,” agency refused to process attachments to emails, ruling that “GSA’s blinkered literalism, distinguishing emails from email attachments, is at odds with the agency’s ‘duty to construe a FOIA request liberally’”**



Search Issues: Case Law

- **Huntington v. Dep't of Commerce, No. 15-2249, 2017 WL 211301 (D.D.C. Jan. 18, 2017) – ruling that agency has not shown that it conducted an adequate search because it “failed to invoke ‘the ‘magic words’ concerning the adequacy of the search, namely, the assertion that [it] searched all locations [not most locations] likely to contain responsive documents”; finding agency’s statement that it “identified offices reasonably likely to have responsive information and those offices conducted a reasonable search for responsive records” to “come close, but they ultimately do not pass muster.”**



Search Issues: Case Law

- **Pub. Citizen v. Dep't of State, 276 F.3d 634 (D.C. Cir. 2002)** – favoring "date-of-search cut-off" because its use "might ... result[] in the retrieval of more [responsive] documents" than would a cut-off based on date of request

**Task
Complete**



Search Issues: Final Odds & Ends

- **Did you search Capstone for e-mails?**
- **Agency personnel conducting the search should note in the FOIA administrative file where the searches were conducted and if an electronic search was conducted, what “key words” were used. This information is essential if the requester questions the search on administrative appeal or in litigation.**



Thank you,

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