Message

From: Ward, Valerie [Ward.Valerie@epa.gov]
Sent: 2/26/2018 6:43:46 PM
To: Gaines, Jeff [Gaines.Jeff@epa.gov]
CC: Kohler, Amanda [Kohler.Amanda@epa.gov]; Shapiro, Melissa [shapiro.melissa@epa.gov]; Beasley, Lynn [Beasley.Lynn@epa.gov]
Subject: RE: Final Disposition, Appeal EPA-HQ-2018-003477 - regarding revised request from Mr. Lustgarten - what about deliberative items, and the decision-making on what may be released.

Hey Jeff,
Okay, I'll need to set down with you tomorrow and go over the information I'll need from you. I'll also, leave a form in your that will give you an idea of what im looking for to submit the information for the search.

From: Gaines, Jeff
Sent: Monday, February 26, 2018 11:47 AM
To: Ward, Valerie <Ward.Valerie@epa.gov>
Cc: Kohler, Amanda <Kohler.Amanda@epa.gov>; Shapiro, Melissa <shapiro.melissa@epa.gov>; Beasley, Lynn <Beasley.Lynn@epa.gov>
Subject: RE: Final Disposition, Appeal EPA-HQ-2018-003477 - regarding revised request from Mr. Lustgarten - what about deliberative items, and the decision-making on what may be released.

Val,

Are you, or someone in your group, available to help us coordinate with OEI and whomever needs to be involved for both Outlook and Lotus Notes searches?

I'm just looking for someone to help with the process – I / my branch can provide the search terms to use, but would prefer someone who is more familiar (than we are) with the process of efficiently working with OEI to get the search initiated.

Thanks!

Jeff Gaines
Phone: 703-308-8655

*"The most exciting phrase to hear in science, the one that heralds the most discoveries, is not "Eureka!" (I found it!) but '**That's funny.**'"* — *Isaac Asimov*

"Dulce et Decorum Est Desipere in Loco" — Josiah S. Carberry

From: Shapiro, Melissa
Sent: Wednesday, February 21, 2018 1:52 PM
To: Gaines, Jeff <Gaines.Jeff@epa.gov>
Cc: Kohler, Amanda <Kohler.Amanda@epa.gov>; Ward, Valerie <Ward.Valerie@epa.gov>
Subject: RE: Final Disposition, Appeal EPA-HQ-2018-003477 - regarding revised request from Mr. Lustgarten - what about deliberative items, and the decision-making on what may be released.

Hi Jeff,

I've attached a copy of the FOIA toolkit and appendix that we developed for the National FOIA Training Conference, as reference. You will need to identify a FOIA POC (if you have not done so already) and, depending on the number of responsive records, a document review team. After your office's search point of contact (SPOC) submits the centralized outlook search request, the FOIA POC/document reviewers will need to review each record for (1) responsiveness and (2) potential withholdings. Under the part (2) review, the designated reviewers will evaluate whether any of the emails qualify for protection under a FOIA exemption, including Exemption 5's Deliberative Process Privilege. If the email is an intra-or inter-agency communication, pre-decisional, and deliberative, i.e. it can be tied to an identifiable decision-making process, *and* there is harm that would result from releasing the information (e.g. public confusion, chill on frank and open communications, etc.), then the information should be withheld under DPP. Any segregable factual information will need to be released.

If the requester maintains a date range that includes Lotus Notes records, I believe that eDiscovery will not include this information in their centralized search (though you can ask). If they do not, then the record custodians will need to collect their own records. The FOIA POC/document reviews will need to figure out whether the custodians will review their own records for (1) responsiveness and (2) potential withholdings, or whether this is something the review team will handle. I'd recommend the latter, so that the application of DPP redactions, for example, are consistent.

Does this help?

Melissa Shapiro
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
shapiro.melissa@epa.gov
202-564-2890

From: Gaines, Jeff
Sent: Wednesday, February 21, 2018 1:29 PM
To: Shapiro, Melissa <shapiro.melissa@epa.gov>
Cc: Kohler, Amanda <Kohler.Amanda@epa.gov>; Ward, Valerie <Ward.Valerie@epa.gov>
Subject: RE: Final Disposition, Appeal EPA-HQ-2018-003477 - regarding revised request from Mr. Lustgarten - what about deliberative items, and the decision-making on what may be released.

Melissa,
Thanks.

One thing I didn't ask you my previous email was how best go about determining what may be considered 'deliberative' among the requested materials (and therefore, presumably, un-releasable). How does that process work – does each person go over each item requested, with counsel, to make a determination?

We anticipate there may be 100s if not 1000s of emails that may, on the surface, satisfy the request.

Thanks!

Jeff Gaines
Phone: 703-308-8655

*"The most exciting phrase to hear in science, the one that heralds the most discoveries, is not "Eureka!" (I found it!) but '**That's funny.**'"* — *Isaac Asimov*

From: Shapiro, Melissa
Sent: Wednesday, February 21, 2018 12:51 PM
To: Gaines, Jeff <Gaines.Jeff@epa.gov>
Cc: Kohler, Amanda <Kohler.Amanda@epa.gov>; Ward, Valerie <Ward.Valerie@epa.gov>
Subject: RE: Final Disposition, Appeal EPA-HQ-2018-003477 - regarding revised request from Mr. Lustgarten

Hi Jeff,

A request that includes record custodians, a time frame, and identifiable subject matter is a proper request under the FOIA and our regulations. So, based on the clarification, below, the requester has now provided the Agency with sufficient information that would enable an employee to reasonably locate responsive records.

Nevertheless, I'd like to understand whether you have additional concerns about the amended request, and if so, what they are, as I may have some suggestions.

For instance, if you are concerned that nearly every email communication between the identified custodians will include at least one of the search terms (i.e. it's equivalent of asking an OAR person for emails containing the term "air" or "CAA"), then this may be something that you should explain to the requester. He is clearly interested in something…we just need to help him help us understand what it is.

If you are concerned that the date range is broad, you can explain that the Agency has relied on two different email servers during the identified time frame, and that the Agency cannot conduct a centralized search for emails contained on the previous server (Lotus). He references a "computerized scan" and thus is likely unaware of the fact that each custodian will need to manually search for and collect responsive emails for the 3 year period prior to the Agency's adoption of Outlook, in conjunction, of course, with a centralized search for all outlook records.

Alternatively, you can accept the clarification and submit a search request, but provide the requester will an estimated completion date that will presumably be more than 30 days based on "usual circumstances," in accordance with our regulations. The pre-case assessment may assist you in providing this date and anticipated volume. It will be worth noting that that the need to collect from multiple email servers will further complicate the collection. You may suggest rolling productions of responsive records and you should provide the requester an opportunity to further narrow if he does not agree with Agency's proposed completion date and productions.

Feel free to give me a call if I'm not on point here or if you have questions.

Thanks,

Melissa Shapiro
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
shapiro.melissa@epa.gov
202-564-2890

From: Gaines, Jeff
Sent: Wednesday, February 21, 2018 10:26 AM
To: Shapiro, Melissa <shapiro.melissa@epa.gov>; Williams, LaShawn <williams.lashawn@epa.gov>

Cc: Kohler, Amanda <Kohler.Amanda@epa.gov>; Ward, Valerie <Ward.Valerie@epa.gov>
Subject: FW: Final Disposition, Appeal EPA-HQ-2018-003477 - regarding revised request from Mr. Lustgarten

Deliberative Process / Ex. 5

Thanks!

Jeff Gaines
Permits Branch (5303P)
Program Implementation & Information Division (PIID)
Office of Resource Conservation & Recovery (ORCR)
S-6222
South Potomac Yard
Phone: 703-308-8655

*"The most exciting phrase to hear in science, the one that heralds the most discoveries, is not "Eureka!" (I found it!) but "**That's funny.**"" — Isaac Asimov*

From: Kohler, Amanda
Sent: Wednesday, February 21, 2018 10:01 AM
To: Galbraith, Michael <Galbraith.Michael@epa.gov>; Shuster, Kenneth <Shuster.Kenneth@epa.gov>; Gerhard, Sasha <Gerhard.Sasha@epa.gov>; Gaines, Jeff <Gaines.Jeff@epa.gov>; Crosby-Vega, Terri <Crosby-Vega.Terri@epa.gov>
Subject: FW: Final Disposition, Appeal EPA-HQ-2018-003477

FYI, here's the latest on the Abrahm FOIA. Jeff is going to follow-up with OGC and Val on next steps.

Amanda Kohler
703-347-8975

From: Abrahm Lustgarten [mailto:Abrahm.Lustgarten@propublica.org]
Sent: Monday, February 12, 2018 5:20 PM
To: Kohler, Amanda <Kohler.Amanda@epa.gov>
Subject: FW: Final Disposition, Appeal EPA-HQ-2018-003477

Amanda,

Regarding the below-mentioned (and attached) FOIA request for information about open burn and detonation, I'd like to offer clarification which I hope make a response to my request more manageable. I appreciate the re-opening of this FOIA request following my appeal, and your efforts to take another look. I apologize if we miscommunicated previously.

I'd like to alter the language of the original request so as to ask for all emails (and any attachments) to or from the following people: Ken Shuster, Mike Galbraith , Terri Crosby-Vega, Amanda Kohler, Sasha Gerhard, and Jeffrey Gaines, containing any of the following keywords: "OBOD"; "OB/OD; "open burn" or "open detonation," during the same timeframe originally requested, since Jan. 1, 2010 to the present.

I hope that helps narrow the request sufficiently, and limits it to a computerized scan of old email.

Thank you,
Abrahm Lustgarten
Senior Reporter, ProPublica
917-589-1262

From: "Williams.Lashawn@epa.gov" <Williams.Lashawn@epa.gov>
Date: Thursday, February 8, 2018 at 11:58 AM
To: Abrahm Lustgarten <Abrahm.Lustgarten@propublica.org>
Subject: Final Disposition, Appeal EPA-HQ-2018-003477

Dear Mr. Lustgarten:

Please see the attached appeal determination for the above-referenced appeal. As explained in the determination, your request has been remanded back to the appropriate office, but will *not* be reprocessed in its current form, as it is not a proper request. You must contact Amanda Kohler at kohler.amanda@epa.gov or 703-347-8975 within **10 business days** of today's today to clarify your request. If you do not contact EPA by February 23, 2018, EPA will administrative close your request.

If you have any questions concerning this determination, please contact Melissa Shapiro, at 202-564-2890 or at Shapiro.Melissa@epa.gov.

Thank you.