

December 15, 2014

By E-mail Only

Mr. Joseph Libuszowski
PPP-Media
25w757 White Birch Lane
Wheaton, IL 60189
joe@ppp-media.net

President
James J. Sandman

Board of Directors
John G. Levi
Chicago, IL
Chairman

Martha Minow
Cambridge, MA
Vice Chair

Sharon L. Browne
Sacramento, CA

Robert J. Grey, Jr.
Richmond, VA

Charles N. W. Keckler
Arlington, VA

Harry J. F. Korrell
Seattle, WA

Victor B. Maddox
Louisville, KY

Laurie Mikva
Evanston, IL

Fr. Pius Pietrzyk, OP
Zanesville, OH

Julie A. Reiskin
Denver, CO

Gloria Valencia-Weber
Albuquerque, NM

RE: Appeal of LSC's Response to FOIA No. 2014-30

Dear Mr. Libuszowski:

I have received your e-mail dated November 15, 2014, challenging the sufficiency the Legal Services Corporation's (LSC) search for records responsive to your September 16, 2014 Freedom of Information Act (FOIA) request. Although your e-mail was not marked as a FOIA appeal, I have treated it as such.

I have reviewed LSC's response to your request and deny your appeal for the reasons explained below.

Background Facts

On September 18, 2014, LSC received your FOIA request for the following records:

All notes, memoranda, documents (electronic or physical), telephonic or written correspondence and files within the possession of the Legal Services Corporation and or Ronald S. Flagg and associates of his. Regarding the interactions between Mr. Joseph A. Libuszowski, AT&T, SBC Telecommunications, Sidley Austin LLP, Laura M. Kotelman [Sidley Austin LLP], Gregory Michael Gawron [SBC Telecommunications], April Prochnow [SBC Telecommunications], James Cicconi [AT&T Legal Affairs], and Sidley Austin LLP's [Practice Development and or Legal Marketing Department]. Between the timeframe of May 2008 up and through the date of this notice September 16, 2014.

Your request stated that you seek these records "for purposes of defending [y]our company and clients against frivolous and vexatious demands made by [a lawyer at Sidley Austin, LLP]," and that you "intend to file a civil suit and ethical and professional misconduct complaint against [the lawyer]."

LSC acknowledged receipt of your request on September 24. A search for responsive records was conducted on September 25. The search yielded 18 e-mails, all of which were provided to you without redaction on September 26. On October 16, an additional eight e-mails, most of which appeared to be duplicates of the first, were provided to you. On November 15, you e-mailed me, challenging the sufficiency of LSC's search because of the small number of responsive records disclosed: "To believe that there were no other emails/phone calls or other documents exchanged with [Mr. Flagg's] prior law firm, is quite frankly unbelievable."

Analysis

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, made applicable to LSC by the LSC Act, 42 U.S.C. § 2996d(g), and implemented by LSC regulations at 45 C.F.R. §§ 1602 *et seq.*, defines the term "search" as meaning "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). Courts require federal agencies¹ to undertake searches that are "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The adequacy of an agency's search is judged by a test of 'reasonableness,' which will vary from case to case." *Id.* at 1351.

In processing your FOIA request, LSC's FOIA Analyst initiated a search by forwarding it to LSC's General Counsel, Ronald Flagg, and to me—the officials within LSC who were reasonably likely to possess records, if any, relating to your request. Mr. Flagg and I conducted a search of our respective electronic and physical business files. Using the following search terms, LSC's Office of Information Technology also searched our electronic files:

- Joseph A. Libuszowski
- AT&T
- PPP Media
- SBC Telecommunications
- Laura M. Kotelman
- Gregory Michael Gawron
- James Cicconi
- Sidley Austin LLP

The search identified 26 emails relevant to your request, all of which were disclosed without redaction. Given the number and strength of search terms used, and that the search results were independently confirmed by information technology specialists, I find that LSC's search was reasonable. It was reasonably calculated to uncover – and did uncover – all relevant documents within LSC's custody and control. *Weisberg*, 705 F.2d at 1351.

To the extent you argue that private emails and other documents within Mr. Flagg's *personal* custody and control should have been disclosed, the Freedom of Information Act does not reach such records. FOIA requires only the disclosure of "agency records"—those records "created by an agency employee on agency time, with agency materials, at agency expense," and "used by the author or other employees to conduct agency business." U.S. Dep't of Justice,


¹ Although LSC is a private, nonprofit organization, it is considered a "federal agency" for purposes of the FOIA. 42 U.S.C. § 2996d(g).

Office of Info. Policy, *OIP Guidance: "Agency Records" vs. "Personal Records,"* Vol. V FOIA Update 4 (1984) (available online at <http://www.justice.gov/oip/blog/foia-update-oip-guidance-agency-records-vs-personal-records>, last checked December 12, 2014); *see, e.g., Bureau of Nat'l Affairs, Inc. v. DOJ*, 742 F.2d 1484, 1489-96 (D.C. Cir. 1984) (holding that officials' uncirculated appointment calendars and telephone message slips were personal records). Mr. Flagg's nonbusiness-related personal emails and phone messages, wherever they may be maintained, do not fall within this definition. Therefore, even if Mr. Flagg had additional emails relevant to your request in his personal custody (and he assures me that he does not), their disclosure could not be compelled through FOIA.

This is especially true when, as here, the FOIA request seeks records in anticipation of litigation. "The Freedom of Information Act (FOIA) is fundamentally designed to inform the public about agency action and not to benefit private litigants." *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) *citing EPA v. Mink*, 410 U.S. 73, 79 (1973). Thus, private litigants may "not utilize the FOIA as a means to obtain earlier or greater access to information, to broaden the scope, or as a supplement or substitute for traditional means of discovery available in pending or anticipated litigation." George K. Chamberlin, *Use of Freedom of Information Act by litigants in federal civil, criminal, or administrative proceedings*, 57 A.L.R. Fed. 903, §3[a] (1982) *citing Murphy v Federal Bureau of Investigation* 490 F. Supp 1138, 1143 (D.D.C. 1980); *see, e.g., Envtl. Crimes Project v. EPA*, 928 F. Supp. 1, 2 (D.D.C. 1995) (ordering stay of FOIA case "pending the resolution of the discovery disputes" in parties' related lawsuit in order to foreclose requester's attempt to "end run" or interfere with discovery.)

If you believe that my decision is in error, you may seek judicial review in a district court of the United States as provided in 5 U.S.C. § 552(a)(4). You may also contact the National Archives' Office of Government Information Services (OGIS), which is available to provide FOIA-related assistance, including facilitation and mediation services, at ogis@nara.gov, or by telephone at 202.741.5770 or toll-free at 877.684.6448.

Sincerely yours,



James J. Sandman
President