

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
ELECTRONIC FRONTIER FOUNDATION)	FOIA Control Nos. 2010-590 and 2011-
)	078
On Request for Inspection of Records)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 2011

Released: October 20, 2011

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we deny two applications for review (AFRs) filed by Electronic Frontier Foundation (EFF).¹ EFF seeks review of decisions by the Public Safety and Homeland Security Bureau (PSHSB) and the Office of General Counsel (OGC)² responding to its Freedom of Information Act (FOIA) requests for records related to the Communications Assistance for Law Enforcement Act (CALEA). For the reasons explained below, we deny the AFRs.

II. BACKGROUND

2. **FOIA No. 2010-590.** EFF’s first FOIA request sought “all agency records created on or after January 1, 2006 (including but not limited to, electronic records) discussing, concerning, or reflecting: 1) any communications or discussions with operators of communications systems or networks, or with equipment manufacturers and vendors, concerning development and needs related to electronic communications surveillance enabling technology; 2) any communications or discussions with foreign government representatives or trade groups about trade restrictions or import or export controls related to electronic communications surveillance-enabling technology; [and] 3) any briefings, discussions, or other exchanges between FBI officials and members of the Senate or House of Representatives concerning implementing a requirement for electronic communications surveillance-enabling technology, including but not limited to, proposed amendments to the Communications Assistance to Law Enforcement Act (CALEA).”³

¹ See Freedom of Information Act Appeal, filed November 23, 2010, by EFF (AFR 1); Freedom of Information Act Appeal, filed January 28, 2011 (AFR 2).

² See Letter from Thomas J. Beers, Chief, Policy Division, PSHSB to EFF (Nov. 10, 2010) (Decision 1); Letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, OGC to EFF (Dec. 28, 2010) (Decision 2).

³ See Letter from Jennifer Lynch, Staff Attorney to FOIA Officer (Sept. 28, 2010) (FOIA No. 2010-590).

3. The request was assigned to PSHSB, the Bureau responsible for developing, recommending, and administering the agency's policies pertaining to public safety communications issues, including those pertaining to CALEA. PSHSB conducted a search of its files for responsive materials. In addition, PSHSB coordinated with OGC, the Office of Engineering and Technology (OET), and the Wireline Competition Bureau (WCB) and asked those offices to search their files for responsive materials.

4. In response to the FOIA Request, PSHSB located and provided EFF with thirteen pages of e-mails from an industry representative discussing CALEA compliance standards.⁴ PSHSB redacted a personal telephone number that was unrelated to the subject of the request, and therefore was not responsive.⁵ PSHSB explained that it "located no records discussing, concerning or reflecting any communications or discussions with foreign government representatives or trade groups about trade restrictions or import or export controls related to electronic communications surveillance-enabling technology."⁶ PSHSB further explained that it "located no records discussing, concerning or reflecting any briefings, discussions or other exchanges 'between FBI officials and the Senate or House of Representatives' concerning implementing a requirement for electronic communications surveillance-enabling technology, including but not limited to, proposed amendments to the Communications Assistance to Law Enforcement Act (CALEA)."⁷

5. **FOIA No. 2011-078.** EFF's second FOIA request sought "all agency records created on or after January 1, 2006 (including but not limited to, electronic records) discussing, concerning, or reflecting any briefings, discussions, or other exchanges between FCC officials and members of the Senate or House of Representatives or their staff concerning implementing a requirement for electronic communications surveillance-enabling technology, including, but not limited to, proposed amendments to . . . CALEA."⁸

6. OGC conducted a search of its files for responsive materials. It also asked PSHSB and the Office of Legislative Affairs (OLA) to search their files for responsive materials. OGC provided EFF with several unredacted copies of letters and e-mails from 2006 and 2007 between members of Congress, their constituents, and the FCC.⁹

III. APPLICATIONS FOR REVIEW

7. EFF's AFRs essentially ask the agency to conduct repetitive searches of documents responsive to the requests in FOIAs 2010-590 and 2011-078, even though no such documents were located during earlier searches by PSHSB, OGC, OLA, OET and WCB. Ultimately, EFF's AFRs rest on the unsupported assertion that the "FCC has not conducted a

⁴ See Decision 1.

⁵ *Id.* EFF does not appeal this portion of Decision 1.

⁶ *Id.* (discussing Item 2 of EFF's first FOIA request).

⁷ *Id.* (discussing Item 3 of EFF's first FOIA request).

⁸ See Letter from Jennifer Lynch, Staff Attorney, EFF to FOIA Officer (Nov. 23, 2010) (FOIA No. 2011-078). The request essentially paralleled Item 3 of FOIA Request No. 2010-590 but replaced "FBI" with "FCC."

⁹ See Decision 2; AFR 2.

reasonable search of its records,” and EFF’s speculation that there are more recent responsive agency records than those released.¹⁰

IV. DISCUSSION

8. We deny EFF’s AFRs. The documents disclosed to EFF represent all of the responsive records located by PSHSB, OGC, OLA, OET and WCB pursuant to searches of their files that were reasonably calculated to uncover all relevant documents. EFF has presented no specific reason to doubt the adequacy of these searches, to require further searches, or to believe that other responsive (and non-privileged) documents exist that were not previously produced. EFF cites *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999), for the proposition that the FCC must show that it made a good faith effort to conduct a search for the requested records and cannot limit its search to only one or more places if there are additional sources that are likely to yield the information requested.¹¹ Under the FOIA, an agency must conduct a search “reasonably calculated to uncover all relevant documents.”¹² The reasonableness of an agency’s search depends upon the facts of each case.¹³ Specifically, the adequacy of a search under the FOIA is determined by a test of reasonableness,¹⁴ which depends, in part, on how the search was conducted in light of the scope of the request¹⁵ and the requester’s description of the records sought.¹⁶ The mere inability to locate requested documents does not render a search inadequate.¹⁷ Moreover, the adequacy of a FOIA search is generally not determined by the fruits of the search, but rather by the appropriateness of the methods used to carry out the search.¹⁸

9. Here, the five FCC Bureaus and Offices likely to have any responsive materials (PSHSB, OGC, OLA, OET and WCB) searched their files pertaining to electronic communications surveillance-enabling technology and proposed amendments to CALEA, and produced to EFF all records they located that were responsive to EFF’s request. We are satisfied that PSHSB, OGC, OLA, OET and WCB conducted diligent searches for relevant information in their offices and talked to relevant personnel in an effort to discover whether responsive materials existed and, if so, where they could be found. These searches were “reasonably

¹⁰ See AFR1 at 1; AFR 2 at 1.

¹¹ See AFR1 at 1; AFR 2 at 1.

¹² See *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Campbell v. U. S. Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) (noting that an agency must search “using methods which can be reasonably expected to produce the information requested”) (quoting *Oglesby v. U. S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

¹³ See *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

¹⁴ See *Weisberg*, 705 F.2d at 1351.

¹⁵ See, e.g., *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) (“[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.”).

¹⁶ See 5 U.S.C. § 552(a)(3)(A) (requiring that a FOIA request “reasonably describe[] . . . records [sought]”).

¹⁷ See *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

¹⁸ *Id.*

calculated to uncover all relevant documents,”¹⁹ and thus were adequate to satisfy the agency’s obligation under FOIA.

10. EFF’s AFRs are premised, in part, on its speculation that because the FCC is charged with implementing CALEA compliance,²⁰ further records must exist.²¹ Additionally, EFF asserts that the FCC “has likely been involved in the discussions between the White House, several federal agencies, and members of Congress regarding updating the statute.”²² EFF cites several articles that discuss a task force, including officials from the Justice and Commerce Departments, the FBI, the National Security Agency, the White House and other agencies, recently working on draft legislation.²³ Those articles, however, do not suggest FCC involvement in the task force. We find that the Commission’s staff discharged their duty under the FOIA by conducting a thorough and reasonable search of its files related to EFF’s two FOIA requests.

V. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that the applications for review filed by Electronic Frontier Foundation ARE DENIED. EFF may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).²⁴

¹⁹ See *Weisberg*, 705 F.2d at 1351.

²⁰ Congress enacted CALEA in 1994 in response to concerns that emerging technologies such as digital and wireless communications were making it increasingly difficult for law enforcement agencies to carry out authorized surveillance. See Pub. L. No. 103-414, 108 Stat. 4279 (1994), codified, as amended, at 47 U.S.C. § 1001 *et seq.* Under the statute, the industry is generally responsible for setting standards and solutions in consultation with the Attorney General and other law enforcement agencies. See 47 U.S.C. § 1006(a). Unless a party files a petition, the FCC does not become involved in the process of developing CALEA compliance standards. See 47 U.S.C. § 1006(b).

²¹ See AFR1 at 1; AFR2 at 1.

²² *Id.*

²³ *Id.* (citing *e.g.*, *Officials Push to Bolster Law on Wiretapping*, available at <http://www.nytimes.com/2010/10/19/us/19wiretap.html>; *U.S. Tries to Make It Easier to Wiretap the Internet*, available at <http://www.nytimes.com/2010/09/27/us/27wiretap.html>); AFR1 at 1; AFR2 at 1; FOIA Request No. 2010-590 at 1; FOIA Request No. 2011-078 at 1.

²⁴ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect EFF’s right to pursue litigation. EFF may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.

12. The officials responsible for this action are the following: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary