

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

In the Matter of)
James Chelmowski) FOIA Control No. 2019-086
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2019

Released: April 5, 2019

By the Commission:

1. By this Order, we deny an Application for Review by James Chelmowski seeking review of the Office of General Counsel’s (OGC) response to his Freedom of Information Act (FOIA) request. We conclude that OGC properly responded to the request.

2. The FOIA and Commission regulations give the public the right to request that an agency produce records that are not routinely available for public inspection. Generally, the agency must conduct a search for the requested records and produce them unless the agency determines that one or more of the FOIA’s nine statutory exemptions apply.

3. Mr. Chelmowski’s FOIA request sought “all the FCC directives, procedures, policies and written instructions for the FOIA Application for Review process . . . from submission, reviewing, drafting documents, presentation to the Commission, Commission votes, FCC Commission voting on the Decision, sending communications to parties involved, etc.” OGC staff searched for responsive records and responded that the search “located no records other than those that are publicly available or have already been provided to [Mr. Chelmowski] in prior FOIA requests.” Prior records provided to Mr. Chelmowski included copies of the Commission’s FOIA directive, FOIA guide, FOIA handbook, and FOIA regulations. OGC’s response also explained that staff familiar with the Commission’s FOIA

1 E-mail from James Chelmowski to Office of General Counsel, Federal Communications Commission (filed Mar. 8, 2019) (Appeal).

2 Letter from Elizabeth Lyle, Federal Communications Commission, to James Chelmowski (Dec. 10, 2018) (Response Letter).

3 5 U.S.C. § 552(a)(3); 47 C.F.R. § 0.461.

4 5 U.S.C. § 552(a)(3),(b); 47 C.F.R. §§ 0.457, 0.461(f).

5 FOIAonline Request 2019-086 (filed Nov. 14, 2018) as modified by Letter from James Chelmowski to Ryan Yates, Federal Communications Commission (Nov. 15, 2018). FOIA 2019-086 is Mr. Chelmowski’s 33rd FOIA request since September 2015. Many of these requests seek records related to the Commission’s FOIA processes and his own prior FOIA requests.

6 Response Letter at 1.

7 Commission staff offered to produce additional copies of these records to Mr. Chelmowski, but he did not respond to that offer. Id.

procedures had confirmed that these were the only records that were responsive to Mr. Chelkowski's request.⁸

4. Mr. Chelkowski appeals OGC's response by arguing that OGC did not conduct an adequate search for responsive records. He contends that "the FCC did not conduct any search and only asked a few FCC staff members."⁹ This argument misconstrues OGC's response. Staff conducted a search for responsive records, and in doing so found the same records that had been previously provided to Mr. Chelkowski. As part of this search, relevant subject matter experts on OGC's staff confirmed that there were no other records that might be responsive. Even if processing staff had merely discussed the issue with the relevant subject matter experts, such a search is acceptable under the FOIA. Courts have repeatedly held that an agency need not conduct a physical search if staff familiar with the records in question can attest that there are no records responsive to the request.¹⁰

5. Mr. Chelkowski also asserts that the search could not have been adequate because he believes there must exist some specific document that precisely governs how the Commission's FOIA appeal process operates, and that it is inconceivable that an adequate search did not reveal such a document.¹¹ However, this ignores that Commission staff have already provided Mr. Chelkowski with hundreds of pages of records related to the Commission's handling of FOIA requests and appeals; the fact that an additional search of those records returned nothing new is unsurprising. Furthermore, courts have consistently held that "a search is not inadequate simply because it failed to turn up a document that [a requester] believes must exist."¹² For these reasons, we conclude that OGC's search for responsive records was adequate.

6. Mr. Chelkowski also challenges OGC's decision to consolidate several of his requests for the purpose of calculating fees.¹³ We do not need to decide this issue. The FOIA provides that requesters like Mr. Chelkowski may receive up to two hours of free search time on their requests.¹⁴ Even after Mr. Chelkowski's requests were consolidated, he did not exceed this two-hour threshold and he was not charged any fees for responding to this request. Thus, his argument regarding the consolidation of his requests is moot.¹⁵

7. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by James Chelkowski IS DENIED. Mr. Chelkowski may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

⁸ *Id.*

⁹ Appeal at 3.

¹⁰ See, e.g., *Espino v. Dep't of Justice*, 869 F. Supp. 2d 25, 28 (D.D.C. 2012); *Thomas v. Comptroller of the Currency*, 684 F. Supp. 2d 29, 33 (D.D.C. 2010); *American-Arab Anti-Discrimination Comm. v. Dep't of Homeland Sec.*, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007).

¹¹ Appeal at 4.

¹² *Espino*, 869 F. Supp. 2d at 28.

¹³ Appeal at 5.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(iv)(II); 47 CFR § 0.470(a)(3).

¹⁵ Mr. Chelkowski further contends that the "concealed responsive records" for this request would "include instructions based on Federal law, regulations, [and] policy . . . on how to combine FOIA requests for fee aggregations." Appeal at 5. As explained above, the Commission already searched for and provided Mr. Chelkowski with the records responsive to his request. His assertion that such instructions must exist, and that the Commission is surreptitiously withholding such instructions from him, is nothing more than unsupported speculation.

8. The officials responsible for this action are the following: Chairman Pai, and Commissioners Rosenworcel, O’Rielly, Carr, and Starks.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ 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 Mr. Chelmowski’s right to pursue litigation. Mr. Chelmowski may contact OGIS in any of the following ways:

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Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
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