



DEPARTMENT OF THE NAVY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
1322 PATTERSON AVENUE SE SUITE 3000  
WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO:  
5720  
Ser 14/441  
August 31, 2017

Mr. Robert Powell

[REDACTED]  
e-mail: robertmaxpowell@gmail.com

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-USMC-2017-003339; FOIA APPEAL DON-NAVY-2017-008885 AND FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY-2017-002364 (SISTER CASE DON-NAVY-2017-002564); FOIA APPEAL DON-NAVY-2017-009164

This letter responds to your two subject FOIA appeals, received in this office on July 24, 2017, and August 3, 2017, respectively. Your appeals are requests for final determinations under the FOIA. For the reasons set forth below, your appeals are granted in part and denied in part.

I. FOIA Request DON-USMC-2017-003339; FOIA Appeal DON-NAVY-2017-008885

First, you appeal the April 5, 2017, response from 3d Marine Aircraft Wing (MAW) to your request for "all communications, log books, radar data, FLIR video, and all other recorded information in the possession of Third Marine Aircraft Wing regarding the events surrounding any Anomalous Aerial Vehicles, Unidentified Airborne Contacts, or other terminology used to describe unknown aircraft, on the date of Nov. 14, 2004." In its response, 3d MAW noted that searches were conducted at Marine Fighter Attack Squadron 232 (VMFA-232) and the operations section of Marine Aircraft Group (MAG) 11; however, the search returned no responsive information because records from the 2004 timeframe of your request are no longer maintained at those commands.

In your appeal, you challenge the adequacy of the search conducted by the U.S. Marine Corps and request "a more thorough search be made for the VMFA-232 records for November 14, 2004 based on the Department of the Navy Records Management Program 5210.1 revised May 2012. If these records cannot be found then please provide all of the records from the VMFA-232 on Nov. 14, 2004 to establish that the records were thoroughly researched." To support your challenge, you also attached two documents to your appeal that you state "lend credence to the belief that there are documents in the possession of the U.S. Marine Corps related to an incident involving an unknown aircraft

on Nov. 14, 2004.”

The adequacy of an agency’s search for information requested under the FOIA is determined by a “reasonableness” test. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Weisberg v. United States Dep’t of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). As a general rule, an agency must undertake a search that is reasonably calculated to locate the requested information. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). Courts have found agencies satisfy the “reasonableness” test when they properly determine where responsive records are likely to be found and search those locations. *Lechliter v. Rumsfeld*, 182 F. App’x 113, 115 (3d Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it “determined to be the only ones likely to possess responsive documents” (citing *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 55-56 (D.D.C. 2012) (concluding that agency’s search was reasonable because agency determined that all responsive records were located in a particular location created for express purpose of collecting records related to subject of request and searched that location). Moreover, courts have found that an agency’s inability to locate a responsive record does not undermine an otherwise reasonable search. *Moore v. FBI*, 366 F. App’x 659, 661 (7th Cir. 2010) (noting that although agency had years earlier destroyed some potentially responsive records, that fact does not invalidate the search).

Following receipt of your appeal, my staff contacted 3d MAW, which provided additional information on the searches conducted. 3d MAW Headquarters staff do not maintain any files, systems, or archives where information responsive to your request could be found. VMFA-232 staff searched flight logs, flight schedules, the command’s share drive, and classified storage hard drives for anything from 2004. VMFA-232 had no records or information from 2004, and no responsive information was found. MAG 11 also searched for responsive information; however, no responsive information was found because MAG 11 does not retain any of the kinds of records that could be responsive to your FOIA request.

Based on these facts, I find the searches conducted by 3d MAW, VMFA-232, and MAG 11 were adequately and reasonably tailored to retrieve responsive information. Moreover, as the 7th Circuit said in *Moore*, an agency’s inability to locate a responsive record does not undermine an otherwise reasonable search – even where the agency had years earlier destroyed some potentially responsive records. You indicate that you obtained the two documents from the internet; however, neither document undermines the adequacy of the searches conducted. Accordingly, your appeal as it pertains to the searches conducted by 3d MAW, VMFA-232, and MAG 11, is denied.

However, in the course of the Marine Corps' search for information responsive to your request, a Marine Lieutenant Colonel provided an email noting that he is aware of the 2004 event and, although he did not witness the event or documentation of the event, he provided names of Navy and Marine Corps personnel who may have responsive information. This email appears to be responsive to your FOIA request; accordingly, a copy is attached at enclosure 1. The names of certain personnel, telephone numbers, and email address have been redacted pursuant to FOIA exemption (b)(6). FOIA exemption (b)(6) allows the Government to withhold information about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. As it relates to FOIA exemption (b)(6), the disclosure of names can constitute an unwarranted invasion of personal privacy for certain personnel; however, other personnel names can be released due to the nature of their positions and duties. For DoD, in the interest of open government, ranks of all personnel and the names of office-director level DoD employees or those in the rank of O-6 (Navy captain or Marine Corps colonel) and above generally are not exempted under (b)(6). In this case, I have determined that there is a public interest in releasing the names of the personnel who have or are serving as commanding officers, as well as personnel above the rank of O-6, that outweighs the privacy interests of these individuals. However, I have also determined all of the service members in enclosure 1 have substantial privacy interests in their e-mail addresses and telephone numbers which outweighs public interest in release. Release of such information is not likely to shed any light on the agency's performance of its statutory duties. Rather, release of such information would raise privacy and security concerns. *See, e.g., George v. Internal Revenue Service, et al.*, 2007 U.S. Dist. LEXIS 36525 (N.D. Ca 2007); *Wilson v. United States Air Force*, 2009 U.S. Dist. LEXIS 114702 (E.D. Ky 2009); *Schoenman v. Federal Bureau of Investigation, et al.*, 575 F. Supp. 2d 136 (D.D.C. 2008).

By copy of this letter, I am remanding your request to 3d MAW for three reasons. First, I am directing that command to contact the Marine Corps personnel listed in enclosure 1 to search for any responsive agency records the listed individuals may have in their possession. Second, I am directing that 3d MAW coordinate with the office of the Deputy Commandant of the Marine Corps for Aviation to search for information that may be responsive to your request. Third, I am directing that 3d MAW coordinate with the Marine Corps' History Division to search for information in that Division that may be responsive to your request. 3d MAW will provide you with a response within 20 working days from the date of this letter. You retain the right to appeal the response to this office within 90 days of the date of the response. I caution you that remand to 3d MAW does not mean that additional records responsive to your FOIA request exist. Moreover, if such records exist, portions may still be withheld under applicable FOIA exemptions.

II. FOIA Request DON-NAVY-2017-002364; FOIA Appeal DON-NAVY-2017-009164

Second, you appeal the April 27, 2017, response from Commander, Naval Air Force Pacific (CNAP) to your request for “communications, log books, radar data, FLIR video, and all other recorded information” relating to “any Anomalous Aerial Vehicles, Unidentified Airborne Contacts, or other terminology used to describe unknown aircraft” encountered by aircraft from Carrier Airborne Early Warning Squadron ONE ONE SEVEN (VAW-117) and Strike Fighter Squadron FOUR ONE (VFA-41) on November 14, 2004. In its response, Commander, Naval Air Force Pacific noted that searches were conducted by Commander, Strike Fighter Wing, Pacific; VFA-41; and Commander, Airborne Command and Control Logistics Wing, Pacific; however, no responsive records were found.

In your appeal, you challenge the adequacy of the searches conducted and request “a more thorough searching of naval records.” To support your appeal, you note that you received a letter from the Naval Air Warfare Center Aircraft Division that indicated the Division’s search for records responsive to your request identified documents that originated with Naval Air Station Lemoore, and that the FOIA request was referred to Naval Air Station Lemoore for a release determination and direct response to you. You therefore challenge CNAP’s conclusion that no responsive records were found, and you request a copy of the records. You also attached two documents to your appeal that you state “lend credence to the belief that an incident involving an unknown aircraft on Nov. 14, 2004 did occur.”

The adequacy of an agency’s search for information requested under the FOIA is determined by a “reasonableness” test. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Weisberg v. United States Dep’t of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). As a general rule, an agency must undertake a search that is reasonably calculated to locate the requested information. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). Courts have found agencies satisfy the “reasonableness” test when they properly determine where responsive records are likely to be found and search those locations. *Lechliter v. Rumsfeld*, 182 F. App’x 113, 115 (3d Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it “determined to be the only ones likely to possess responsive documents” (citing *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 55-56 (D.D.C. 2012) (concluding that agency’s search was reasonable because agency determined that all responsive records were located in a particular location created for express purpose of collecting records related to subject of request and searched that location). Moreover, courts have found that an agency’s inability to locate a responsive record does not undermine an otherwise reasonable search. *Moore v. FBI*, 366 F. App’x 659, 661 (7th

Cir. 2010) (noting that although agency had years earlier destroyed some potentially responsive records, that fact does not invalidate the search).

Following receipt of your appeal, my staff contacted CNAP staff, which provided additional information on the searches conducted. VFA-41 conducted a search for responsive information; however, the squadron had no records of flight schedules or FLIR footage going back to 2004; therefore, no responsive information was found. Similarly, Commander, Strike Fighter Wing, Pacific, the Immediate Superior in Command of VFA-41, did not have records dating to 2004; therefore, no responsive information was found. Commander, Airborne Command and Control Logistics Wing, Pacific, the Immediate Superior in Command of VAW-117, stated that the squadron no longer has any records pertaining to the date in question, and the E-2C that would have been operating at the time did not have a flight data recorder that could have recorded information responsive to your request.

Based on these facts, I find the searches conducted by VFA-41; Commander, Strike Fighter Wing, Pacific; Commander, Airborne Command and Control Logistics Wing, Pacific; and VAW-117 were adequately and reasonably tailored to retrieve responsive information. Moreover, as the 7th Circuit said in *Moore*, an agency's inability to locate a responsive record does not undermine an otherwise reasonable search – even where the agency had years earlier destroyed some potentially responsive records. You indicate that you obtained the two documents from the internet; however, neither document undermines the adequacy of the searches conducted. Accordingly, your appeal as it pertains to the searches conducted by VFA-41; Commander, Strike Fighter Wing, Pacific; Commander, Airborne Command and Control Logistics Wing, Pacific; and VAW-117 is denied.

However, in its response to you, CNAP did not address the Naval Air Warfare Center Aircraft Division's search for responsive information or how the referral of your request to Naval Air Station Lemoore was resolved. Additionally, as noted above, in the course of the Marine Corps' search for information responsive to your request, a Marine Lieutenant Colonel provided an email noting that he is aware of the 2004 event and, although he did not witness the event or documentation of the event, he provided names of Navy and Marine Corps personnel who may have responsive information.

By copy of this letter, I am remanding your request to CNAP for two reasons. First, I am directing that CNAP coordinate contacting the Navy personnel listed in enclosure 1 to search for any responsive agency records those individuals may have in their possession. Second, I am directing that CNAP coordinate with the Naval Air Warfare Center Aircraft Division to address that command's search for responsive information and the referral of your request to Naval Air Station Lemoore. CNAP will provide you with a response

5720  
Ser 14/441  
August 31, 2017


within 20 working days from the date of this letter. You retain the right to appeal the CNAP response to this office within 90 days of the date of the response. I caution you that remand to CNAP does not mean that additional records responsive to your FOIA request exist. Moreover, if such records exist, portions may still be withheld under applicable FOIA exemptions.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for the partial denials of your appeals. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. government and is therefore unable to assist you in this process.

If you would like to seek dispute resolution services, you have the right to contact the Marine Corps' FOIA public liaison, Ms. Sally Hughes, at [hqmcfoia@usmc.mil](mailto:hqmcfoia@usmc.mil) or (703) 614-4008, or the Department of the Navy's FOIA public liaison, Mr. Chris Julka, at [christopher.a.julka@navy.mil](mailto:christopher.a.julka@navy.mil) or (703) 697-0031.

If you have further questions or concerns for my office, my point of contact is LCDR Adam Inch, JAGC, USN, who may be reached at [adam.inch@navy.mil](mailto:adam.inch@navy.mil) or (202) 685-5452.

Sincerely,



G. E. LATTIN  
Director  
General Litigation Division

Enclosures:

1. Copy of responsive email

Copy to:  
3d MAW  
HQMC (ARSF)  
CNAP  
DNS-36  
DON CIO

**From:** Tomlinson LtCol Robert A  
**To:** (b) (6) Maj (b) (6); Byrum LtCol Dustin J  
**Cc:** (b) (6) Capt (b) (6); (b) LtCol (b) (6)  
**Subject:** RE: FOIA Request  
**Date:** Tuesday, March 07, 2017 22:33:52

---

(b) (6),

I am definitely aware of the "flying tic tac"! We were aboard the USS NIMITZ attached to CVW-11. The CO of VFA-41, CDR "Sex" Fravor (spelling?) had the video footage on his ATFLIR and several pilots in VMFA-232 saw the video. I personally did not see the video, but I heard all about it. I believe our CO at the time, LtCol "Cheeks" Kurth (retired) observed the tic tac, and I believe LtCol (b) (6), LtCol (b) (6) (retired), LtCol (b) (6) (retired), and several others also observed the video footage. Another good reference might be RADM Dell Bull (CNATRA) as he was the VFA-41 XO at the time.

S/F,

LtCol Rob "DAHIGI" Tomlinson  
Commanding Officer  
VMFA-323 "Death Rattlers"  
(b) (6)

-----Original Message-----

**From:** (b) (6) Maj (b) (6)  
**Sent:** Tuesday, March 07, 2017 6:27 PM  
**To:** Byrum LtCol Dustin J; Tomlinson LtCol Robert A  
**Cc:** (b) (6) Capt (b) (6); (b) LtCol (b) (6)  
**Subject:** FW: FOIA Request

Good afternoon Gentlemen,

3d MAW received a FOIA request recently for any responsive records in regards to an unknown, white, oval-shaped aircraft without obvious means of propulsion that was detected approximately 80 miles from San Diego by the USS Princeton and FA-18s from VFA-41 and VMFA-232. (request is provided in the attached email). During the course of our search for records, you gentlemen were identified as Marines who may have knowledge pertaining to this request.

Please let me know if you can spread any light on the circumstances surrounding this FOIA request and

1. if you have any records responsive to this request
- or
2. know of any people or commands which may be able to provide responsive records.

Please let me know if you have any questions and thank you for any help that

you can give.

V/r,

(b) (6)

Major, USMC  
Deputy Staff Judge Advocate  
3rd Marine Aircraft Wing

Office: (b) (6)

-----Original Message-----

From: (b) (6) Maj (b) (6)  
Sent: Monday, March 06, 2017 10:20 AM  
To: (b) (6) Capt (b) (6)  
Subject: FOIA Request

Capt (b) (6) ,

All flight schedules from the timeframe outlined in the FOIA request have been archived, and we at the squadron no longer have access to them. MAG-11 Ops should have a POC at the archive to facilitate recovery of these files. The squadron also has no archived FLIR footage or radar data from that date, nor do we even use the same recording systems that were used at that time. Two individuals, LtCol "Warren" Byrum (CO VMFA-314), and LtCol "DAHIGI" Tomlinson (CO VMFA-323) were in VMFA-232 on the date in question, and may be able to provide further clarification should Mr. Powell desire to talk to them. Let me know what other questions you have.

S/F,

Maj (b) (6)  
Executive Officer  
VMFA-232 "Red Devils"

Office: (b) (6)  
DSN: (b) (6)  
Mobile: (b) (6)  
BB: (b) (6)  
(b) (6)

Time Zone: Z - 8 / Japan - 16 / Hawaii + 3