

FREEDOM OF INFORMATION ACT

Non-Responsive Information in Responsive Records

You have asked whether the Freedom of Information (FOIA) requires an agency to process and release, when a FOIA exemption does not apply, non-responsive information contained in an otherwise responsive record or, in your case, an email string of discussions between two Air Force employees concerning the subject matter requested.

In past years, Department of Justice and Department of Defense policy required FOIA offices to process and release non-responsive information contained in email discussion strings unless a FOIA exemption required withholding of the non-responsive information or the requester agreed he did not want the non-responsive information otherwise contained in documents to be released by the agency. That policy recently changed and was removed from the updated DoD FOIA Manual, DoDM 5400.07, *Freedom of Information Act (FOIA) Program*. The new DOJ guidance can be found at https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia.

In your case, if an agency, for purposes of the FOIA request, considers each individual email between employees to be a separate “record,” or a string of emails dealing with one subject to be a separate record, then an agency may withhold as non-responsive information other emails within the email string that is intertwined with the responsive emails.

On the other hand, a record that is reasonably considered a discrete, separate record should not have its non-responsive information ‘redacted’ for that reason alone. Rather, any non-responsive information within one (each) responsive record can only be redacted if a FOIA exemption applies, or, as in the past, the FOIA requester clarifies he does not want to receive any non-responsive information contained in the record(s) he has otherwise requested. This latter situation will commonly occur for written reports, memorandums and more traditional policy and similar documents.

This more discretionary policy concerning the processing of non-responsive information contained in records otherwise requested by the requester—especially emails—should make the processing of such information less complicated for the Air Force. The updated guidance will eventually be included in a revision to the Air Force’s FOIA Manual.