

December 6, 2022

**RE: Freedom of Information Act Request Appeal: EPA-2023-001071  
VIA EMAIL**

Dear FOIA Officer:

On November 30, 2022, Public Employees for Environmental Responsibility (PEER) submitted a Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) concerning text messages sent and received by Tala Henry. By this letter, PEER seeks to appeal the final determination made by EPA.

**Procedural History**

*Initial Request*

On November 30, 2022, PEER submitted a FOIA request to EPA regarding text messages sent and received by Tala Henry under the Freedom of Information Act (5 U.S.C. 552, as amended). *See* FOIA Request. In this initial letter, PEER requested the following:

- Text messages regarding government business sent and received by Tala Henry, dated from November 8, 2016, through November 30, 2022. Relevant phone numbers may include, but are not limited to, the following: (202) 564-3810 and (202) 213-8880.

In addition to these items, PEER requested both a *Vaughn* index, justifying any claimed exemptions, and a fee waiver.

*Request for Clarification and Constructive Denial*

In a letter dated December 5, 2022, EPA requested clarification with respect to the description of the records sought. Namely, that “...the number (202) 564-3810 is an office number and not capable of sending or receiving text messages.” *See* Request for Clarification Letter.

On December 6, 2022, PEER responded to EPA’s letter, stating, “I [requestor] was giving examples of potentially relevant phone numbers, since I [requestor] did not know which could send or receive text messages. If ‘(202) 564-3810’ does not send or receive text messages, then it can be excluded from the search.” *See* Email from PEER to EPA 12/6/22 at 10:06AM.

On December 6, 2022, EPA responded, “Thank you for your message. Also, we are also unable to provide the content of text messages, but I can provide messaging records that provide details such as to/from, date/time and origination/destination information. I processed a similar request for PEER in 2021.” *See* Email from EPA to PEER 12/6/22 at 10:25AM.

On December 6, 2022, PEER responded, “Could you please tell me why the contents of the text messages are at issue? I understand Tala Henry is retiring, and I want to make sure her phones are not wiped given the FOIA.” *See* Email from PEER to EPA 12/6/22 at 11:40AM.

On December 6, 2022, EPA responded, “Currently, EPA doesn’t have the capability to retrieve the content of text messages.” See Email from EPA to PEER 12/6/22 at 11:51AM.

PEER appeals this constructive denial of production of the contents of the text messages on the grounds that 1) text messages are covered under FOIA and must be preserved once requested; and 2) EPA failed to conduct a reasonable search for records responsive to the FOIA request. Agencies have a duty to liberally construe FOIA requests to ensure responsive records are found. See *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

To fulfill its search obligations, an agency must “demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted); see also *Ancient Coin Collectors Guild v. United States Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (“An agency is required to perform more than a perfunctory search in response to a FOIA request.”).

### **I. The Contents of Text Messages are Covered under FOIA and Must be Preserved Once Requested.**

FOIA, 5 U.S.C. § 552(f)(2)(A), expressly defines “record” to include information “maintained by an agency in any format, including an electronic format.” Moreover, even before that language took effect on March 31, 1997, federal courts relied on the comparable language of 44 U.S.C. § 3301, which defined “records” to include “documentary materials, regardless of physical form or characteristics.” *E.g., Forsham v. Harris*, 445 U.S. 169, 183 (1980); *Save the Dolphins v. U.S. Dept. of Commerce*, 404 F. Supp. 407, 411 (N.D. Cal. 1975); accord, *e.g.*, *Atl. City Conv. Ctr. Auth. v. S. Jersey Publ. Co.*, 637 A.2d 1261, 1266, 1267 (N.J. 1994) (citing federal case law and, *inter alia*, Colorado statute).

In *Citizens for Responsibility & Ethics in Washington v. United States Department of Justice*, the United States District Court for the District of Columbia implicitly regarded texts as “records” under 5 U.S.C. § 552, further holding that, “if the record is a text conversation with some responsive text messages, the agency must disclose the whole conversation” rather than only the responsive texts (removed from their context). 2020 U.S. Dist. LEXIS 92400, 2020 WL 2735570 (Case No. 1:18-cv-00007-TSC) (mem. op.) (D.D.C. May 26, 2020). Neither party appeared to question, and the court implicitly accepted the premise that texts are no less public records than a tangible writing (assuming their substantive contents otherwise “qualify”). See, *e.g., id.* (“The issue here is that[,] rather than considering . . . a whole text chain as ‘a record,’ [the defendant] defined . . . each single text as ‘a record.’ ”).

While an agency need not preserve materials because someone might make a FOIA request for them in the future, once there is a pending FOIA request, they may not dispose of them. *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009).

Therefore, once requested, text messages regarding government business sent and received by government employees are covered under FOIA. Thus, EPA must comply with FOIA and produce the records PEER requested..

## **II. EPA Has Not Demonstrated Beyond Material Doubt that its Search was Reasonably Calculated and Thus the Search Is Inadequate.**

EPA failed to show the search for documents was adequate. “The adequacy of the search . . . is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case.” *Steinberg v. U.S. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (citing *Weisberg v. Dep’t. of Justice*, 745 F.2d 1476, 1485 (D.C.Cir. 1984)). Additionally, the “agency must provide detail as to how it conducted the search, and why that search was reasonable.” *Aguilar v. Drug Enft Admin.*, 865 F.3d 730, 738 (D.C. Cir. 2017). Challenging the adequacy of a search requires the requester to point to specific evidence. See *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (finding it is not enough for a requester to bring “purely speculative claims about the existence and discoverability of other documents.”) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

In response to the FOIA request for text messages, EPA simply stated, “Currently, EPA doesn’t have the capability to retrieve the content of text messages.” This assertion is conclusory and fails to meet the standard. In its constructive denial of production, EPA did not cite any attempts to retrieve the contents of the text messages. Moreover, the request was made on November 30, 2022, and the assertion that the contents of the text messages could not be retrieved was made December 6, 2022 – merely four business days after the initial request. Given that simple FOIA requests have a 20-day production schedule, it stands to reason that EPA had 16 more business days to attempt to retrieve the contents of the text messages, yet claimed they lacked the capability.

Therefore, EPA has not demonstrated beyond a material doubt that the search was reasonably calculated and adequate, and EPA likely has additional responsive documents.

### **Conclusion**

EPA’s claim that the agency does not have the capability to retrieve the content of text messages shows that this search was insufficient and unreasonable. EPA’s responses to PEER’s request asserts that the agency did not intend to produce the contents of the text messages. As previously discussed, the EPA failed to show beyond material doubt that its search was reasonably calculated. EPA likely has additional responsive records.

Thus, any additional responsive material should be disclosed. Consequently, EPA’s response to PEER’s FOIA request is unjustified and should be reversed.

Thank you for your prompt consideration of this appeal.

Sincerely,

Colleen E. Teubner  
Staff Litigation and Policy Attorney  
Public Employees for Environmental Responsibility (PEER)