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Secretary of the Air Force
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December 23, 2004

To the Secretary of the Air Force:

I am writing to appeal the response, dated November 22, 2004, to my FOIA requests dated April 23, 2004, May 3, 2004 (2 letters), June 10, 2004, July 22, 2004, August 4, 2004, September 6, 2004, and October 7, 2004. A copy of the response to my FOIA request is attached for your reference.

In the November 22, 2004 response, the Air Force recognized that my requests encompass "All photographs of caskets containing the remains of US military personnel received at any US military facility between 7 October 2001 and the present."

The search that was conducted yielded 288 images, which were previously released to another FOIA requester and, according to the accompanying finding aid, were taken on February 5, 2003, March 25, 2003, and November 17, 2003 at Dover Air Force Base. The Air Force response confirms that such images properly belong in the public record.

For reasons discussed in this letter, I do not believe that the Air Force has searched all locations reasonably expected to contain the records requested, nor has it found or released all records which meet the request.

The Air Force's obligation is to "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). This means that the search must be conducted in good faith using methods that are likely to produce the information requested. *See*

Campbell v. United States Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998). The Air Force "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Department of Justice FOIA Guide* (May 2004).¹ Stated another way, an agency search meets the requirements of FOIA only where the agency "can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325-326 (D.C. Cir. 1999) (quoting *Truitt*, 897 F.2d at 542 (D.C. Cir. 1990) (emphasis added)).²

To withstand judicial scrutiny, an agency must adjust the depth and breadth of its search commensurate with information it uncovers along the way. Courts assess the reasonableness of an agency search based upon what an agency knows once a search is completed, rather than "what the agency speculated at [the search's] inception." *Department of Justice FOIA Guide* (May 2004); see also *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998).

Moreover, as you are aware, Department of Defense regulations provide that Department of Defense personnel, including Air Force personnel, are expected to comply with the letter and spirit of the FOIA. DoD 5400.7-R at C1.5. This includes forwarding and referring requests to appropriate offices and components within the agency. DoD 5400.7-R at C1.5.9 and C5.2.7. To the extent that the Air Force did not take steps to ensure that the FOIA request was fully responded to, it is in violation of Department of Defense policy.

There are several indicators to support the conclusion that there are additional responsive records in other locations not searched by the Air Force. Through my own efforts, I have located many additional images that fall within my request but were not included in the Air Force's production of

¹ See e.g. *Juda v. United States Customs Serv.*, No. 99-5333, 2000 WL 1093326, at **1-2 (D.C. Cir. June 19, 2000) (per curiam) (reversing grant of summary judgment where agency "fail[ed] to pursue clear leads to other existing records"); *Conteh v. FBI*, No. 01-1330, slip op., ** 4-5 (D.D.C. Apr. 1, 2002) (concluding search inadequate where agency uncovered reference to other sources likely to contain responsive information); *Comer v. IRS*, No. 97-76329, 1999 WL 1922219 at *1 (E.D. Mich. Sept. 30, 1999) (doubting the adequacy of an agency's search where the agency failed to justify why it was not feasible to search those locations brought to its attention by the requester), subsequent opinion, 2000 WL 1566279 (E.D. Mich. Aug. 17, 2000), motion for reconsideration denied, 2000 WL 172771 (E.D. Mich. Oct. 5, 2000).

² Reasonably calculated searches oftentimes include resort to off site locations where the agency stores its records. In *Valencia-Lucena, supra*, the D.C. Circuit determined that, "pursuant to the regulations of the National Archives and Records Administration . . . agency records stored at a federal record center are deemed 'to be maintained by the agency which deposited the record.'" *Id.* at 327 (quoting 36 C.F.R. § 1229.162 (1998)).

288 images. These include images in the Air Force Link system, at www.af.mil, which is the official World Wide Web site of the United States Air Force and is certainly completely accessible to your office. The Air Force Link systems includes images of returning soldiers' remains at Hickam Air Force Base and Ramstein Air Force Base. Additional images are also likely available through the Defense Visual Information Center. The availability of images responsive to my request through these public sources strongly suggests that similar, additional images probably exist, but have not been made public, at these and other similar locations.

Other images that were not provided include, for example, numerous images taken at Ramstein AFB, including those available at the following hyperlink locations:

- www.usafe.af.mil/news/news02/uns02003.htm (released January 7, 2002)
- www.usafe.af.mil/news/news01/uns01415.htm (released December 7, 2001)
- www.usafe.af.mil/news/news02/uns02071.htm (released March 6, 2002)
- www.usafe.af.mil/news/news02/uns02148.htm (released April 16, 2002)
- www.usafe.af.mil/news/news02/uns02190.htm (released May 21, 2002)
- www.usafe.af.mil/news/news02/uns02237.htm (released June 17, 2002)
- www.usafe.af.mil/news/news03/uns03061.htm (released February 3, 2003)

The fact that additional responsive records exist and were not located by the Air Force in its search demonstrates that the search was not adequate. *Cf. Cooper v. DOJ*, No. 2004 U.S. App. LEXIS 8135 (D.C. Cir. April 23, 2004) (relying on FOIA requester's affidavit demonstrating the existence of a type of record that was not produced by the search and finding the search, therefore, inadequate). *See also Truitt*, 897 F.2d at 543 (holding grant of summary judgment for agency inappropriate since requester's discovery in the National Archives of relevant records generated by agency, but never disclosed to him, cast doubt upon the adequacy of the agency's search). Where, as here, it is clear that the responsive records exist that were never located, courts usually require not only a detailed explanation of the search conducted but also a convincing explanation of why further searches would be unreasonably burdensome. *See, e.g., Weisberg v. Department of Justice*, 627 F.2d 365, 370-71 (D.C. Cir. 1980).

At best, the handling of this FOIA request suggests that politics or policy affected how it was handled and led both to unnecessary delay in the processing and to a deliberately narrow search by the agency. At worst, the handling of this request strongly suggests that policy was changed upon receipt of the request to cease the creation of responsive records. Accordingly, I request that you make additional efforts – in accordance with FOIA requirements as outlined above – to locate responsive records, including searching Air Force electronic databases of images and searching related files that may be in a different location than those already searched.

If, notwithstanding the issues raised in this letter, the Air Force believes its search was adequate, I respectfully request that the Air Force provide a detailed explanation of the efforts undertaken. It is my sincere hope that we can resolve this matter. If you have any questions regarding this request, please call me at 302-831-2687 or email me at Ralph.Begleiter@udel.edu. I look forward to a response from the Air Force.

Sincerely,

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