

National Aeronautics and Space Administration
Headquarters
Washington, DC 20546-0001



November 14, 2016

Reply to Attn of:

Office of the General Counsel

Mr. Ronald D. Lee
Arnold & Porter LLP
601 Massachusetts Avenue, NW
Washington, DC 20001

Dear Mr. Lee:

By letter dated September 8, 2016, you appealed two determinations under the Freedom of Information Act (FOIA), 5 U.S.C. §552, et seq., which responded to separate but related FOIA requests you had submitted. One was issued on August 29, 2016, by Ms. Martha Terry, the FOIA Officer at NASA Headquarters (HQ), and the other on August 11, 2016, by Mr. Dennis Mahon, the FOIA Public Liaison Officer at the NASA Management Office (NMO), Jet Propulsion Laboratory (JPL). Each office indicated that it could not process your request because it was unclear what specific records you were seeking, and closed your case. This letter is NASA's final determination of that consolidated appeal.

BACKGROUND

I. Request to HQ FOIA Office:

On July 11, 2016, you submitted a FOIA request to the NASA HQ FOIA Office on behalf of your client, Dr. Nathan Myhrvold, as follows:

"1. Recipients of Request

This request is directed towards any office, subdivision, or personnel who may have responsive records, and in particular the following offices, subdivisions, and personnel who are familiar with the subject area of this request and will be able to identify and locate responsive records with a reasonable amount of effort:

- a. Office of the Administrator
- b. Office of the Deputy Administrator
- c. Office of the Chief of Staff
- d. Office of the Chief Scientist
- e. Office of the Chief Technologist
- f. Office of Communications
- g. Science Directorate

2. Detailed Description of the Records Sought

We request production of the following records:

- a. All documents related to Nathan Myhrvold, his research, and his inquiries to NASA's NEOWISE team and to other NASA officials. Subject matter of such documents may include:
 - i. Nathan Myhrvold's claims regarding Krichhoff's law;
 - ii. Nathan Myhrvold's inquiries leading up to the attached paper Comparing NEO Search Telescopes; and
 - iii. Nathan Myhrvold's inquiries about NEOWISE.
- b. All documents referencing the following articles (as a courtesy, we have attached a compilation of these articles in this request) [*electronic links to articles omitted*]:
 - i. Kenneth Chang, How Big Are Those Killer Asteroids? A Critic Says NASA Doesn't Know, New York Times (May 23, 2016);
 - ii. Eric Hand, Billionaire technologist accuses NASA asteroid mission of bad statistics, Science (May 23, 2016);
 - iii. Lee Billings, For Asteroid-Hunting Astronomers, Nathan Myhrvold Says the Sky is Falling, Scientific American (May 27, 2016);
 - iv. Rachel Feltman, That study critiquing NASA's 'bad science' on asteroids is pretty bad science, Washington Post (May 25, 2016);
 - v. Alan Boyle, Tech titl Nathan Myhrvold stirs up debate over search for killer asteroids, GeekWire (May 23, 2016).
- c. All documents discussing the accuracy of NEOWISE diameter estimates, including:
 - i. How the estimates were calculated;
 - ii. How the estimates should be described;
 - iii. Different approaches to calculation; and
 - iv. Policies or decisions regarding the accuracy and how NEOWISE-related papers or presentations should refer to them.

- d. All documents regarding comments about or criticism of NEOWISE data analysis by other researchers.
- e. All documents regarding policies or procedures regarding how to handle inquiries from external researchers about NEOWISE data.

These requests seek records stored in any form, whether recorded in writing, electronically, or by any other means.”

On July 19, 2016, the NASA HQ FOIA Office responded, indicating that it was unable to process the request since it was unclear what specific NASA records you were seeking. It stated further that unless you provided additional clarification within 20 days, it would close the case.

On August 5, 2016, you responded to the above letter, arguing that the request already sufficiently described the records sought. Nevertheless, you provided additional clarification and information, as follows: names of various personnel, offices, and directorates at NASA HQ involved in the subject matter of the request; a date range for which some records are being sought; and additional suggestions with respect to each specific request. These included searching e-mail correspondence of Mr. Lindley Johnson of the Science Mission Directorate, and other NASA officials, for references to Mr. Myhrvold, the five articles mentioned in the request, and the terms “NEOWISE” and “diameter.” You then concluded that these suggestions and clarifications would allow for a proper search for the requested records.

On August 10, 2016, the NASA HQ FOIA Office responded, indicating that you “did not provide any new information to clarify your request,” and that it was still unable to process your request. It then stated it was closing your case file. On August 29, 2016, the NASA HQ FOIA Office responded more directly to your letter of August 5. It concluded that you still have not provided any further clarification that would allow it to conduct a “reasonable and non-random search for Agency records,” and again indicated it was closing your case file.

II. Request to NMO FOIA Office:

Also on July 11, 2016, you submitted a similar FOIA request to the NASA NMO FOIA Office on behalf of your client, Dr. Nathan Myhrvold, as follows:

“1. Recipients of Request

This request is directed towards any office, subdivision, or personnel who may have responsive records, and in particular the following offices, subdivisions, and personnel who are familiar with the subject area of this request and will be able to identify and locate responsive records with a reasonable amount of effort:

- a. The NEOWISE team, including team members:
 - i. Amy Mainzer (JPL),
 - ii. Joseph Masiero (JPL),
 - iii. Lindley Johnson (NASA),
 - iv. Thomas Statler (NASA),
 - v. All other NEOWISE team members and affiliated personnel.
- b. Office of the Inspector General – JPL
- c. The Office of the Director Michael Watkins
- d. The Office of Deputy Director Larry James
- e. The Office of Chief Scientist Daniel McCleese
- f. Astronomy, Physics and Space Technology Directorate – JPL
- g. Engineering and Science Directorate – JPL
- h. The JPL division of the NASA Management Office

2. Detailed Description of the Records Sought

We request production of the following records:

[a-e: Same as in request to HQ FOIA Office discussed above]

- f. All documents related to papers or analyses regarding WISE/NEOWISE done by the NEOWISE team (*see, e.g.*, the following papers: Mainzer/TMC, Mainzer/NEO, Masiero/MB) [*footnotes with citations to articles not included herein*], including:
 - i. Model fitting and details thereof;
 - ii. Any documents including least squares fitting, chi-square fitting or other model fitting approaches;
 - iii. Any documents on least squares algorithms (which could also be called least squares minimization or optimization). For example, the Levenberg-Marquardt algorithm or variations thereof;
 - iv. Linear adjustment to the W3 band as described in Mainzer/TMC, Mainzer/NEO, Mainzer/MB;
 - v. Changes to per-observation estimated errors due to onset of saturation as described in Mainzer/TMC, Mainzer/NEO, Mainzer/MB, and other NEOWISE papers/analyses;
 - vi. All documents about the use of diameter estimates from prior radar, stellar occultation or spacecraft flyby in Mainzer/TMC, Mainzer/NEO, Mainzer/MB, and other NEOWISE papers/analyses;

- vii. Documents expressing or indicating the rules or procedures for eliminating data from analyses conducted by the NEOWISE team, including any analysis expressed in Mainzer/TMC, Mainzer/NEO, Mainzer/MB;
- g. Any and all documents related to NEOWISE analysis of Ryan and Woodward 2010, or IRAS (Tedesco et al 2002) (*see, e.g., Mainzer/TMC and Mainzer et al 2011*) [*footnotes with citations to articles omitted*].
- h. All correspondence about NEOWISE or any of the above topics to or from:
 - i. Edward Wright (UCLA);
 - ii. Tommy Grav (Planetary Sciences Institute);
 - iii. Timothy Spahr (originally at Minor Planet Center, more recently elsewhere).

These requests seek records stored in any form, whether recorded in writing, electronically, or by any other means.”

On July 18, 2016, the NMO FOIA Office responded, indicating it was unable to process your request based on the information you provided. It added that it would close your file unless you supplied the necessary clarification within 20 work days.

On August 5, 2016, you responded to the above letter, arguing that the request already sufficiently described the records sought. Nevertheless you provided additional clarification and information, as follows: names of various personnel, offices, and directorates at NASA and JPL involved with the subject matter of the request; a date range for which some records are being sought; and additional suggestions with respect to each specific request. These included searching the e-mail correspondence of Dr. Amy Mainzer, the principal investigator for NEOWISE at JPL, along with other JPL officials, for references to Mr. Myhrvold, the five articles mentioned in the request, and the terms “NEOWISE” and “diameter.” Regarding the request for documents related to papers or analyses associated with WISE/NEOWISE done by the NEOWISE team, you also suggested a search could be conducted by consulting with authors, identifying relevant files, and examining authors’ e-mails. Finally, regarding the request for correspondence about NEOWISE to or from the named individuals (Wright, Grav, and Spahr), you also suggested examining various e-mail accounts. As with the HQ case, you concluded that these suggestions and clarifications would allow for a proper search for the requested records.

On August 11, 2016, the NMO FOIA Office responded that it was still unclear what specific records you were requesting and closed the case.

III. Your Appeal:

On September 8, 2016, in a consolidated appeal, you appealed the related determinations of the NASA HQ and NMO FOIA Offices. As noted above, each office indicated that it could not process your request because it was unclear what specific records you were seeking, and consequently closed your case.

Your appeal argues that the FOIA requests were properly made, particularly when considered with the additional information included with your clarification letters, and that the responses from the HQ and NMO FOIA Offices were inconsistent with the FOIA and NASA's FOIA regulations. You requested that these actions be reversed and that the two offices be instructed to process and comply with your requests.

In support of your appeal, you reiterated many of the same arguments you raised in your clarification letters. You also emphasized that for much of the requested information, a reasonable search would entail examining the e-mail accounts of various individuals you named. Further, you argued that requests for "all documents related to" or "regarding" are not overly broad, if they seek documents pertaining to more narrow and specific topics, as you indicate exist in your cases. You concluded this point by saying that agencies "must consider the overall content and context of a request, and the mere fact that a request contains the words 'all' or 'relating to' does not make it *per se* infeasible to determine what records are sought."

You also disputed a number of contentions raised by the FOIA Offices: (1) that complying with your FOIA requests would require the FOIA Offices to conduct "random searches of email accounts"; (2) that a search in these cases would be "overly burdensome; and (3) that FOIA is not intended to be a substitute for discovery in litigation. Your response was that (1) especially in light of information provided in your clarification letters, targeted searches could be conducted that would efficiently yield the responsive documents; (2) it would be premature for a FOIA office to reject a request as overly burdensome when it had determined that it was not reasonably described, and further that though a request may be very broad or burdensome in magnitude, it may still reasonably describe the records sought; and (3) the statement about discovery and litigation is irrelevant as your client is not engaged in litigation with NASA.

DETERMINATION ON APPEAL

Your appeal has been reviewed and processed pursuant to applicable statutes and regulations, including the FOIA and NASA's FOIA regulations, 14 C.F.R. Part 1206. This process involved an examination of your original request, the determinations by the HQ and NMO FOIA Offices, your appeal, and related correspondence and documentation.

The principal issue raised by your case is whether you have reasonably described the records you are seeking. Both the HQ and NMO FOIA Offices took the position that you

did not. The FOIA is clear that a proper FOIA request must indeed reasonably describe the records sought. 5 U.S.C. § 552(a)(3)(A). The courts have been just as clear that “broad, sweeping requests lacking specificity are not permissible.” *See Marks v. DOJ*, 578 F.2d 261, 263 (9th Cir. 1978). Moreover, they have routinely found that requests seeking “any and all documents” regarding a general subject are defective in that they do not reasonably describe the records sought. In other words, requesters are not allowed to conduct “fishing expeditions” through agency files. *See, e.g., Dale v. IRS*, 238 F.Supp 2d 99, 104-05 (D.D.C. 2002). The NASA FOIA regulations also echo this sentiment. *See* 14 C.F.R. § 1206.601(b), which states that “NASA need not comply with a blanket or categorical request (such as ‘all matters relating to’ a general subject).” I note that your requests often use language such as “related to,” “regarding,” and “about.” On the other hand, case law is settled that even if a request “is not the model of clarity,” federal agencies should carefully consider the nature of requests and reasonably interpret their terms and overall content. *LaCedra v. EOUSA*, 317 F.3d 345, 347-48 (D.C. Cir. 2003). Similarly, they should be vigilant not to interpret requests so strictly that requesters are denied information the agencies know resides in their files. *Hemenway v. Hughes*, 601 F.Supp. 1002, 1005 (D.D.C 1985). Requests should also be considered against the background of the FOIA which requires agencies to construe requests liberally and respond to them “in a spirit of cooperation.” *See generally* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

Your requests do, as noted above, include language regarded as defective when related to a general subject. However, in view of the specificity you have used to describe the documents you are seeking, including naming particular offices, persons, topics, and time frames, along with other clarifying information described in your correspondence, I find that all but two of your requests, as revised through correspondence with the FOIA offices, relate to very specific subjects and that your descriptions of the requested records are reasonable and sufficiently describe the requested documents sufficient to support a reasonable search.

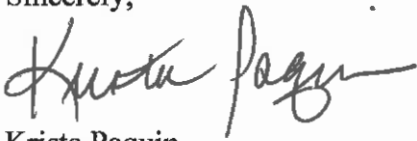
I find that two categories of requested documents are insufficiently specific to support a reasonable search. In your requests to both the HQ and NMO FOIA Offices you asked for (1) “All documents regarding comments about or criticisms of NEOWISE data analysis by other researchers;” and (2) All documents regarding policies or procedures regarding how to handle inquiries from external researchers about NEOWISE data or results.” I affirm the initial determinations with regard to these two requests.

Based on the foregoing, I remand the respective cases to the HQ and NMO FOIA Offices and direct that searches be conducted for records responsive to your requests consistent with this final determination.

Pursuant to 5 U.S.C. §552 (a)(4), you may seek judicial review of this determination. I have included a copy of that statute for your reference.

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,

A handwritten signature in black ink, appearing to read "Krista Paquin", with a horizontal line extending to the right.

Krista Paquin
Associate Administrator
Mission Support Directorate

Enclosure

Freedom of Information Act, Section 552(a)(4), as amended

(I)

if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II)

for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v)

No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi)

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii)

In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)

An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B)

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C)

Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D)

Repealed. Pub. L. 98-620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)

(i)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

Freedom of Information Act, Section 552(a)(4), as amended

(I)

a judicial order, or an enforceable written agreement or consent decree; or

(II)

a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)

(i)

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii)The Attorney General shall—

(I)

notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II)

annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii)

The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G)

In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.