

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

February 9, 2017

VIA ELECTRONIC MAIL

Scott B. Cryder

RE: FOIA Appeal 2018-071

Dear Mr. Cryder:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”), on the grounds that the Office of the Chief Financial Officer (“OCFO”) did not adequately respond or search for records responsive to your request for information regarding the Office of Tax and Revenue (“OTR”)¹ and the Real Property Tax Appeals Commission (“RPTAC”).

Background

On November 3, 2017, you submitted a request to OCFO for six categories of records of interaction and coordination between OTR and RPTAC. On November 16, 2017, OCFO responded to your request by providing you with 14 pages of responsive records. OCFO’s response did not indicate how the records it disclosed related to the six categories of your request. Additionally, OCFO’s response did not indicate that any records were withheld.

This Office received your appeal on January 26, 2018, and contacted OCFO for its response. Your appeal asserts that OCFO’s 14-page disclosure is inadequate based on the five-year scope of your request. Specifically, you state that the records disclosed by OCFO demonstrate that additional records should exist because the disclosure clearly contains partial email chains. Additionally, you assert that your request would promote the public interest of understanding the District’s handling of real property assessments.

On February 2, 2018, OCFO contacted this Office, stating that its initial search had included only current employees. OCFO claimed that it had subsequently identified former employees whose emails would likely contain responsive records and that it would search and review those emails and provide you with additional non-exempt responsive documents as they became available.

Discussion

¹ OTR is an office within OCFO.

It is the public policy of the District of Columbia that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The primary issue in this appeal is your belief that additional responsive records exist beyond those that OCFO has disclosed; therefore, we consider whether or not OCFO conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government’s search for responsive documents was adequate. *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence that records exist, is not enough to support a finding that full disclosure has not been made. *Marks v. U.S. Dep’t of Justice*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

‘the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’ [*Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a ‘reasonableness test to determine the ‘adequacy’ of a search methodology, *Weisberg v. United States Dep’t of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

To conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of records requested; and (2) search for the records in those locations. *Doe v. D.C. Metro. Police Dep’t*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). This first step includes determining the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory statements cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

On appeal, you have claimed that additional responsive records should exist based on the emails provided in OCFO's initial disclosure. OCFO has acknowledged that additional emails exist and that it intends to disclose those records to you. However, emails were only one category of the six-category request that you submitted to OCFO. It does not appear that OCFO has: (1) made a determination regarding the locations of the other five categories of records you requested; (2) communicated to you this determination(s); and (3) described the search(es) it conducted for the other categories of records. Therefore, OCFO has not demonstrated that it has conducted a reasonable search pursuant to your request.

Conclusion

Based on the foregoing, we remand this matter to OCFO. Within 10 business days from the date of this decision, OCFO shall identify the relevant locations of records for each category or your request and describe the results of its search. If OCFO's forthcoming searches result in retrieving additional responsive records, OCFO shall disclose to you non-exempt portions in accordance with DC FOIA. You are free to challenge OCFO's forthcoming substantive response by separate appeal to this Office.

If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Tracye Y. Peters, FOIA Officer, OCFO (via email)