

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeals: 2020-021 & 2020-036**

December 6, 2019

VIA ELECTRONIC MAIL

Fritz Mulhauser:

RE: FOIA Appeals 2020-021 and 2020-036

Dear Mr. Mulhauser:

This letter responds to the two administrative appeals you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your two appeals, you assert that the Office of Administrative Hearings (“OAH”) did not fully respond to your request for records relating to a plan that was described in OAH’s FY 19 performance plan.

Background

On September 12, 2019, you submitted a request to OAH for any records from October 1, 2018 to September 12, 2019 related to the “plan” described in the agency FY 19 performance plan as follows: “By the end of FY 19, OAH will develop a proposed plan to provide direct but limited access from the OAH website to the OAH case management system.” You also requested any correspondence related to the plan, such as an extension of the expected date. On October 1, 2019, OAH contacted you and asked if you could narrow the request. You responded on October 2, 2019, stating that if the study is released that would fully satisfy your request. In the alternative, if the study is not released (or is delayed or postponed), you wanted any record discussing the schedule or plan for the project. This included any revised work plan or schedule for the study or correspondence about doing the work or scrapping the project.

On October 24, 2019, OAH responded to the modified request with an initial production of 22 pages of documents. OAH also indicated that some documents were being withheld pursuant to the deliberative process privilege. On November 3, 2019, you appealed to this Office. You were skeptical of the agency’s position that no plan existed or that there were no documents on why the plan was delayed and/or the steps the agency would take to get the plan in place. And you questioned whether the documents that were withheld were subject to the deliberative process privilege. On November 14, 2019, OAH responded to your appeal.¹ In the response, OAH indicated that it had conducted a search specifically for any “report,” “study,” “plan” or any record discussing the schedule or plan. This included a search of the agency’s computer network. OAH also provided to this office a Vaughn index listing five emails and one draft

¹ A copy of OAH’s response to your appeal is attached.

document being withheld under the deliberative process privilege. D.C. Official Code § 2-534(a)(4) (“Exemption 4”). On November 20, 2019, OAH supplemented its response to your appeal. In that response, OAH provided three emails in which the pre-decisional deliberative information was redacted. OAH again withheld three documents under the deliberative process privilege. On November 24, 2019, you filed a second appeal challenging the supplemental production as inadequate. For administrative efficiency, we have designated that second appeal as FOIA Appeal 2020-036.

Discussion

It is the public policy of the District of Columbia government 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, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Adequacy of Search

In determining whether an agency conducted an adequate search in response to a records request, 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 allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

In this instance, you deem the response of OAH to be deficient because no plan was ever provided and you do not understand why there are no documents discussing the completion of the plan or schedule for completion of the plan. However, FOIA does not require OAH to create a document which does not exist and/or is not in its possession. In addition, FOIA does not require that an agency provide answers to questions about why certain documents do not exist. In this instance, OAH has specifically stated that after a diligent search, including a search of electronic record and discussions with agency officials deemed likely to have the requested records, no plan has been located. OAH has provided the responsive documents or public records which it has located and which it does not believe are subject to nondisclosure on the basis of privilege. While you may be dissatisfied with the volume of documents provided, OAH appears to have conducted a reasonable search for records.

Exemption 4- Deliberative Process Privilege

In its response to your initial appeal (2020-021), OAH also indicated that it withheld five (5) emails and on draft document under D.C. Official Code § 2-534(a)(4). Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” This exemption has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). As a result, Exemption 4 encompasses the deliberative process privilege. *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). The deliberative process privilege protects agency documents that are both pre-decisional and deliberative. *Coastal States Gas Corp., v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it was generated before the adoption of an agency policy and it is deliberative if it “reflects the give-and-take of the consultative process.” *Id.*

OAH has provided this Office with a copy of the six (6) documents withheld in their entirety in response to the initial appeal (2020-021) and the redacted documents provided in a supplemental production which is the basis of your second appeal (2020-036). This Office has reviewed the six documents.

Document 1- Email dated November 20, 2019 – the entire chain of emails is deliberative and pre-decisional. OAH was justified in withholding this document from production under D.C. Official Code § 2-534(a)(4).

Document 2 – Email dated March 18, 2019 forwarded a draft of court management priorities. The draft summary of management priorities is deliberative and pre-decisional. OAH was justified in withholding this document from production under D.C. Official Code § 2-534(a)(4).

Document 3 – Email dated June 12 2019 lists IT projects (IT meeting notes). 6/12/19.

Document 4 – Email dated August 2, 2019 – IT meeting notes 7/24/19.

Document 5 – Email dated August 16, 2019- Notes from IT meeting 8/7/19

Some sections of each of the foregoing emails are deliberative and pre-decisional and are subject to the deliberative process privilege. D.C. Official Code § 2-534(a)(4). However, there are segregable portions of all three emails that are not deliberative or pre-decisional and should have been produced under D.C. Official Code § 2-534(b). These emails have now been produced, with redactions limited to those items that the agency determined were subject to the deliberative process privilege. We have reviewed those redactions and we believe they are justified in light of the deliberative process privilege.

Document 6- Draft Report and Recommendations From the Court Management Committee. The draft report is deliberative and pre-decisional. OAH was justified in withholding this document from production under D.C. Official Code § 2-534(a)(4).

Conclusion

Based on the foregoing, we affirm OAH's position that it conducted an appropriate search, and with the supplemental document production, was justified in withholding the remaining documents (in whole or in part). Therefore, we hereby dismiss both FOIA Appeal 2020-021 and 2020-036. This constitutes the final decision of 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: Rachel Noteware
Assistant General Counsel and FOIA Officer
OAH (via email)