

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeals: 2020-025 & 2020-043**

December 5, 2019

VIA ELECTRONIC MAIL

Mr. Austermuhle

RE: FOIA Appeals 2020-025 and 2020-043

Dear Mr. Austermuhle:

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”), on the grounds that the Executive Office of the Mayor (“EOM”) failed to timely respond to your request for “copies of messages sent and received via the WhatsApp messaging app from Mayor Muriel Bowser's city-funded and/or personal cell phones. I would also like copies of messages sent and received via the WhatsApp messaging app from Chief of Staff John Falcicchio's city-funded and/or personal cell phones. (Date Range for Record Search: From 09/16/2019 to 10/02/2019).” FOIA Appeal 2020-025. After the agency responded to your FOIA request, you sent an email amending your initial appeal. In that second appeal, you asked a number of questions and you identified additional documents that you sought to have the EOM produce. For administrative purposes, we will treat the amended appeal as a second appeal designated as FOIA Appeal 2020-043. This letter responds to both of the appeals.

Background

On October 9, 2019, you submitted a FOIA request to EOM. On November 4, 2019, you deemed your FOIA request constructively denied because you had not received a response from the EOM. On November 8, 2019, EOM responded to your FOIA request indicating that no responsive documents had been located. On that same date, EOM responded to this Office’s request for an explanation of the lack of response which was the basis for the initial appeal. In that response, EOM indicated that as part of the search, both the Mayor and Chief of Staff John Falcicchio were asked for documents that were responsive to your request. However, both officials indicated that they did not have any responsive documents. On November 25, 2019, you acknowledged receipt of EOM’s November 8, 2019 response, and you amended your appeal to request additional public records and/or information that had not been raised in your initial FOIA request.¹

¹ Your November 25, 2019 amended appeal read as follows:
“Hi there,

Discussion

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).

FOIA Appeal 2020-025

We agree that the EOM did not provide a timely response to your initial FOIA request. However, we accept EOM’s representations that it conducted an adequate search for the requested records and that no responsive documents for the time range in question were located. As a result, we dismiss FOIA Appeal 2020-025 as moot.

FOIA Appeal 2020-043

As to FOIA Appeal 2020-043, this Office views your amended appeal as primarily a number of interrogatories to the EOM (“I am requesting evidence of how the search was conducted, who conducted the searches and on what dates, and what means were used to conduct the search. I am also requesting clarity on whether D.C. considers messages that may be contained on outside servers or devices (such as text messages, WhatsApp messages, etc.) to be searchable, obtainable and disclosable.”). FOIA does not require agencies to conduct research by “answer[ing] questions disguised as a FOIA request.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985) (“FOIA creates only a right of access to records, not a right to personal services.”) document requests or to create documents. *See Forsham v. Harris*, 445 U.S. 169, 186 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975)); accord *Yeager v. DEA*, 678 F.2d 315, 321, (D.C. Cir.

I am writing to amend my appeal, as I did receive a response to my FOIA request on Nov. 8 which was outside the 15-day window. It is attached. Given that the agency has said it found no responsive documents to my request, I am requesting evidence of how the search was conducted, who conducted the searches and on what dates, and what means were used to conduct the search. I am also requesting clarity on whether D.C. considers messages that may be contained on outside servers or devices (such as text messages, WhatsApp messages, etc.) to be searchable, obtainable and disclosable. Past practice has been that D.C. has considered emails pertaining to public business but on private email accounts to be disclosable under the auspices of FOIA, and I would like to know whether a similar policy applies to text messages and WhatsApp messages. D.C. FOIA clearly states that the “public policy of the District of Columbia is 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.” It also specifies that the provisions of the law “shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information. “Public access relies on an honest search for documents requested, at the very least.

Regards, Martin.”

1982) (“It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.”). *See also Nat’l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269 (D.D.C. 2012); *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009); *Frank v. U.S. Dep’t of Justice*, 941 F. Supp. 4, 5 (D.D.C. 1996) (holding that agencies are “not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff’s question”). To the extent that the amended appeal seeks to have the EOM answer a series of interrogatories, the request exceeds the parameters of an appropriate FOIA request, and DC FOIA does not compel the EOM to provide a response to these interrogatories.

However, a portion of the amended appeal can be fairly construed as a request for public records reflecting how the search was conducted, who conducted the search, and what dates and what means were used to conduct the search. To the extent that this is what was intended by what you have characterized as an amended appeal, such a request would be an appropriate FOIA request. However, since such a request would constitute a new request for public records under DC FOIA, the EOM has not had an opportunity to search for such requested documents. Therefore, we remand FOIA Appeal 2020-043 back to EOM to determine if there are any documents that reflect the answers to the interrogatories identified in the amended appeal. To the extent that any such documents are identified, the EOM should promptly disclose to you any such documents which cannot be withheld pursuant to one or more exemptions recognized by DC FOIA. You may file a new appeal if you are dissatisfied with the EOM’s response to this remand.

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: Karuna Seshasai
Deputy General Counsel, EOM (via email)