

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-029**

January 28, 2020

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2020-29

Dear Mr. Mulhauser:

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 State Superintendent of Education (“OSSE”) failed to properly respond to your September 20, 2019 FOIA request. In your request, you sought records related to a 2015 incident in which OSSE erroneously released personally identifiable records in response to a FOIA request. You sought records explaining the incident, the FOIA request involved, the agency transmittal in response (no data is requested), how many student files, explanation of the mistake made, data or discussion on individual student or family problems arising from the release of any data or discussions of the remedial measures taken and their effectiveness.

Background

On November 1, 2019, OSSE responded to your FOIA request indicating that its search only produced two documents that were being withheld as privileged pursuant to D.C. Official Code § 2-534(a)(4) (“Exemption 4”). On November 14, 2019, you appealed OSSE’s decision contending that the search was inadequate and the agency had not shown why the two responsive documents that were located were privileged and could be withheld. On December 3, 2019, OSSE responded to your appeal.¹ In its response, OSSE maintained that it had done a thorough search and justified the withholding of the two responsive documents as subject to the deliberative process, attorney work product and attorney client privileges under D.C. Official Code § 2-534(a)(4).

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

¹ A copy of OSSE’s response to your appeal is attached to this decision.

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).

Adequacy of Search

The first issue you raise in the instant appeal is whether OSSE conducted an adequate search for responsive records in light of your belief that additional responsive records should exist. 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 the response to your appeal, OSSE indicates that OSSE’s General Counsel and the Office of Attorney General were involved in the investigation of the 2015 FOIA incident. The OSSE

General Counsel searched for files on government issued network drive, emails, and files that are saved directly to her computer. In addition, OSSE maintains that the current FOIA Officer searched FOIA files that were archived by the former FOIA Officer for responsive records. There were no reports found that detailed the 2015 FOIA incident. The FOIA Officer and the FOIA attorney at the time of the incident are no longer employed with OSSE; therefore, the current FOIA Officer does not have access to the employee's files that could have been saved onto the local drive for the government issued laptop/computer. However, the current FOIA Officer searched through the former FOIA Officer's government issued network drive for older FOIA requests but did not find records relating to the incident in question. OSSE's response indicates that a targeted search was conducted. But OSSE has also confirmed that no OCTO search was conducted. Therefore, to the extent an OCTO email search was not conducted, the OSSE search was inadequate as to any responsive emails.

We find OSSE's search to be inadequate to the extent that OSSE did not conduct an OCTO email search for any responsive emails/records.

Exemption 4

Under D.C. Official Code § 2-534(a)(4), public bodies are vested 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); *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized). 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.* Under D.C. Official Code § 2-534(e), the deliberative process privilege, attorney work product privilege and attorney-client privilege are expressly incorporated under the inter-agency memorandum exemption listed in § 2-534(a)(4).

OSSE has provided a Vaughn Index listing the two responsive documents that are being withheld as privileged.

Document 1: OSSE Data Disclosure OAG MOLC Investigation Report, dated April 3, 2015, from a junior OAG attorney to a senior Deputy Attorney General. The memorandum discusses the legal litigation risk exposure to OSSE from the 2015 data disclosure under a number of federal statutes, federal constitutional provisions and a District common-law tort. The memorandum was provided by OAG to OSSE as legal guidance on the litigation risks to OSSE from the data disclosure. This document is not subject to the deliberative process privilege. The memorandum is neither pre-decisional nor deliberative. However, the document is exempt from

production as an inter-agency memorandum, and the document is covered by both the attorney-client and attorney work product privileges.

Document 2: Draft OSSE/BuzzFeed Data Disclosure Timeline, dated May 13, 2015. The memorandum was provided by the OSSE General Counsel to OSSE. This memorandum discusses the investigation conducted by the MOLC and OAG into the data disclosure. The memorandum includes the mental impressions of counsel regarding the facts and information provided by agency employees. The memorandum also includes specific recommendations for the agency to take to avoid future inadvertent data disclosures. We find that this draft memorandum is subject to the deliberative process, attorney-client and attorney work product privileges.

Conclusion

Based on the foregoing, we concur with OSSE's judgment that the two identified memoranda were privileged and could be withheld. However, we do not believe that OSSE has established that it conducted an adequate search for records and produce for you any responsive records identified which are not subject to withholding under an exemption recognized by DC FOIA. We remand the FOIA request to OSSE with the directive that it should promptly conduct an OCTO email search for any responsive records. You are free to file a new appeal once you have received OSSE's response after the additional search has been concluded. This constitutes the final decision of this Office with respect to this appeal.

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: Mona Patel, FOIA Officer
OSSE (via email)