

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-035**

January 13, 2020

VIA ELECTRONIC MAIL

Ms. Claudia Barber

RE: FOIA Appeal 2020-035

Dear Ms. Barber:

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”). In your appeal, you assert that the Office of Administrative Hearings (“OAH”) did not fully respond to your request for records relating to internal OAH communications between identified OAH officials.

Background

On August 16, 2019, you sent a FOIA request for all correspondence and emails between specific individuals at OAH. On September 6, 2019, you appealed OAH’s failure to respond to your FOIA request. FOIA Appeal 2019-214. On September 10, 2019, OAH responded indicating that at the time of your appeal the agency’s response time had not expired. OAH also noted that it had responded to your FOIA request on September 9, 2019. On November 12, 2019, this Office issued a decision on your appeal confirming that the appeal had been premature and that OAH had responded to your FOIA request. Our decision also informed you that you could file a separate appeal addressing OAH’s response. In this appeal (FOIA Appeal 2020-035), you challenge the sufficiency of OAH’s response. On December 3, 2019, OAH responded to your appeal¹. In the response, OAH states that 24 responsive documents were located. Seven (7) documents were provided to you. However, OAH withheld eight (8) documents on the basis of deliberative process privilege under D.C. Official Code § 2-534(a)(4) (“Exemption 4”). Six (6) documents were withheld under the privacy exemption in D.C. Official Code § 2-534(a)(2) (“Exemption 2”). And, three (3) documents were withheld under both Exemptions 2 and 4. OAH also provided a Vaughn Index and a copy of the documents that were withheld for review by this Office.

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

¹ A copy of OAH’s response to your appeal in 2020-035 is attached to this decision.

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 you believe that there should be additional emails or correspondence particularly with respect to one official. In this instance, OAH states that after a diligent search, including a previously performed OCTO search of emails and a search of private cell phones for responsive text messages, only 24 responsive documents were located. While you may be dissatisfied with the volume of documents provided, OAH appears to have conducted a reasonable search for responsive records.

.Exemption 4- Deliberative Process Privilege

OAH has indicated that it withheld 8 (eight) documents 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.* In addition, Exemption 4 specifically incorporates the attorney-client and the attorney work-product privileges.

OAH has provided this Office with a copy of the eight (8) documents that were withheld as subject to the deliberative process privilege. This Office has reviewed the eight (8) documents and the Vaughn Index that describes the documents and the basis for the documents being withheld. This Office concludes that all of the documents are deliberative in nature and pre-decisional, and therefore, are subject to the deliberative process privilege exemption in D.C. Official Code § 2-534(a)(4).

Exemption 2 - Privacy

OAH also indicates that it withheld six (6) documents under the privacy exemption in D.C. Official Code § 2-534(a)(2) (“Exemption 2”). Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personally identifiable information. *Skinner v. U.S. Dep’t. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994); *see also* FOIA Appeal 2017-133, FOIA Appeal 2017-149.

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of “public interest” if it would shed

light on an agency's conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that "reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773.

Id. at 1492-93.

In this case, OAH withheld six (6) documents as subject to the privacy exemption in D.C. Official Code § 2-534(a)(2). These documents discuss or are about confidential personnel matters. In addition, three (3) documents were withheld as subject to both the deliberative process privilege and the privacy exemption. These nine documents along with the Vaughn Index were reviewed by this Office. We conclude that each of the nine documents may be properly withheld under either the deliberative process privilege or privacy exemption (or both). And, as to the privacy exemption, none of the documents shed sufficient light on an agency's performance of its statutory duties so as to outweigh the privacy interest arising from the discussion of internal agency personnel matters.

Conclusion

Based on the foregoing, we affirm OAH's position that it conducted an appropriate search and had sufficient authority under DC FOIA to withhold the 17 responsive documents which were not produced. This constitutes the final decision of this Office in connection with your 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: Maia Ellis
Assistant General Counsel
OAH (via email)