**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**EXECUTIVE OFFICE OF THE MAYOR**
**MAYOR'S OFFICE OF LEGAL COUNSEL**
**Freedom of Information Act Appeal: 2020-044**

January 21, 2020

VIA ELECTRONIC MAIL

Mr. Daniel Freeman

RE: FOIA Appeal 2020-044

Dear Mr. Freeman:

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 Executive Office of the Mayor ("EOM") improperly responded to your request for all correspondence to and from (and copied to) a senior advisor to the Mayor regarding bike lanes in the Shaw neighborhood.

Background

On August 12, 2019, the Mayor's Office of Legal Counsel ("MOLC") received a FOIA request from you for all correspondence to, from or copied to, Beverly Perry, a senior advisor to the Mayor, regarding bike lanes in the Shaw neighborhood. Your request also included a list of search terms. On November 18, 2019, you filed an appeal after you were informed by EOM that five responsive documents had been located and were being provided to you with redactions. On December, 12, 2019, EOM responded to your appeal. [1] In the response, EOM notes that on October 22, 2019, you were told that the initial email search for documents generated thousands of emails that would have to be examined for responsiveness and any privileges that might apply. According to EOM, on October 23, 2019, you clarified and narrowed your request stating "…the intention of the search is to obtain information related to … the construction of the Eastern Downtown Protected Bike Lane." Accordingly, EOM applied your clarification of the search query which produced five (5) responsive documents. Your appeal was based on the number of responsive documents that were located in comparison to the large amount documents identified in the initial search result. And, you felt that a large number of documents must have been withheld pursuant to D.C. Code § 2-534(a)(2). However, in the response to your appeal, EOM states that all documents withheld were deemed non-responsive based on your clarification of your search. The five documents that were deemed responsive were then redacted and provided to you under D.C. Official Code § 2-534(a)(2). [2]

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[1] A copy of the EOM response to your appeal is attached to this decision.
[2] EOM has also clarified that a fifth document was mistakenly redacted to remove an office phone number that was printed in the letterhead of the sender. EOM will provide that fifth document to you unredacted.

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).

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 EOM conducted an adequate search for records or, in the alternative, improperly withheld a large number of documents under D.C. Official Code § 2-534(a)(2).

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 case, EOM notes that on October 22, 2019, you were told that the initial email search for documents generated thousands of emails that would have to be examined for responsiveness and any privileges that might apply. According to EOM, on October 23, 2019, you clarified and narrowed your request stating "…the intention of the search is to obtain information related to … the construction of the Eastern Downtown Protected Bike Lane." Accordingly, EOM applied your clarification to the search query which produced five (5) responsive documents. Your appeal was based on the number of responsive documents in comparison to the large amount documents identified in the initial search result. And, you felt that a large number of documents must have been withheld. However, EOM states in its response that all documents withheld were deemed non-responsive based on the clarification of your search. The five (5) documents -- now four, with the production to you of the 5th document that should not have been redacted -- were the only documents deemed responsive. The documents were then redacted under D.C. Official Code § 2-534(a)(2). Based on the foregoing, we conclude that an adequate search for documents was conducted.

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, EOM only redacted private cell phone numbers and private email addresses. No documents were withheld in their entirety as privileged. As to the redactions, we find no cognizable public interest in the release to you of private cell numbers and email addresses. Therefore, EOM’s redactions were appropriate.

Conclusion

Based on the foregoing, we conclude that EOM conducted an adequate search for records. We also affirm EOM’s decision to redact the four (4) responsive documents to withhold private email addresses and private phone numbers. Therefore, we hereby dismiss your appeal. 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: Grant Tanenbaum, FOIA Officer
EOM (via Email)