GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-047

January 10, 2020

VIA ELECTRONIC MAIL

Mr. John McFarland

RE: FOIA Appeal 2020-047

Dear Mr. McFarland:

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 Department of Consumer and Regulatory Affairs ("DCRA") failed to respond to your FOIA request for a copy of all audio recordings of meetings and communications between several DCRA employees.

Background

On November 14, 2019, you submitted a FOIA request to DCRA's FOIA Officer.
On December 3, 2019, DCRA responded to your FOIA request. On December 12, 2019, you filed this appeal indicating that you had not received a response to your FOIA request. Since DCRA's response to your request was attached to your appeal, we will view your appeal as challenging the sufficiency of DCRA's December 3 FOIA response. Further, on December 24, 2019, DCRA responded to your appeal indicating that the only responsive document located in its files was a recording of an interview involving the two individuals identified in your FOIA appeal. However, that recording was being withheld under the investigatory records exception in D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3") and D.C. Official Code § 2-534(b). [1]

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

[1] A copy of DCRA's December 24, 2019 response to your FOIA appeal is attached to this decision.

federal stature 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 the Search

As indicated above, your appeal does not specifically challenge the adequacy of the search. However, we view your appeal as challenging the sufficiency of the search because you have asked that we compel DCRA to provide the documents you requested and you attached to your appeal a copy of DCRA's FOIA response.

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. *See 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, DCRA's response indicates that it conducted a search for the requested records and located one document, an audio file, that was responsive to your request. However, no information is provided by DCRA on the search, who conducted the search, what records were searched or whether an OCTO email search was even conducted. DCRA's one conclusory sentence that it did a search and only found one responsive document does not demonstrate that an adequate search was conducted.

Indeed, DCRA appears to have misconstrued your appeal as challenging only the non-production of the audio recording. To the contrary, you also challenged the failure of DCRA to produce the other types of communications you sought that were listed in your initial FOIA request and in your appeal of this matter (emails, text messages, memos, hand-written or typed letters and notes, post-it notes, video tapes, cassette recordings, meeting phone records, phone records and electronic folders containing Word documents, excel files, access database and PDF documents).
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Exemption 3 – Investigatory Records Compiled for Law-Enforcement Purposes

Records are considered "investigatory records" under Exemption 3 if they were compiled pursuant to an investigation focused on acts that could, if proven, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 814-15 (D.C. 2014) ("the phrase 'investigatory records compiled for law enforcement purposes' in exemption 3 [of the District's FOIA] refers only to records prepared or assembled in the course of 'investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified [persons], acts which could, if proved, result in civil or criminal sanctions.'").

However, courts have consistently distinguished between (i) internal disciplinary investigations where the agency is acting as an employer, and (ii) internal investigations in which the agency is acting as an enforcer of law.[2] To wit:

> There can be no question that an investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for "law enforcement purposes" under Exemption 7. This is assumed in the *Rural Housing Alliance* test, which requires that the acts investigated must be ones "which could, if proved, result in civil or criminal sanctions." *Rural Housing Alliance*, 498 F.2d at 80. Furthermore, this is assumed in all of the FOIA cases respecting requests for the disciplinary records of federal employees which are analyzed under Exemption 6[3] (which protects certain personnel files), rather than Exemption 7[4].

Stern v. FBI, 737 F.2d 84, 90 (D.C. Cir. 1984).

On appeal, DCRA argues that, pursuant to the D.C. Official Code § 2-534(a)(3)(A)(i), the audio recording is exempt from disclosure as it is an interview of a DCRA employee by a DCRA investigator. However, we find that the audio recording does not meet the threshold

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[2] *See also, Rural Hous. All.*, 498 F.2d at 81 ("For the purpose of analyzing the application of exemption 7 in the instant and similar cases, it is therefore necessary to distinguish two types of files relating to government employees:
(1) government surveillance or oversight of the performance of duties of its employees; (2) investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.")

[3] Federal Exemption 6 is the equivalent of DC's Exemption 2.

[4] Federal Exemption 7 is the equivalent of DC's Exemption 3.

requirement of being compiled for "law enforcement purposes," because "an agency's general internal monitoring of its own employees to insure [sic] compliance with the agency's statutory mandate and regulations is not protected from public scrutiny under" Exemption 3. *Stern*, 737 F.2d at 89.[5] We find that the nature of the internal investigation, during which the recording was made, is an employment determination that is different in kind from the sort of criminal or civil enforcement embraced by Exemption 3.[6] Thus, the audio recording does not meet the threshold requirement of being compiled for "law enforcement purposes," and we need not analyze the recording any further under Exemption 3. The audio recording may not be withheld under Exemption 3. [7]

Segregability

The last issue to be considered is whether DCRA can redact the withheld records to protect personal privacy interests. D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009). In this case, DCRA contends that it does not have the technical capability to separate privileged from non-privileged information on the audio recording. However, this is a red herring in this case. DCRA did not argue in its response to your appeal that the audio recording is subject to the privacy interest of the employees whose voices are on the audio recording. And, we have already concluded in this decision that the investigatory records exemption does not apply to the audio recording in this matter. Therefore, we find that there is no issue regarding segregability for the audio recording in this FOIA matter.

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[5] *Wood v. FBI*, 312 F. Supp. 2d 328, 345 (D. Conn. 2004) (reiterating that "'investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for law enforcement purposes under Exemption 7'" (quoting *Stern*, 737 F.2d at 90)), *aff'd in part & rev'd in part on other grounds*, 432 F.3d 78 (2d Cir. 2005); *Varville v. Rubin*, No. 3:96CV00629, 1998 WL 681438, at *14 (D. Conn. Aug. 18, 1998) (finding threshold not met by report discussing possible ethical violations and prohibited personnel practices because inquiry "more closely resembles an employer supervising its employees than an investigation for law enforcement purposes").

[6] *See Schoenman v. FBI*, 573 F. Supp. 2d 119, 147 (D.D.C. 2008) (finding State Department records relating to investigation of passport enforcement to be compiled for law enforcement purposes); *Envtl. Prot. Servs. v. United States EPA*, 364 F. Supp. 2d 575, 588 (N.D.W. Va. 2005) (finding withholding justified because of ongoing EPA administrative action in enforcing the Toxic Substances Control Act).

[7] DCRA did not assert that the audio recording was except under D.C. Official Code § 2-534(a)(2) or D.C. Official Code § 2-534(a)(3)(C) (the privacy exemptions). And, DCRA does not assert that the document should be withheld under the common-law "law enforcement privilege" which protects records in ongoing investigations whether or not the investigation could result in criminal or civil sanctions.

We therefore remand this FOIA matter to DCRA to produce the audio recording unredacted to you. Because DCRA's December 24, 2019 response suggests that there may be some confusion regarding the breadth of your request, we also direct DCRA to contact you to discuss the breadth of the request for other documents that you requested that involve communications "between" or "about" the two employees identified in your FOIA request. Once the breadth of your request is clear to DCRA, the agency shall then either (i) conduct an adequate search and promptly produce for you all responsive records not subject to withholding under an exemption in DC FOIA, or (ii) provide you written notice of its determination that it has conducted an adequate search for the records requested and the basis for the assertion that the search conducted was adequate.

This constitutes the final decision of this Office with regard to 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Erin J. Roberts
FOIA Officer
DCRA (via email)