GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-048

January 10, 2020

VIA ELECTRONIC MAIL

Mr. John McFarland

RE: FOIA Appeal 2020-048

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 5, 2019, DCRA responded to your FOIA request. On December 12, 2019, you filed an 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. On December 30, 2019, DCRA responded to your appeal indicating that it had identified 70 pages of email communications which contained the names of the two employees identified in your FOIA request. After reviewing the emails, DCRA determined that 21 emails (totaling 32 pages with an attachment) were responsive. No responsive documents were withheld. However, the emails were produced to you with redactions done under D.C. Official Code § 2-534(a)(2) ("Exemption 2") and D.C. Official Code § 2-534(a)(4) ("Exemption 4"). [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).

[1] A copy of DCRA's December 30, 2019 response to your FOIA appeal is attached to this decision.

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 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, you do ask that we compel DCRA to provide the documents you requested and your appeal email includes DCRA's December 3, 2019 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 describes how the search was conducted, who was contacted for records and who handled the search in various offices. The response also indicates that OCTO conducted a search of the relevant email accounts. We therefore conclude that DCRA conducted an adequate search for documents in response to your FOIA request.

Exemption 2 – Personal Privacy

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). 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). DCRA characterizes the records as containing personal information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of the two named employees. The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id*.

> The privacy interest in the FOIA balancing analysis "encompasses the individual's control of information concerning his or her person," including names, addresses, and other identifying information. *Padou*, *supra*, 29 A.3d at 982. Moreover, individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature. *U.S. Dep't of State v. Washington Post Co*., 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).

District of Columbia v. FOP, 75 A.3d 259, 265-66 (D.C. 2013).

Based on the DCRA response, and our review of the documents that were redacted along with the Vaughn Index, we conclude that DCRA appropriately redacted the names of individuals identified in internal communications as having possible violated DCRA regulations. We find that there is a privacy interest as to these individuals who were identified in the emails that DCRA produced to you.

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.

Although the emails were redacted to eliminate the names of individuals accused of violating DCRA regulations, this redacted information does not shed any light on the agency's conduct.

Therefore, we conclude that the public has no cognizable interest in the release of such information that outweighs the privacy rights of the persons who are named in the emails that have been redacted.

Exemption 4- Deliberative Process Privilege

DCRA also indicated that it redacted an email 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 this case, DCRA maintains that it redacted the text of an email that contained personal opinions and conclusions regarding the value of a third party vendor in handling or addressing issues arising from a particular property. We have reviewed the original email and the redaction and conclude that the deleted portion is pre-decisional and deliberative and therefore exempt from production under D.C. Official Code § 2-534(a)(4).

We therefore conclude that DCRA has conducted an adequate search and produced the responsive documents with redactions consistent with Exemptions 3 and 4. We therefore dismiss your appeal seeking the production of additional public records. This is the final decision of this Office on 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: Genet Amare
FOIA Officer
DCRA (via email)