

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-049**

January 10, 2020

VIA ELECTRONIC MAIL

Mr. John McFarland

RE: FOIA Appeal 2020-049

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 6, 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. On December 24, 2019, DCRA responded to your appeal indicating that it had not located any documents responsive to your request.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 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 the Search

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

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 included 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 describes how the search was conducted, who was contacted for records and who handled the search in various offices. The response also indicates that an OCTO search was not conducted because you did not provide search terms to facilitate the email search so that the search would not produce all emails sent by the individuals involved. And, no information is provided confirming that DCRA actually reached out to you to provide search terms that could streamline the search. We note that there is no authority provided by DCRA, and this Office has not located such authority, that a FOIA request solely seek emails between two individuals during a specific period of time, as in this FOIA request. We therefore conclude that while DCRA conducted an adequate search for non-email documents, DCRA did not conduct an adequate email search.

We therefore remand this FOIA request to DCRA to contact you to determine the appropriate search terms which will streamline the search if it was not your intention to get all emails

between the employees without regard to the subject. If you are dissatisfied with the response to the resulting search, if such search is sought, you may file a separate appeal. This is the final decision of this Office with respect 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)