

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-050**

January 10, 2020

VIA ELECTRONIC MAIL

Mr. John McFarland

RE: FOIA Appeal 2020-050

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. On December 30, 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).

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

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 you attached a copy of DCRA's FOIA response to your appeal.

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. DCRA also indicates that an OCTO search for emails was also conducted. However, no responsive documents were located. We therefore conclude that DCRA conducted an adequate search for documents in response to your FOIA request.

We therefore dismiss your appeal since the record supports the conclusion that a diligent search for records did not locate any responsive records. 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Genet Amare
FOIA Officer
DCRA (via email)