GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-070

January 23, 2020

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2020-070

Dear Mr. Mulhauser:

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 Executive Office of the Mayor ("EOM") failed to properly respond to your FOIA request for records related to the Mayor's release of Metropolitan Police Department ("MPD") body worn camera ("BWC") video and records of mayoral consultations about such releases.

Background

On September 23, 2019, you submitted a FOIA request to the EOM for (1) any record showing the total number of times, and the date and circumstances of each, where the Mayor has released DC MPD BWC video, as authorized by Title 24, Section 3900.10 of the D.C. Municipal Regulations, and (2) in the event that BWC videos were released, a copy of the Mayor's request in each case to the consultation partners specified in the regulation. On October 15, 2019, EOM informed you that it had not located any records that were responsive to the first request. As for the second request, EOM informed you that the responsive records were being withheld on the basis of privilege. On October 22, 2019, you filed this appeal. In your appeal, you indicated that on October 15, 2019, you modified your request to make it clear that you were not just seeking a "list". Instead, you also wanted the records on each individual event in which the Mayor directed the release of BWC video. You also note that there have been public discussions regarding four (4) BWC video releases. And, you further asked that EOM identity its procedure for records retention if a responsive record had existed but is no longer available. On January 15, 2020, EOM responded to your appeal. [1] In the response, EOM reiterated that you had been notified on October 15, 2019 that there were no documents responsive to your first request. Regarding, the second request, EOM indicated that any records relating to the Mayor's consultation with the U.S. Attorney's Office for the District of Columbia ("USAO") and the Office of the Attorney General for the District of Columbia ("OAG") were protected by D. C. Official Code § 2-534(a)(4) ("Exemption 4").

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[1] A copy of EOM's response to your appeal is attached to this decision.

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 Search

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 the appeal response, EOM describes the search that was conducted and the personnel with the Office of the General Counsel to the EOM ("OGC") involved in the search. The search was focused on the OGC because the coordination of the release by the Mayor of the BWC videos was handled by the OGC. The appeal response states that counsel "…searched the computer drive containing documents related to body worn camera footage housed within the Office of the General Counsel and electronic mail." No responsive documents were located. In addition, once the requestor clarified that he was not just looking for a "list" but for records relating to the individual events, EOM again determined that such records did not exist. However, EOM did locate records that were responsive to the second request (with some possible overlap with the first request). These records were withheld under D. C. Official Code § 2-534(a)(4) ("Exemption 4").

Based on the foregoing, we conclude that the search conducted by EOM was adequate. We now turn our attention to EOM's decision to withhold responsive records under Exemption 4.[2]

Exemption 4

Under D.C. Official Code § 2-534(a)(4), Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memoranda 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); *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized). 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*. Under D.C. Official Code § 2-534(e), the deliberative process privilege, attorney work product privilege and attorney-client privileges are expressly incorporated under the inter-agency memorandum exemption listed in § 2-534(a)(4).

This Office has physically reviewed all of the records withheld by EOM. These records include memoranda, emails and email attachments between OAG, USAO, MPD, the EOM, including different offices within the EOM. We have concluded that the various communications all fall within one or more of the following privileges: deliberative process (communications that are pre-decisional and deliberative); attorney-client and/or attorney work product. We note that some of the records fall under more than one privilege. Based on our direct review of the records, we conclude that all of the withheld records are covered by Exemption 4.

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[2] Our review in this matter is limited to Exemption 4 because EOM has justified withholding records under that Exemption. Therefore, we do not address whether any of the materials could have also been withheld, at least in part, under D.C. Official Code § 2-534(a)(2) ("Exemption 2").

Segregability

The last issue to be considered is whether EOM can redact the withheld records to protect the information that is covered by Exemption 4. 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. As stated above, we have concluded that records in response to the second request (records relating to consultation between the Mayor and MPD, OAG and the USAO) are inter-agency or intra-agency communications and are covered by Exemption 4. Moreover, communications between OGC personnel and EOM officials for the purposes of developing a legal recommendation on the discretionary release of BWC videos are either attorney-client privileged or attorney work product protected communications. Unlike the records subject only to the deliberative process privilege, communications falling within those privileges are not subject to disclosure under FOIA in their entirety, and therefore, segregability is not an issue for those records.

Even if any of these documents are deemed to be subject only to the deliberative process privilege, those documents need not be redacted if the agency can 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). Of course, purely factual material is generally not deliberative. However, the act of distilling a large amount of factual information into a compilation can represent an editorial judgement which, if disclosed, would reveal the deliberative process. *E.g. Montrose Chem. Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) ("To probe the summaries of record evidence would be the same as probing the decision-making process itself."). In the documents reviewed, the facts included in the documents are those facts gathered by the author of the document reflecting the author's subjective assessment on the legal recommendation regarding the release of the BWC video to the public. In this context, even the author's selection of the facts to support a recommendation shows the mental processes of the document's author and the facts summarized by the author are deliberative.

Based on our review of the documents, if the information that is deliberative and pre-decisional is deleted from the records subject only to the deliberative process privilege, the result would be documents which we conclude would have no informational value.

Conclusion

Based on the foregoing, we conclude that EOM conducted an adequate search and had sufficient justification under DC FOIA to withhold the documents responsive to your second request. Therefore, we dismiss your appeal. 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: Karuna Seshasai, Deputy General Counsel
Executive Office of the Mayor (via email)