

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-081**

November 5, 2020

VIA ELECTRONIC MAIL

Ms. Melanie MacDonald

RE: FOIA Appeal 2020-081

Dear Ms. MacDonald:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Fire and Emergency Medical Services Department (“DC FEMS”) failed to properly respond to your FOIA request.

Background

On January 22, 2020, you submitted a FOIA request to DC FEMS for records related to a fire at 703 Kennedy Street, N.W. On January 22, 2020, DC FEMS responded to you by email indicating that it had conducted a search and did not locate any responsive records for the 703 Kennedy Street, N.W. address. On that same date, you sent an email to DC FEMS indicating that your original request had the wrong address and that the correct address should have been 708 Kennedy Street, N.W. You asked whether you should submit a new FOIA request. On that same date, DC FEMS responded stating that no new request was needed as there were no documents for 708 Kennedy Street, N.W. Although we do not have a response from DC FEMS to the appeal, we have reviewed emails between you and DC FEMS regarding the agency’s response to your request, the correction of the address, and the agency’s response that there were no records for either address provided by you.

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 D.C. 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

In this appeal, you have challenged DC FEMS' assertion that there were no records responsive to your request relating to the 708 Kennedy Street, N.W. fire. Because of the notoriety of this fire and extensive news media coverage, it is important that DC FEMS establish that it conducted an adequate search for records.

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).

DC FEMS has stated that there was a search for records by the Information and Privacy Office. However, the agency provided absolutely no information on the actual search that was conducted. This makes the response that there are no records at DC FEMS regarding the Kennedy Street fire somewhat troubling. Therefore, we remand this appeal to DC FEMS to provide within 5 business days a detailed description of the search that was conducted (including email searches and searches for electronic records in data systems). You may file a new appeal

in response to DC FEMS information regarding its search or the results of any new search conducted on remand.

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 D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Dashuan Washington, FOIA Officer
DC FEMS (via email)