

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-119**

August 10, 2020

VIA ELECTRONIC MAIL

Ms. Clare Garvie

RE: FOIA Appeal 2020-119

Dear Ms. Garvie:

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”), challenging the failure of the Department of Motor Vehicles (“DMV”) to respond to your FOIA request.

Background

On January 27, 2020, you submitted a DC FOIA request to the DMV requesting records regarding a purported partnership between the Federal Bureau of Investigation (“FBI”) and the District of Columbia involving facial recognition software searches of driver’s license and District identification records. On February 13, 2020, you filed an appeal with this Office, challenging the DMV’s denial of your DC FOIA request on the grounds that “a search was conducted and no record was found responsive” to the request. You also submitted attachments to a published report from the U.S. Government Accountability Office (“GAO”), which you contend reflect the existence of a partnership between the FBI and District of Columbia for facial recognition activities. On February 20, 2020, the DMV responded to your appeal and stated that the agency found no records responsive to your request after conducting a search.

Discussion

It is the public policy of the District of Columbia 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. 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.....” D.C. Code § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Code § 2-534. Under DC FOIA, an agency is required to disclose materials if they are “retained by a public body.” D.C. Code § 2-502(18).

Adequacy of the Search

The issue you have raised by implication in this appeal is whether the DMV conducted an adequate search for records. You state that “it is implausible that a reasonable search by the DMV would fail to turn up a single record satisfying any of the requests made in the Center’s original FOIA request.” Your support for this position is that GAO reports (submitted with your appeal) regarding facial recognition technology included maps highlighting the District of Columbia as a region in which the FBI partnered with local government on the application of the technology. You assert that the DMV must have records regarding the program given those GAO reports.

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 factual evidence that records exist, is not enough to support a finding that full disclosure has not been made. *Marks v. United States*, 579 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search:

[t]he 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. The court applies a reasonableness test to determine the adequacy of a search methodology

Campbell v. DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998) (internal citations and quotations omitted).

To conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of the 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 v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). This first step includes determining the likely electronic databases where such records 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).

The DMV’s response to your appeal states that the agency conducted a “thorough search” for records responsive to your DC FOIA request. In a subsequent communication with our Office, the agency confirmed that it contacted the employees most likely to have records responsive to your request, if such records did exist. Those employees did not have responsive records. Further, the agency conducted a search of its databases and did not locate anything regarding the partnership referenced in your DC FOIA appeal. We conclude that the DMV did conduct an adequate search and therefore deny this appeal.

This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia 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: Ariel Reed, Assistant General Counsel
DMV (via email)