

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-121**

September 3, 2020

VIA ELECTRONIC MAIL

Mr. Clint Johnson

RE: FOIA Appeal 2020-121

Dear Mr. Johnson:

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 District Department of Transportation (“DDOT”) failed to properly respond to your DC FOIA request for public records.

Background

On December 5, 2020, you submitted a DC FOIA request to DDOT for several categories of documents regarding the DDOT Dockless Sharing Vehicles Permit Program (“the program”), including communications and documents of the program selection committee members, DDOT, the District of Columbia, and the City Council regarding the program. On February 5, 2020, DDOT responded to your request and stated that it located six (6) pages of public records responsive to your request and withheld the records in their entirety, pursuant to the deliberative process privilege, D.C. Code § 2-534(a)(4) (“Exemption 4”). You filed an appeal with this Office on February 17, 2020.

In your appeal, you raised two issues. First, you indicated that the volume of responsive records identified by DDOT appeared to you to be small, in light of your request for “all documents and communications relating to *how* those selecting the permit award winners made their decisions and the *process* by which they reached their decision.” Secondly, you argued that the withheld records were not pre-decisional.

On February 24, 2020, DDOT responded to your appeal. In that response, the agency noted that it received six to seven requests for similar documentation regarding the program. In response to those requests, the agency shared the responsive information on a publicly-accessible website. The agency’s response to your appeal acknowledged that it initially overlooked DC FOIA requests you made that did not mirror those of the other requesters, specifically your request for the names of scoring committee members. DDOT subsequently conducted an additional search and identified records responsive to that request, but withheld them pursuant to Exemption 4. After further review, the agency determined that it should release those records to you, which it

did. The agency also produced to you additional records containing the names of those selection committee members. Of those records, it withheld three pages pursuant to Exemption 4.

With regard to your argument on appeal that the agency's discovery of six (6) pages of public records responsive to your initial request seemed "unlikely," DDOT asserted that it "made no selective withhold [*sic*] of documents in response to this specific requester." The agency further clarified that it conducted an additional search and found "no information such as 'app-based' communications . . ." that were potentially responsive.

### 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. 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, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

### *Adequacy of Search*

In your appeal, you indicate that the volume of responsive records identified by DDOT, six (6) pages, was significantly lower than you expected, considering the scope of your DC FOIA request. You state that, "[t]he discovery of only six (6) pages to Bird's request which includes emails, scoring notes, evaluation records, etc. seems unlikely." This appears to challenge the adequacy of the agency's search, even though you do not specifically make that claim.

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 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). Further, the agency is under no obligation to “either answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Env’tl. Prot. Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt records, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

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). The 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).

DDOT has acknowledged that it initially overlooked your DC FOIA request for “[d]ocuments listing or otherwise showing the names, titles, and roles of all employees serving on the . . . [program] . . . selection committee . . .” To remedy that oversight, the agency conducted additional searches for both email communications and “app-based communications” containing lists of the committee members. The agency was able to produce to you several additional records not previously uncovered as a result of those searches. For this reason, we find that the agency’s searches were adequate, and we further compliment the agency for putting a quantity of material of public interest on line.

#### *Exemption 4 – Deliberative Process Privilege*

DDOT indicated in response to your initial DC FOIA request that it withheld records under D.C. Code § 2-534(a)(4). Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums 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). 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.* And, under D.C. Code § 2-534(e), the deliberative process privilege, attorney work product privilege, and attorney-client privilege are expressly incorporated under the inter-agency memorandum exemption in § 2-534(a)(4).

The agency reviewed those records it initially withheld pursuant to Exemption 4 and subsequently produced the records to you in response to this appeal. DDOT has also produced

additional records responsive to your DC FOIA request and withheld a memorandum contained in those records pursuant to Exemption 4. This office conducted an *in camera* review of that withheld memorandum and determined that it constituted an intra-agency memorandum that would not be available to a party outside of the agency in litigation. For this reason, we find that DDOT appropriately withheld the memorandum.

### *Segregability*

Under D.C. Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). The phrase “reasonably segregable” is not defined under the DC FOIA, and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and non-exempt 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. 55, 60 (D.D.C. 2009). As DDOT has produced records the agency previously withheld pursuant to Exemption 4 and now withholds in its entirety an intra-agency memorandum, we do not need to reach the issue of segregability.

We conclude that DDOT properly responded to your FOIA requests and we hereby dismiss your appeal. 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Karen R. Calmeise, Hearings/FOIA Officer  
DDOT (via email)