

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-155**

September 2, 2020

VIA ELECTRONIC MAIL

Anthony R. Van Vuren

RE: FOIA Appeal 2020-155

Dear Mr. Van Vuren:

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 appeals, you assert that the Department of Health (“DOH”) did not adequately search for records pertaining to your request for lead-testing records.

Background

On February 10, 2020, you submitted a request to DOH for a number of categories of documents relating to lead levels and related testing performed at playgrounds and athletic fields located at any District of Columbia public school. On February 11, 2020, DOH responded to your request by informing you that it no longer handles environmental issues such as lead, hazardous materials storage or disposal, industrial waste discharges or spills/releases, or other environmental concerns. DOH informed you that its environmental function was transferred to the District Department of the Environment when it was created in 2006, since renamed the Department of Energy and Environment. In its response, DOH further represented that all DOH files on environmental issues were transferred to the District Department of the Environment when it was created and that, as a result, DOH has no documents responsive to your request. DOH suggested that you submit a FOIA request to the Department of Energy and Environment, which may have responsive documents.

On March 19, 2020, you appealed to this office. You were skeptical of DOH’s position that it had no responsive documents and claimed that the agency did not conduct any search for responsive documents. In arguing that the DOH likely had responsive records, you pointed to testimony in 2019 by the Chief Operating Officer of the Department of General Services, who indicated that his agency had “coordinated” with DOH—among a number of other agencies—on issues of lead and lead testing. On March 26, 2020, DOH responded to your appeal.¹ DOH challenged your claim that it had not conducted any search for documents by noting that your FOIA request was not the first time it had searched for the records you requested. DOH

¹ A copy of DOH’s response to your appeal is attached.

explained that “[a] recent search for similar records allowed the reasonable search for records for [your] FOIA request.”

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 this instance, DOH based its denial of your FOIA request on its assertion that it “conducted a reasonable search (aided by a prior search for similar documents), determined that the Department of Health had no responsive documents . . . , and referred [you] to the Department of Energy and the Environment.” We agree with DOH that, having conducted a search for similar documents related to lead and lead testing, could reasonably conclude that it lacks documents responsive to your request, especially in light of the agency’s representation that it does not maintain records related to environmental issues like lead and lead testing.

However, DOH’s response to your appeal does not explain what steps it took in its prior search for similar documents or any additional steps it took to search for the specific documents you requested. Most importantly, DOH’s generalized description of its prior search, without any supporting detail, does not allow our office to determine that the prior search was adequate. As a result, we are unable to determine whether DOH’s present search—based in large part on its prior search—was adequate as well. A remand for a more-detailed explanation from the agency is appropriate under these circumstances.

Conclusion

Based on the foregoing, we remand this matter to DOH to explain what steps it took in its prior search for similar documents in response to an earlier request and any additional steps it took to search for the documents you requested.

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 government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Phillip L. Husband
General Counsel and FOIA Officer
DOH (via email)