

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-179**

April 11, 2022

VIA ELECTRONIC MAIL

Mr. Jonathan Cloar

RE: FOIA Appeal 2020-179

Dear Mr. Cloar:

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”), arguing that the Office of Tax and Revenue (“OTR”) within the Office of the Chief Financial Officer failed to produce records responsive to your request.

Background

You submitted a DC FOIA request to OTR seeking records concerning the inputs and process used by OTR to produce the Tax Year 2021 real property tax assessments for residential properties. You specifically asked for the following categories: 1. Assessment Instructions or Guidelines; 2. Rental Rates for Residential Properties; 3. Vacancy Ratio for Residential Properties; 4. Expense Ratio for Residential Properties; 5. Capitalization Rates for Residential properties; 6. Reserves for Residential Properties; 7. Instructions or Guidelines for Residential Properties; and 8. Instructions or Guidelines for Non-Market Residential Properties. Each category included multiple subparts. You included names of employees believed to have responsive records. OTR responded to your request by providing you with a 138- page Appraiser Reference Guide and 5 pages from a Pertinent Data Book. You appealed, asserting that based on the breadth of your request there had to be additional responsive records and that OTR failed to provide a *Vaughn* index even though OTR was clearly withholding responsive records.

In response to your appeal, OTR said your request was unduly burdensome and did not reasonably describe the records sought. Citing case law, OTR also explained that it was not required to create a *Vaughn* index.<sup>1</sup>

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

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<sup>1</sup> A copy of the agency’s response to your appeal is attached to this decision.

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 DC FOIA was modeled on the corresponding federal Freedom of Information Act. See *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. See *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The issues in this appeal are whether OTR conducted an adequate search and whether it was required to provide a *Vaughn* index. In determining whether an agency conducted an adequate search in response to a records request, the test is not whether documents might conceivably exist, but whether the agency’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).

Here, OTR claims it made a reasonable attempt to provide responsive records but does not explain how it searched for records. OTR provides no information on electronic databases searched. Additionally, OTR does not indicate if emails were searched or what search terms were used.

OTR is correct that under DC FOIA, agencies are not required to create a *Vaughn* index at the initial administrative review stage. *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C.

1995) (“Agencies need not provide a Vaughn Index until ordered by a court after the plaintiff has exhausted the administrative process.”), *aff’d on other grounds*, 76 F.3d 1232 (D.C. Cir. 1996).” The *Vaughn* index is a mechanism to organize FOIA litigation for judges. *Vaughn v. Rosen*, 484 F.2d 820, 827 (1973) (“the District Judge may examine and rule on each element of the itemized list.”).

### Conclusion

Based on the foregoing, we remand this matter to OTR to conduct an adequate search

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: Basil Facchina, Assistant General Counsel  
Office of Tax and Revenue (via email)