

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-237**

February 23, 2020

VIA ELECTRONIC MAIL

Mr. Joseph Pileri

RE: FOIA Appeal 2020-237

Dear Mr. Pileri:

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 Department of Small and Local Business Development (“DSLBD”) failed to properly respond to your DC FOIA request for public records.

Background

You submitted a DC FOIA request to DSLBD for all documents related to the grant process for the Grown in DC grant between March 1, 2019 to June 3, 2019, and specifically any documents regarding the evaluation of Common Good City Farm (“CGCF”). DSLBD responded to your request by providing three documents related to the Grown in DC grant process: the request for applications, a PowerPoint presentation made available to applicants, and an FAQ document made available to applicants. DSLBD explained, however, that it had no documents related to an evaluation of CGCF because a search of the Office of Tax Revenue’s (“OTR”) system determined that CGCF did not have “clean hands” and therefore CGCF’s application was deemed ineligible prior to scoring. You subsequently filed an appeal with this Office reiterating your request for documents explaining the grant-applicant evaluation process and information on how DSLBD evaluated and denied CGCF specifically. In essence, your appeal challenges the adequacy of DSLBD’s search for responsive documents.

In response to your appeal, DSLBD explained that it provided all responsive documents to you based on a search of its records.¹ In particular, DSLBD’s program manager for the grant stated:

We have made a thorough search of our files for documents maintained in our shared drives for records from 03/01/2019 to 06/03/2019 in "Office 365" files where Inno.ED maintains limited grant records and “ZoomGrants,” the system of record for the grant competitions. We searched and “Common Good City Farm.” I

¹ A copy of DSLBD’s response to your appeal is attached to this decision.

am the central custodian of both. The full Inno.ED team also has access to these records.

Further, DSLBD explained:

That [CGCF] application was not scored and not awarded, as its application was deemed ineligible prior to scoring, and therefore no actual records specific to CGCF exist that would fall under the FOIA exceptions noted herein. To the request for documentation on the clean hands rejection, we do not have records on that. We adapted our process after this grant round to maintain further records related to clean hands status per applicant, but that was not part of our process at the time of this grant.

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 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).

Here, DSLBD has explained that it searched the relevant electronic database, “ZoomGrants,” which is the system of record for the grant competitions. DSLBD also searched for key terms, including “Grown in DC” and “Common Good City Farm,” which were likely to produce any records responsive to your request. Under the standard articulated in *Doe*, we believe that DSLBD’s description of its search is both sufficiently detailed and reasonably calculated to locate responsive records. Moreover, DSLBD’s representation that it has no documents related to the “evaluation” of the CGCF application itself is sensible in light of the fact that, after DSLBD conducted its “clean hands” check, the CGCF application did not proceed to the evaluation or scoring stage.

In addition, DSLBD’s explanation makes clear that, at least as of the time CGCF submitted its application, the agency did not keep screenshots of the searches it conducted using OTR’s database. Because the agency is not under an obligation to create new records in response to document requests or to produce records that it does not possess, DSLBD was not required to re-query OTR’s database, take a screenshot, save that document, and then produce it to you. However, if you would like to seek a record that is in OTR’s possession, you are of course free to submit a FOIA request to that agency. The link to submit FOIA requests to OTR can be found here: <https://otr.cfo.dc.gov/page/open-government-and-foia-otr>.

We conclude that DSLBD properly responded to your FOIA requests and we hereby deny 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: Lorenzo McRae, General Counsel
DSLBD (via email)