

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-039**

March 18, 2021

VIA ELECTRONIC MAIL

Mr. Fenit Nirappil

RE: FOIA Appeal 2021-039

Dear Mr. Nirappil:

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 challenge the adequacy of the search conducted by the Executive Office of the Mayor (“EOM”) in response to your records request.

Background

On August 17, 2020, you submitted a DC FOIA request for “[a]ll messages related to government business sent by Mayor Muriel Bowser on her WhatsApp account between May 31 and June 2.” On October 2, 2020, EOM responded to your request and informed you that a search had been conducted but that no responsive records were found. You appealed, challenging the adequacy of the search and asking EOM to “please describe whether the agency searched Mayor Bowser’s WhatsApp messages, and if it did, [to] please describe how the search was conducted.” EOM responded to your appeal, explaining that “Mayor Bowser was asked to conduct a search[,] and she indicated that no government records responsive to this request existed on her device.”¹

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, 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).

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

Adequacy of Search

Because EOM asserted that it had no records responsive to your request, the issue in this appeal is whether EOM conducted an adequate search for records. 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, EOM's response demonstrates that a reasonable search was conducted:

It is important to note that messages on applications such as WhatsApp, are not retained by a central District agency. Unlike e-mail messages, the Office of the Chief Technology Officer does not retain copies of text messages and/or messages on other applications. WhatsApp messages, or other messaging applications, are maintained by the private companies that own the information and may be accessible in limited circumstances only through a warrant or subpoena. In these instances, we must rely upon the individual employees to conduct the searches themselves. As such, Mayor Bowser was asked to conduct a search and she indicated that no government records responsive to this request existed on her device.

As indicated by EOM's response to your appeal, WhatsApp messages are not stored centrally. Thus, according to EOM, Mayor Bowser was asked to search for responsive WhatsApp messages, but did not locate any on her device. Those representations suffice to demonstrate that EOM searched for records in the appropriate location in a manner likely to identify any responsive records, rendering its search adequate.

Conclusion

Based on the foregoing, we conclude that EOM responded appropriately to your request, and we hereby deny your 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 government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Alana D. Burnett
Associate General Counsel
EOM (via email)