

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-040**

May 27, 2021

VIA ELECTRONIC MAIL

Mr. Rend Smith

RE: FOIA Appeal 2021-040

Dear Mr. Smith:

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”). Your appeal asserts that the D.C. Department of Corrections (“DOC”) did not adequately search for records pertaining to your request for records regarding the furlough program at the Lorton Reformatory.

Background

On November 23, 2020, you submitted a FOIA request to DOC for records “regarding the furlough program at the Lorton Reformatory and its collaboration and communication with ‘The Mission of Community Concern.’” The date range for the records you sought were between 1970 and 1975. On December 5, 2020, DOC denied the request stating that “staff conducted [a] due diligence search and did not find records that are responsive to your request.” Additionally, DOC asserted that “[i]t appears that the records sought, if created and maintained, have been disposed of, pursuant to retention policy.”

On appeal, you challenged the integrity of the search. Specifically, you assert suspicion that DOC did not conduct an adequate search of paper and electronic records.

DOC provided this Office with a response to your appeal on January 23, 2021.¹ In its response, DOC: (1) stated the relevant portion of DOC’s record retention schedule; (2) clarified its efforts to search for responsive records; (3) reaffirmed that its searches were adequate; and (4) restated that it did not possess records responsive to the request. DOC’s response stated that its record retention schedule requires the agency to retain community release program records “for a total of seven years.” As a result, DOC asserted records sought could begin being disposed of in 1982. DOC also clarified that since Lorton Reformatory closed in 2001 and that any records permanently maintained as records of historical value or for other reasons would have been transferred to the DC Government Records Center. DOC stated that searches were conducted in

¹ A copy of DOC’s response is attached.

response to both the initial FOIA request and the FOIA appeal. DOC indicated that physical records were not searched because the identified location does not maintain relevant physical records old enough to be responsive.

Discussion

It is the public policy of the District of Columbia 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, DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” D.C. Official Code § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

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 the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The primary issues in this appeal are whether DOC conducted an adequate search for the records at issue and sufficiently described the search. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. 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 make a reasonable determination as to the locations of records requested and 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 may include a determination of 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).

The initial descriptions DOC provided of its search efforts were brief only stating that no responsive records were found. In response to the appeal, however, DOC provided a detailed description of the searches it conducted, as well as the relevant timeframe of its document retention schedule, and affirmed that no responsive records were found. DOC identified the relevant location for records responsive as the files formerly maintained by the Lorton Reformatory. DOC's response affirmed that the relevant location was searched with the information available. Additionally, DOC describes its record retention in a manner that can be useful for future FOIA requests. Based on the description DOC provided in response to the appeal, we find that the search it conducted was adequate.

Conclusion

Based on the foregoing, we affirm DOC's decision and hereby dismiss 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 D.C. Official Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Oluwasegun Obebe, Records, Information & Privacy Officer
DOC (via email)