

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2021-076**

July 7, 2022

**VIA ELECTRONIC MAIL**

Ms. Denise Krepp

RE: FOIA Appeal 2021-076

Dear Ms. Krepp:

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 District Department of Transportation (“DDOT”) failed to properly respond to your DC FOIA request for public records.

**Background**

On January 8, 2021 DDOT, received your request for traffic data from a study of a particular area. On January 25, 2021, DDOT responded to your FOIA request and stated that it located 7 pages of public records responsive to your request and withheld 6 pages of draft work product in their entirety, pursuant to the deliberative process privilege, D.C. Code § 2-534(a)(4) (“Exemption 4”). You filed an appeal with this Office on January 25, 2021 asserting that DDOT’s response did not include 2020 data referenced in separate correspondence with DDOT. On January 28, 2021, DDOT sent you a revised response after it determined that “one responsive document identified as a DRAFT was actually a document which was used to make the final determination.” On January 31, 2021, you followed-up on your appeal to note that the 2020 data was still missing and provided the specific timeframe of the 2020 data collection.

On February 9, 2021, DDOT responded to your appeal. In that response, the agency noted that your initial FOIA request “was interpreted from an email to DDOT’s Communications Officer” which complicated the inquiry. After receiving notice of your appeal, DDOT conducted an additional search, located the 2020 traffic study you referenced in your January 31, 2021 email, and provided it to you.

**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 your appeal, you indicate that the responsive records are missing 2020 data. This appears to challenge the adequacy of the agency's search, even though you do not specifically make that claim.

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).

DDOT has not explained how it conducted the initial search or why the 2020 data was not located. However, after receiving additional details from you, the agency conducted additional

searches. The agency was able to produce to you the 2020 data not previously uncovered as a result of those searches. For this reason, we find that the agency's searches were adequate.

We conclude that DDOT properly responded to your FOIA request and we hereby dismiss 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: Karen R. Calmeise, Hearings/FOIA Officer  
DDOT (via email)