GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-099

June 15, 2021

VIA ELECTRONIC MAIL

Mr. Jacob David Bournazian

RE: FOIA Appeals 2021-099

Dear Mr. Bournazian:

This letter responds to an 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 of Columbia Department of Transportation ("DDOT") failed to properly respond to your DC FOIA request for public records.

Background

On December 31, 2020, you submitted a six-part request in which you sought various records related to a statute in the public space. DDOT responded to your request on January 21, 2021. In its response provided you with 27 pages of responsive pages of records responsive to your request, which were redacted in part to protect personal information pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2").[1]

You appealed, challenging "the redaction of portions of the documents relating to identity of the persons because this information is necessary for the public's understanding of the operations and activities of DDOT with a foreign government." You also questioned the adequacy of DDOT's response based on the absence of two emails from a named individual that you believe to exist.

On February 23, 2021, this Office notified DDOT of your appeal and requested a response. DDOT responded on March 19, 2021.[2] In its response to your appeal, DDOT reiterates that its redactions were proper pursuant to Exemption 2. Also DDOT asserted upon receipt of your DC FOIA request, the agency submitted an email search request, utilizing the search terms you provided, to the Office of the Chief Technology Officer ("OCTO") for emails to and from a named individual

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[1] Exemption 2 protects "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
[2] DDOT's response is attached to this decision.

within the date range provide; and that "the search resulted in multiple email correspondence on multiple dates from 2001 through 2020. There is no evidence that the OCTO search was edited nor were any email search results withheld. The absence of e-mails from specific dates does not mean that the above referenced communications specialist communicated the complaint via e-mail to other DDOT officials or employees."

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.

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).

Adequacy of the 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'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).

Here, you deem the response of DDOT to be deficient because you believe that there should be two additional emails with respect a named individual. In this instance, DDOT states that after a diligent search, including an email search performed by the OCTO, the agency located responsive emails that were not withheld from you. While you may be dissatisfied with the volume of documents provided, DDOT appears to have conducted a reasonable search for responsive emails.

Exemption 2.

Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See*, e.g., *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). The information that DDOT redacted- home addresses, email addresses, and telephone numbers that DDOT determined were personal and not of a business- raises a substantial privacy interest, as it involves personally identifiable information.[3]

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. The "public interest" in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

> This statutorypurpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee,* 489 U.S. at 773; *see also Ray,* 112 S. Ct. at 549. Information that "reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee,* 489 U.S. at 773.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

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[3] DDOT has represented that the personally identifiable information that it redacted is in fact personal information and not that of a corporate entity. We accept these representations.

Here you have not articulated a cognizable public interest under DC FOIA. Your public interest argument asserts that "[the redacted] information is necessary for the public's understanding of the operations and activities of DDOT with a foreign government." Your argument does not explain how releasing the redacted personal information will reveal anything about DDOT's performance of its statutory duties. When there is a privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *See*, *e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). As a result, we find that DDOT has properly redacted the personal information under Exemption 2.

Conclusion

Based on the foregoing, we affirm DDOT'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 DC FOIA.

Sincerely,

Mayor's Office of Legal Counsel

cc: Karen Calmeise, Hearings/FOIA Officer
DDOT (via email)