

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-101**

April 13, 2021

VIA ELECTRONIC MAIL

Mr. Claude E. Bailey

RE: FOIA Appeal 2021-101

Dear Mr. Bailey:

This letter serves as a supplemental response 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 Office of Contracting and Procurement (“OCP”), as well as various withholdings and redactions, in response to your records request.

Background

On December 24, 2020, you submitted a DC FOIA request for six categories of records from OCP. The agency responded to your request by informing you that it was withholding thirty-two pages and redacting five pages of responsive records pursuant to D.C. Code § 2-534(a)(4).

You appealed, challenging both OCP’s search for records and its decision to withhold and redact certain documents. OCP then provided you with a supplemental response, in which it clarified that the withholdings and redactions were made pursuant to the deliberative-process privilege, attorney work-product privilege, and attorney-client privilege (DC FOIA Exemption 4). OCP also filed a response to your appeal with this office, including a *Vaughn* index of withheld documents.

Based on the agency’s response, this Office determined that OCP properly conducted its search in response to requests 4, 5, and 6, and that OCP properly redacted the set of emails that it partially produced to you. However, we remanded to OCP to provide us with an explanation of how it conducted its search in response to requests 1, 2, and 3, as well as unredacted copies of the withheld documents for *in camera* review.

On March 30, 2021, OCP filed a supplemental response following our remand order.¹ In its supplemental response, reproduced below, OCP explained how it searched for your first three requests:

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

1. “Any written and electronic communications between OCP Chief Procurement Officer George Schutter and OCP Deputy Procurement Officer Nancy Hapeman related to any report by Chief Contracting Officer Wilbur Giles regarding: a) his April 29, 2020 meeting with Immanuel Irono; and/or b) any actions taken to terminate, deny an option[,] decline to renew, or otherwise modify any contract with Motir Services, Inc. in response to Mr. Giles’ allegations of attempted bribery by Mr. Irono.”

OCP’s search commenced with the OCP FOIA Officer contacting CPO Schutter and Deputy CPO Hapeman and requesting all written documentation responsive to this request. The OCP FOIA Officer also submitted two separate email search requests of both CPO Schutter’s and Deputy CPO Hapeman’s email accounts for documents responsive to this request. OCP provided Complainant with all responsive documents other than those that were withheld or redacted under D.C. Official Code § 2-534(a)(4).

2. “Any communications related to the production and appearance of Mr. Giles at the Motir debarment hearing where Mr. Irono’s attorneys would take his testimony.”

The OCP FOIA Officer submitted an ESR request for documents responsive to this request for the email accounts of all individuals involved with or that have been assigned to the proposed debarment of Motir Services, Inc. and Emmanuel Irono. OCP provided Complainant with all responsive documents other than those that were withheld or redacted under D.C. Official Code § 2-534(a)(4).

3. “Any and all documents from January 1, 2020 to the present constituting, reflecting or referencing any statements by Mr. Giles related to Motir, Mr. Irono, Deborah Washington, or Community Bridge.”

The OCP FOIA Officer contacted CPO Schutter, Deputy CPO Hapeman, Mr. Giles, Ms. Taylor, Ms. Harrington, and Mr. Koslosky for documents responsive to this request. An ESR request of Mr. Giles’ email was also made for purposes of finding documents responsive to this request. OCP provided Complainant with all responsive documents other than those that were withheld or redacted under D.C. Official Code § 2- 534(a)(4).

OCP also provided this Office with unredacted copies of all responsive documents that it withheld from 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, 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).

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'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).

OCP's supplemental response provides sufficient detail to allow us to determine the adequacy of its search. For each request, we conclude that OCP's search was adequate. In particular, with respect to Request 1, OCP conducted email searches of CPO Schutter's and Deputy CPO Hapeman's email accounts and asked those individuals to provide documents in their possession responsive to your request. Those were reasonable steps to identify the records you requested. Similarly, with respect to Request 2, OCP searched the email accounts of all individuals involved with or that were assigned to the proposed debarment of Motir Services, Inc. and Emmanuel Irono. That approach was reasonably calculated to identify the communications you sought. Finally, with respect to Request 3, OCP appropriately asked key individuals to review their files

for responsive documents and searched the main email account where responsive documents would likely be found. Nothing more was required from OCP in order to conduct an adequate search.

Exemption 4

Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” This exemption has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). As a result, Exemption 4 encompasses the deliberative-process privilege, *see McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011), as well as the attorney-client and attorney work-product privileges.

As OCP observes, the deliberative-process privilege protects agency documents that are both pre-decisional and deliberative. *Coastal States Gas. Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it was generated before the adoption of an agency policy, and it is deliberative if it “reflects the give-and-take of the consultative process.” *Id.*

OCP invokes the deliberative-process privilege for all of the documents it withheld or redacted and invokes the attorney-client and attorney work-product privileges for seven of the nine withheld documents. Having now reviewed those withheld documents *in camera*, this Office agrees with OCP’s determination.

All records except Document 9 (as reflected on the agency’s *Vaughn* index) reflect communication to or from District attorneys providing or seeking legal advice. As such, they are protected by attorney-client privilege. They also reflect internal, pre-decisional agency deliberations on the matter at hand and are further protected by the deliberative-process privilege. The deliberative-process privilege similarly shields Document 9, which does not include a request or provision for legal advice but nevertheless reflects internal agency deliberations about the appropriate course of action to take in this case.

Conclusion

Based on the foregoing, we conclude that OCP properly conducted its search in response to all of your requests, and we affirm OCP’s decision to withhold the documents in question pursuant to deliberative-process, attorney-client, and attorney-work product privileges. We therefore 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: D. Ryan Koslosky
Associate General Counsel
OCP (via email)