

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-105**

March 11, 2022

VIA ELECTRONIC MAIL

Mr. Edward Hanlon

RE: FOIA Appeal 2021-105

Dear Mr. Hanlon:

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 failure of the Office of Advisory Neighborhood Commissions (“OANC”) to respond to a request you submitted under DC FOIA.

Background

On June 19, 2020, you sent to OANC a D.C. FOIA request in your capacity as the Commissioner for Advisory Neighborhood Commission B9. Specifically, you requested:

[A]ll correspondence [seven named] individuals¹ have had since January 1, 2017 with anyone at [the District Department of Transportation (“DDOT”)] concerning the possible installation of one or more protected bike lanes on 17th Street north of Mass Ave. This includes correspondence and emails [of] any of the [seven named] individuals sent or received (either as a recipient, a cc or a bcc) and any attachments

This request includes any emails described above, whether a government email account or a personal email account was used. This request includes all above described correspondence whether communication was via mail, email, or Snapchat.

On June 26, 2020, OANC emailed you, pursuant to 1 DCMR § 402.5, to modify your request to permit the identification and location of the records you were seeking. Specifically, in its response, OANC stated that it does “not have a readily available list of ‘anyone at DDOT’ and [that] it would be unreasonably difficult to conduct a search involving possible thousands of people.” The agency then asked you to “provide a manageable list of individuals at DDOT that could be readily identified for search purposes.” On the same day, you responded via email to OANC’s request by email in which you provided the agency with four suggested search terms.

¹ The seven named individuals include ANC2B commissioners, officers, and staff.

On March 3, 2021, you filed this appeal, challenging OANC’s failure to issue a final response to your request.

On March 17, 2021, OANC responded to your appeal.² In its response, OANC asserts that “[a]lthough [the requester] subsequently provided a modified search request, it still involved ‘anyone at DDOT.’” As a result, OANC “concluded that the search request remained unreasonably difficult, and when [the requester] did not respond again, [the office] concluded that he abandoned his request, especially since he predicated his request on his duties as an ANC Commissioner.”

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 the 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).

Constructive Denial

Pursuant to D.C. Official Code § 2-532 (c) and (d), the District of Columbia typically has fifteen (15) business days, subject to the possibility of a ten (10) business-day extension, to respond to your public record request as of the date of receipt. However due to the COVID-19 closure, this deadline was not applicable for FOIA requests made between March 11, 2020 and January 15, 2021. Under the FOIA Tolling Emergency Amendment Act of 2020 (D.C. Act 23-555, effective December 22, 2020), a FOIA request made between March 11, 2020 and January 15, 2021 must be processed within 45 business days after January 15, 2021. A constructive denial occurs when agency fails to respond within the timing requirements as described above. D.C. Official Code § 2-532(e).

Because you filed your FOIA request between March 11, 2020 and January 15, 2021, OANC had 45 business days after January 15, 2021, to process your request. At the time of your March 3, 2021 appeal, OANC was still within its statutorily permitted period to provide you with a response. Therefore, at the time of filing, you had not yet been constructively denied.

² A copy of OANC’s response to your appeal is attached to this decision.

Adequacy of Request

In its response to your appeal, OANC appears to be arguing that: (1) despite your modified request in response to its request for clarification, your request remained “unreasonably difficult;” and (2) because you did not contact the agency regarding your request and were no longer ANC Commissioner, you abandoned your request. This Office construes this response to your appeal as a denial to your request.

This Office rejects the premise that your request is too vague or “unreasonably difficult” to process. Your request asks for correspondence for a specific time period between seven named ANC commissioners, officer, and staff and DDOT employees about a specific topic – possible installation of protected bike lines on 17th Street north of Mass Ave. This request describes records that are identifiable and retrievable. It was OANC’s responsibility to make a determination as to where the requested documents were likely to be located - a responsibility that can be met by identifying agency employees in the relevant programs and making inquiries about the nature of document creation and retention in those programs. *See* 1 DCMR § 402.5; *see also* *Truitt v. Dep’t of State*, 897 F.2d 540, 545 n. 36 (D.C. Cir. 1990) (quoting H.R. Rep. No.

93-876, 93d Cong., 2d Sess. at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271)). (finding a request to not be vague when “a professional employee of the agency who [is] familiar with the subject area of the request . . . [could] locate the record with a reasonable amount of effort.”).

Absent your suggested search terms, OANC should have conducted an email search for messages the 7 named employees sent and received on the topic of protected bike lanes on 17th Street north of Mass Ave during the specified time period. From there, OANC would have been able to identify the number of documents retrieved and could have provided you with a fee estimate for reviewing these documents for applicable exemptions and to identify which are communications with DDOT. Alternatively, OANC should have asked the 7 named employees to search their records for communications with DDOT regarding protected bike lines on 17th Street north of Mass Ave. In other words, your request is not so vague as to have prevented OANC from conducting an initial search without additional input from you.

OANC makes arguments relating to the scope of your request and its burdensome nature. These arguments do not constitute an exemption or justification to withhold records. *Fraternal Order of Police v. District of Columbia*, 139 A.3d 853, 863 (D.C. 2016) (“there is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request.”). However, pursuant to DC FOIA, OANC may avail itself of fees to recoup costs. *See* D.C. Official Code § 2- 532(b-3) (“No agency or public body may require advance payment of any fee unless . . . the agency or public body has determined that the fee will exceed \$250.”); 1 DCMR § 408.

This Office also rejects the premise that you abandoned your request because you are no longer an ANC Commissioner. Purpose in making a request is irrelevant. Therefore, you are still entitled to any nonexempt records responsive to your request.

Conclusion

Based on the foregoing, we remand this matter to OANC. Within 15 days of this decision, OANC shall conduct a search in accordance with the guidance in this decision and may provide you with a fee estimate based on the number of documents retrieved. If you agree to pay for the production in that instance, OANC shall begin providing you with nonexempt responsive documents on a rolling basis.³

This constitutes the final decision of this Office; however, you may challenge OANC's subsequent response by separate appeal to 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.

Respectfully,

Mayor's Office of Legal Counsel

cc: Simon Gottlieb, Executive Director
OANC (via email)

Kathy Williams, Special Assistant to the Executive Director
OANC (via email)

³ Please note that because of the size and scope of this request, you may be required to pre-pay for these services. *See* D.C Official Code § 2-532(b-3).