

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-159**

July 27, 2021

VIA ELECTRONIC MAIL

Mr. Philip Fornaci

RE: FOIA Appeals 2021-159

Dear Mr. Fornaci:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 (“DC FOIA”), challenging the search conducted by the Department of Forensic Sciences (“DFS”) in response to your DC FOIA request.

Background

You submitted a DC FOIA request to DFS seeking the following records:

1. Any specifications and technical requirements of all laboratories conducting SARS-Cov-2 testing utilizing the RT-PCR methodology.
2. Any documents indicating the Ct value (cycle threshold) utilized by laboratories performing RT-PCR testing for SARS-Cov-2.
3. Any orders by the Department of Public Health and/or any agency of the D.C. government specifying the number of amplification cycles used to identify a positive or negative test result for (Date Range for Record Search: From 01/15/2020 To 01/15/2021)

DFS responded by providing certain records that it deemed responsive to your request related to Ct values, but it stated that “[y]our request for orders specifying the number of amplification cycles used to identify a positive or negative test result is denied because DFS does not have responsive records.”

You appealed, arguing that it is implausible that DFS does not have such documents. You also claim that the documents with which you were provided do not contain information indicating the actual “Ct value (cycle threshold) utilized by laboratories performing RT-PCR testing for SARS-CoV-2,” and you suggest that such documents must exist.

In response to your appeal, DFS reiterated that it provided you with “specifications and

technical requirements documents some of which include Ct values”.¹ With respect to your claim that DFS did not conduct a thorough search for records, DFS argued that, “[b]ecause there are not District requirements for specifying the number of amplification cycles used to identify a positive or negative test result, DFS acting appropriately in denying that portion of the request.”

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....” D.C. Code § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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. *See Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Adequacy of the Search

Your appeal challenges adequacy of DFS’s search for responsive records. In determining whether an agency conducted an adequate search in response to a records request, the test is not whether documents might conceivably exist, but whether the agency’s 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).

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

¹ A copy of the agency’s responses to your appeal is attached to this decision.

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).

In this instance, DFS has not provided this Office with sufficient information to determine whether it has reasonably searched for records responsive to part of your request. In particular, DFS has not explained how it searched for documents indicating the actual Ct values used by laboratories in the District performing RT-PCR testing for SARS-Cov-2. DFS may or may not have such documents, but this Office cannot affirm DFS's decision without additional information about how the search was conducted.

However, with respect to your request for District "orders . . . specifying the number of amplification cycles used to identify a positive or negative test result," DFS has represented that there are no such requirements and therefore no such orders to provide to you. As a result, no additional search with respect to that request was required.

In sum, we affirm in part DFS's decision with respect your DC FOIA request, but we remand to DFS to provide this Office with an explanation for how the agency searched for records responsive to your request for documents reflecting Ct values actually used by District laboratories for the testing at issue.

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 in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Andrea Stempel, FOIA Officer
DFS (via email)