

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-201**

August 3, 2021

VIA ELECTRONIC MAIL

Mr. John T. McFarland

RE: FOIA Appeals 2021-201

Dear Mr. McFarland:

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 alleged failure of the Department of Consumer and Regulatory Affairs (“DCRA”) to provide all documents responsive to your request.

Background

You submitted a DC FOIA request to DCRA seeking written documents and audio recordings made during an investigation by Special Investigator Tyrone Lawson. DCRA responded to your request by providing you with Mr. Lawson’s final investigative report, two audio files, and 28 emails. You appealed, asking that DCRA send you “all audio recordings of meetings between Special Investigator Tyrone Lawson and Shawn Gibbs, and all audio recordings of meetings between Special Investigator Tyrone Lawson and Sarah Bouldin-Carr regarding [your] October 17, 2019 complaint.”

In response to your appeal, DCRA described the steps that it took to search for records and explained that no such additional audio recordings existed.¹ In detailing its search, the agency noted that:

Mr. McFarland’s FOIA request was received by the DCRA FOIA Office on April 30, 2021 via the DC Government Public FOIA Portal. Upon review of his request, [the agency’s FOIA officer] determined that Mr. Tyrone Lawson and Ms. Shirley Kwan-Hui were the best persons within the agency to submit the FOIA request to, as Mr. Lawson conducted the investigation of the complaint filed by Mr. McFarland, and Ms. Kwan-Hui was identified by Mr. McFarland as someone who was in correspondence with him about his complaint. [The FOIA officer] submitted a request for records to both Mr. Lawson and Ms. Kwan-Hui on April 30, 2021. . . . Mr. Lawson and Ms. Kwan-Hui both responded with responsive records. After receiving all responsive records and conducting a privilege review, on June 7, 2021,

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

the DCRA FOIA Office produced to Mr. McFarland the following records: Tyrone Lawson's final investigative report, two audio files, and 28 emails

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

To the extent you challenge DCRA's assertion that it does not possess additional responsive records, we conclude that DCRA properly conducted a search under the DC FOIA.

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 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, DCRA identified the individual likely to have responsive records—in particular, the investigator whose records you were seeking. Following your appeal, the agency's FOIA officer followed up with the investigator by email. The investigator explained that he did not maintain a list of all the persons he interviewed and that he provided all of the audio recordings in his possession. As the investigator explained, not all interviews are recorded, so the fact that the investigator may have spoken to someone but does not have a recording of an interview with that person is immaterial. In short, there is nothing to suggest that the agency has failed to search for, or to produce, any relevant audio recordings or other records in its possession related to your request.

Conclusion

Based on the foregoing, we conclude that DCRA conducted an adequate search in response to your request for records. Therefore, we deny this 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 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: Erin J. Roberts, FOIA Officer
DCRA (via email)