

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-261**

November 30, 2022

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2021-261

Dear Mr. Mulhauser:

This letter is in response to the administrative appeal that you have submitted to the Mayor pursuant to the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531, *et seq.* In your appeal, you have challenged the response of the Office of the Chief Technology Officer ("OCTO") to your July 14, 2021 FOIA request, identified as 2021-FOIA-06487, which sought the following:

[A]ny record showing the number of requests for DC records submitted to the [DC FOIA portal furnished by software developer AINS] and pending, that is not closed, as of today 7/14/2021.

On August 31, 2020 OCTO advised you that after a search it could not locate any responsive records.

In your September 13, 2021 appeal, you have asserted the following:

The request was to OCTO for a record from the "FOIAXpress" software -- the intake and request management system used by the public and agencies. The database shows in real time, for each request, whether it is closed or not. The request thus is for any record showing the simple total of those requests not closed – surely a figure available with a keystroke, not requiring creating of any new record. (Such a figure (as of 9/30/21) will be included in the mayor's statutory FOIA processing report, but not due until 2/1/22.)

The agency response is error, insufficient search.

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, FOIA creates the right “to inspect...and...copy any public record of a public body...” D.C. Code § 2- 532(a).

FOIA only requires that, under the circumstances, a search is reasonably calculated to produce the relevant documents. 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. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

In assessing whether a District entity subject to FOIA has undertaken an adequate search to fulfill a FOIA request, courts look not to “the fruits of the search,” but instead to the “appropriateness of the methods used to carry out the search.” *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C.Cir.2003). “An agency's search conducted in response to a FOIA request ‘need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.’” *Fraternal Order of Police, Metro. Police Labor Comm. v. District of Columbia (FOP Peaceoholics)*, 79 A.3d 347, 360 (D.C.2013) (*quoting Meeropol v. Meese*, 790 F.2d 942, 956 (D.C.Cir.1986)).

Here, OCTO has asserted that it could not locate any responsive records “[a]fter making reasonable efforts to search for the record you describe...” This Office is inclined to accept that assertion on its face and in light of the original request. However, your appeal presents considerable clarification to the original request, of which OCTO may not have considered. Given the original request has evolved in specificity—so much that is arguably distinct from the original—this Office is unable to assess the adequacy and reasonableness of OCTO’s, previously issued and potentially incongruent, response.

To the extent you are still interested in the requested documents you are urged to resubmit your request, as clarified within you appeal, to OCTO for additional processing. If OCTO is still unable to locate any responsive documents, or its prior search already inferred your clarification, it may appropriately describe the search performed and the specific limitations of the FOIAXpress platform or other reason contributing to the result, if applicable.

Finally, the Functionality of the District of Columbia’s Online System for Managing and Processing Freedom of Information Act Requests is the topic of the Office of Open Government’s Advisory Opinion (#OOG-2021-008-M).¹ Consideration as to the functionality of FOIAXpress may provide additional assistance to you in describing the records sought and OCTO in identifying the same.

Conclusion

Based on the foregoing, this appeal is denied. 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 Superior Court in accordance with D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: OCTO FOIA Officer (via email only)

¹ https://www.open-dc.gov/sites/default/files/OCTO_FOIASystem_AdvisoryOpinion_FINAL%20%2017%2022.pdf