

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-052**

February 1, 2023

**VIA ELECTRONIC MAIL ONLY**

Mr. Eddie Becker

RE: FOIA Appeal 2022-052

Dear Mr. Becker:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the Office of the Chief Financial Officer (“OCFO”) to your DC FOIA request.

Background

You have advised this Office that you submitted a DC FOIA request to OCFO, identified as #20211124\_028, which sought the following:

On Nov 2, 2021, I was informed by William Bowie, Senior Counsel of the Office of Tax & Revenue, that the Permanent Records of the Investment Advisory Committee maintained by D.C. Treasury, while in review pursuant to my active FOIA request #20210901\_246 and Appeal #2022-008 have all gone missing. This is a severe breach of records management security. Missing are all the final Reports of the Investment Advisory Committee these are permanent records. According to Mr. Bowie, the Reports can no longer be accurately recreated. [In an email he explained] that the Investment Advisory Reports review because reconstructing the Investment Reports from the source documents can no longer be accurate, it is, therefore, essential to find all the missing Reports. Therefore, this is a request for any and all internal and external documents, emails, notes of meetings, or any other materials pertaining to any and all aspects of my FOIA request. This must include everything compiled or created, before and after the Records were reported missing. Besides the material related to my directly or indirectly to my FOIAs, this request must include any and all materials in any form or format, textual or electronic related directly or indirectly to the investigation that would have been launched once it was discovered that all the Investment Advisory Committee records had

gone missing- including the initial report of the missing documents and all actions taken thereafter. This would include, but not be limited, to any and all textual or electronic records, including all notes of meetings from any and all parties involved directly or indirectly to my FOIA request. This is a request that includes but is not limited to all materials, files, records memoranda emails, meeting notes, text and telephone messages from but not limited to the office files and convenience files and email records of an unnamed Treasury official, Tracye Peters, William Bowie, and Aaron Droller, and FOIA Officer Laverne Lee related to my FOIAs and the investigation of the missing documents. This FOIA still stands and be in effect even if some or all the missing records be found.

On December 10, 2021, OCFO advised you that it considered your request “excessively broad and [lacking] the specificity required for a proper FOIA request.” Notwithstanding this assertion, OCFO identified and produced, “records concerning the response to [your] initial request for the ‘Treasurer Investment Reports’” OCFO withheld “communications among staff of the Office of Finance and Treasury and OCFO attorneys in compiling the records to your original FOIA request” pursuant to D.C. Code § 2-534(a)(4), the deliberative process privilege.

You filed an appeal with this Office on December 27, 2021. In your appeal, you stated that you are seeking records revealing what happened, and there was no deliberation because “the decision to deny [your] FOIA request was already OCFO policy” and it was “an ordinary and factual work product.” Additionally, you asserted that your request adequately described the records sought because it was “narrow and specific to materials focused on FOIA #20210901\_246”, and the response OCFO did provide “lack[s] the specificity of a [r]eport” and fail[s] to satisfy your prior request for the last six Investment Committee Reports.”

On December 29, 2021, we notified OCFO of your appeal and requested a response. OCFO provided this Office with a response to your appeal on January 11, 2022, which included a copy of the withheld records for our *in camera* review and a *Vaughn Index*. In its response, OCFO reiterated its position that the withheld records—from those that could be identified given what it considered an overly broad request—are protected from disclosure by D.C. Code § 2-534(a)(4), the deliberative process privilege. OCFO also explained,

[The] prior FOIA request sought copies of “Treasurer Investment Reports” (Report) that are no longer prepared by the Office of the Chief Financial Officer (OCFO), but which are referenced in a document that was posted on the OCFO website. Although the specific records requested did not exist and so could not be provided, the agency nonetheless provided documents containing some of the types of information that were identified in this request. The agency, therefore, responded to the initial request....

On October 29, 2021, after the Requestor filed FOIA Appeal 2022-008, the agency provided certain documents containing some of the types of information identified in that prior request and asked that the FOIA Appeal be withdrawn. In an October 29, 2021, email, the Requestor declined to withdraw the appeal and

restated that he had requested the Reports, listing the information that these Reports should contain. On November 2, 2021, an agency representative emailed an update to the Requestor, providing information concerning “the items listed in your request as missing”, including a description of the agency’s current practices regarding investments and stating that information reviewed in connection with investment decisions is not compiled in a single document. In short, the agency informed the Requestor that Reports sought did not exist.

From this, the Requestor apparently concluded that records were missing, although he was never told that records were missing, and the agency representative’s reference to missing items in the November 2, 2021, email simply reflects the Requestor’s own characterization of the matter.

OCFO further advised “there are no documents concerning any ‘investigation’ into ‘missing’ records because no records are missing, and so there is nothing to investigate.”

### 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. 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. 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 the denial of a request. *See* D.C. Code § 2-534.

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

### *Adequacy of the Request and the Search*

Your request not only seeks “any and all” documents related to “any and all” aspects of your FOIA request, but also material “directly or indirectly” related, including documents related to speculative events (the report and investigation of “missing documents”). Such a request does not reasonably describe the records sought and is insufficient to permit the identification and location of records within an agency without an unreasonable amount of effort. *See* 1 DCMR § 402.4 (“A request shall reasonably describe the desired records. Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied”); *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) (a request for “any and all” records does not describe the records sought with reasonably sufficient detail).

“[T]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.” *Assassination Archives & Research Ctr. v. CIA*, 720 F.Supp. 217, 219 (D.D.C.1989). “FOIA creates only a right of access to records, not a right to personal services.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009).

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)).

Even though OCFO has contested the adequacy of the request, it was still able to process it as submitted. While this Office considers this issue moot, it is noted that more specificity might have produced a better result, and the requestor is encouraged to engage with OCFO as to additional search parameters that may produce a better result through a new request, if applicable.

#### *D.C. Code § 2-534(a)(4) (“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).

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.*

The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are

protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

*Id.*

OCFO has asserted the documents withheld in response to your request are both deliberative and pre-decisional. Applying the criteria discussed above, this Office has conducted an *in camera* review of the withheld records and determined that OCFO has properly withheld the records. The withheld records consist of email exchanges among OCFO staff discussing the agency response to a FOIA request and a FOIA appeal. They involve discussions of a draft document, the sharing of opinions, and the solicitation of information by supervisors in the decision-making process. Because we find the withheld records are protected in their entirety under deliberative process privilege, we need not evaluate whether they were properly withheld under attorney-client privilege and work product doctrine.

#### 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: LaVerne Lee, OCFO FOIA Officer (via email only)