

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-083**

February 1, 2023

VIA ELECTRONIC MAIL ONLY

Mr. Vic Edgerton

RE: FOIA Appeal 2022-083

Dear Mr. Edgerton:

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 Department of Health (“DOH”) to your DC FOIA request.

Background

On October 1, 2021, you submitted a DC FOIA request to DOH, identified as 2022-FOIA-00044, which sought the following:

[A]ll documents and communications related to COVID testing rates in schools for the fall semester of 2021.

On October 4, 2021, DOH provided a preliminary response which referred you to a website containing publicly-accessible COVID-19 data. DOH denied the remainder of your request on November 8, 2021 pursuant to D.C. Code § 2-534(a)(6)([i]nformation specifically exempted from disclosure by statute...). Specifically, DOH explained that D.C. Code § 7-131(b) only allows for the disclosure of COVID-19 positive results in certain circumstances, none of which are applicable to your request. Further, DOH asserted that to the extent documents and communications related to COVID-19 testing rates were provided by schools they are exempt from disclosure by D.C. Code § 2-534(a)(1)(“[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position...from whom the information was obtained.”).

You filed an appeal with this Office on February 7, 2022 challenging DOH’s reliance on the cited exemptions to “justify the blanket denial of all requested documents and communications.” As for DOH’s reliance on D.C. Code § 2-534 (a)(1), you noted that the exemption only applies to information obtained from outside the government and the regular disclosure of anonymized data indicates that there is no harm to the competitive position of the entity from whom the data was obtained. As for DOH’s reliance on D.C. Code § 2-534(a)(6) you asserted, “[i]t is patently impossible for all [DOH] documents and communications related

to COVID testing rates in schools for Fall 2021 to consist only of data with personally identifiable information of individual patients. Since the start of the pandemic, [DOH] has used a variety of tools—whether memos, meeting minutes, notes, emails, texts/SMS, or chats—to communicate both internally as well as with the public about testing rates, implementation, types of tests, consent, etc.”

On March 8, 2022, we notified DOH of your appeal and requested a response. DOH responded on March 15, 2022 explaining that “all information related to COVID-19 flows through the Joint Information Center (JIC) established as part of the Incident Command Structure for the Emergency Operations Center overseeing the District of Columbia’s COVID-19 response [and].... The JIC controls what is posted on coronavirus.dc.gov.” Additionally, DOH noted that data on coronavirus.dc.gov continues to be updated and the agency “does not have anonymized data beyond what is posted on coronavirus.dc.gov.”

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 the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. 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. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Adequacy of Request

An underlying issue in this appeal is whether the request adequately describes the records sought. A request shall reasonably describe the desired records. *See* 1 DCMR § 402.4. Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied. *Id.* A request for “any and all documents” does not describe the records sought with “reasonably sufficient detail.” *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) (“[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).

Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. 1 DCMR § 402.5. When the Freedom of Information Officer, pursuant to § 402.5, contacts the requester for additional information, the request is deemed received when the Freedom of Information Officer receives the additional information. 1 DCMR § 405.6.

Here, your appeal has identified a disconnect between the documents you seek and the processing of the request by DOH (““It is patently impossible for all [DOH] documents and communications related to COVID testing rates in schools.to consist only of data with personally identifiable information of individual patients...[DOH] has used a variety of tools— whether memos, meeting minutes, notes, emails, texts/SMS, or chats--to communicate both internally as well as with the public about testing rates, implementation, types of tests, consent, etc.”), Cf., “Mr. Edgerton's FOIA request is quite broad as it seeks ‘all documents and communications related to COVID testing rates in schools for the fall semester of 2021’” Given this disconnect and the potential ambiguity arising from a request for “all documents and communications related to COVID testing rates in schools”, a remand is appropriate.

Conclusion

Based on the foregoing, we remand this matter to DOH to seek further clarification from you as to the specific records you are seeking, to search for those records and to provide you with a copy of any such non-exempt records that are identified. In the absence of any further clarification from you regarding the records sought, DOH may appropriately deny the request. If the parties are unable to agree upon an adequate description of the records sought, following an attempt by you to clarify the request, you may file a subsequent appeal with this Office.

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 government in Superior Court in accordance with DC FOIA.

Sincerely,

Mayor’s Office of Legal Counsel

cc: Phillip L. Husband, DOH FOIA Officer (via email only)