

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-128**

January 26, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Kimberly Lehmkuhl

RE: FOIA Appeal 2022-128

Dear Ms. Lehmkuhl:

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 Unified Communications (“OUC”) to your DC FOIA request.

Background

On March 21, 2022, you submitted a DC FOIA request to OUC, identified as 2022-FOIA-04619, which sought the following:

All radio and other communications regarding dispatch and operations of MPD, emergency medical services, Dept of Behavioral Health, and any other responders leading up to and throughout the incident at 1028 Bladenburg Rd NE on March 20, 2022 related to CCN 22-038598.

OUC advised you by email on March 24, 2022 that “[p]er our conversation, after a search of our records, there was no 911 call associated with your incident. In addition, as your case is already undergoing court proceedings, you will have to submit a subpoena for requests related to the case.”

On April 15, 2022, you filed an appeal with Office which asserted:

I was originally informed by a FOIA officer at OUC that radio communications are not FOIAable if there is active litigation. I followed up with the same FOIA officer March 31, 2022 when I learned that the criminal charge... related to my FOIA request had been no papered by the Attorney General's office. My FOIA request was still closed without further explanation and I would like the OLC to turn over the requested communications or state in writing why they must be subpoenaed.

On April 26, 2022, we notified OUC of your appeal and requested a response. OUC

responded on April 27, 2022 by providing a copy of the March 24, 2022 email that was sent to you. OUC also asserted that “[n]o documents have been withheld in response to this FOIA request” and explained that “[u]pon obtaining the FOIA request, Agency FOIA Officer requested the documents, and it was discovered that there were no records. Thus, the FOIA request was closed for other reasons on March 24, 2022.”

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

DC FOIA was modeled on the corresponding federal Freedom of Information Act. *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).

Pursuant to D.C. Code § 2-534(a)(3)(A)(i), investigatory records compiled for law enforcement purposes are exempt from disclosure to the extent the production of the records would interfere with an enforcement proceeding. *See Rural Housing Alliance v. United States Dep’t of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974)(records compiled for law enforcement purposes that pertain to an investigation are exempt from disclosure if the focus of the investigation is on acts that could, if proven, result in civil or criminal sanctions).

In your conversation with OUC FOIA personnel, your reference to an active law enforcement proceeding could reasonably lead to a discussion of the aforementioned DC FOIA exemption and the need for a subpoena to obtain the desired records. Notwithstanding the exemption, which may or may not be applicable given your assertion that “the criminal charge against me related to my FOIA request had been no papered by the Attorney General's office”, OUC has advised this Office that it was unable to identify any documents that were responsive to your request.

DC 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).

Here, while OUC has sufficiently explained that it does not have any records that are responsive to your request, the response it provided to you on March 24th challenges the

requirements of DC FOIA. If an agency cannot locate a requested record, the agency must notify the requester. 1 DCMR § 407.3. A denial letter issued by a District agency in response to a FOIA request must also comply with D.C. Code § 2-533(a) by including, at minimum, the following:

(1) The specific reasons for the denial, including citations to the particular exemption(s) under § 2-534 relied on as authority for the denial; (2) The name(s) of the public official(s) or employee(s) responsible for the decision to deny the request; and (3) **Notification to the requester of any administrative or judicial right to appeal under § 2-537.** (emphasis added).

Conclusion

Based on the foregoing, we hereby deny your 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 Superior Court in accordance with D.C. Code § 2-537.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Domingo Juan, OUC FOIA Officer (via email only)