

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-130**

August 10, 2022

VIA ELECTRONIC MAIL

Ms. Amy Phillips

RE: FOIA Appeal 2022-130

Dear Ms. Phillips:

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”), on the grounds that the Department of Corrections (“DOC”) constructively denied your DC FOIA request for public records and failed to provide all responsive records.

Background

On March 23, 2022, you submitted an 11-part DC FOIA request to DOC “seeking information regarding visitor lockers in the lobbies and outside the entrances to the Correctional Treatment Facility (CTF) and the Central Detention Facility (CDF).” You specifically requested the following:

1. Copies of any currently active contracts with private companies or outside agencies to supply and/or maintain visitor lockers at CTF or CDF, regardless of when those contracts were drafted or signed.
2. Copies of any requests for proposals (RFPs) issued by DOC that led to the current visitor locker contract, and copies of any bids received in response to those RFPs. This includes RFPs and bids issued prior to July 23, 2018.
3. Any correspondence, questions, complaints, or request for information received from or sent to DOC related to the visitor lockers, from December 17, 2019 to present. Please specifically search emails to or from current or former DOC employees Kathleenjo Landerkin, Quincy Booth, Lennard Johnson, Wanda Patten, Gitana Stewart-Ponder, Eric Glover, Michelle Wilson, Carlos Bivens, Michele Jones, Nora Talley, Laretta Johnson, Antoine Cobb, Rhonda Dorsey, Tocarra Bruce, David Becketts, Linwood Becton, Alvin Ford, Delran Faison, Mulet Dompierre, Heather Crawley, Kelly Vick, Arletha King, Harrison Ekwonna, Ejikeme Onukwubiri, Isiac Prosise, Cornethia Williams, Eric Vinyard, Ronald Adams, Ronald, Daria Hagood, Alvin Henry, Lawrence Goodwin, Stephanie McKinnon, Julius Allen, David Burrus, and Thomas Faust.
4. Any correspondence between any DOC staff member and Tiburon Lockers, LLC. This includes any letters, memos, memorializations of phone calls, or emails.

The email address for Tiburon Lockers, upon information and belief, is customerservice@tiburonlockers.com, so I would specifically request that DOC instruct OCTO to search for emails to or from that email address. This request is for documents from December 17, 2019, to present.

5. Any correspondence or communications between any DOC staff member and the visitor locker service provider about the condition of or repairs to the lockers, from December 17, 2019 to present.

6. Any logs showing visits by the locker service provider to any DOC facility for the purpose of inspecting or repairing the visitor lockers, and any documentations of the results of those inspections or repairs, from December 17, 2019, to present.

7. Any documents memorializing allegations made against staff members that DOC staff are removing locker keys and taking them home at the end of their shifts, and any documents memorializing disciplinary action taken against such staff for retaining locker keys in violation of DOC policy, from December 17, 2019, to present.

8. Any communication between DOC and its staff or between DOC and any other person or entity about rules for DOC staff or contractors who wish to use the lockers from December 17, 2019, to present.

9. Any DOC reports, policies, or final determinations related to the visitor lockers. This request includes any memorandums or rules given to DOC staff or visitors related to their use of visitor lockers. Please provide any such reports, policies, or rules that are currently in effect, regardless of when they were first written.

10. Any documentation from July 23, 2018, to present of the amount of profit DOC has received from Tiburon Lockers as its 15% of the gross receipts from the operation of the lockers. Based on the locker contract, DOC should have received checks from Tiburon Lockers on or about the 20th day of each month from August 2018 to present.

11. Any documentation from July 23, 2018, to present, of how DOC has spent the profit DOC has received from Tiburon Lockers as its 15% of the gross receipts from the operation of the lockers.

On April 15, 2022, you filed an appeal with Office because the statutory deadline passed without any response from the agency. You specifically stated, “I am asking the Mayor to treat that lack of response as a constructive denial, and to request that the Agency disclose the requested records immediately.” On May 13, 2022, we notified DOC of your appeal and requested a response. DOC responded on May 24, 2022.¹ In its response, DOC asserted that “the appeal should be considered moot” because the agency provided you a partial response on May 23, 2022. DOC also noted that it asked you to “provide additional information so that a search for remaining items can be conducted.” You replied on May 24, 2022, which we construe as an amended appeal, challenging DOC’s assertion that your request is moot because DOC “ha[s] not yet fulfilled the FOIA request with regards to [item numbers] 8, 9, 10, and 11.” Citing caselaw, you also challenged DOC’s assertion that it needs additional information to conduct searches for item numbers 4 and 5. Additionally, regarding item number 6 and DOC’s response that it has no

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

responsive records, you noted that you “personally use [the Visitor’s Entrance/Staff Entrance] to the jail multiple times a week” and regularly see a physical log book with “sign ins from individuals from cleaning companies, elevator repair companies, HVAC companies, and other contractors for DOC who come to the facility to do inspections or perform services for DOC.” And you believe “those physical log books are maintained by DOC, because [you] have been made aware of cases in which they have been introduced as evidence to determine when an attorney has visited the jail.”

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).

Constructive Denial

Under D.C. Official Code § 2-532(e), a constructive denial occurs when an agency fails to respond within the timing requirements established in D.C. Official Code §§ 2-532(c) and (d). This Office has no authority to extend the maximum deadline for responding to a DC FOIA request, which is 25 business days. D.C. Official Code § 2-532. Based on the record before us, we conclude that DOC constructively denied your request.

Adequacy of the Search

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, DOC has not demonstrated that it conducted a reasonable and adequate search. DOC has represented that its search is not completed for item numbers 8,9,10, and 11. Also, DOC improperly placed the burden on you to identify search terms for parts of your request that reasonably describe the records sought. It was DOC's responsibility to make a determination as to where the requested documents were likely to be located - a responsibility that can be met by identifying agency employees in the relevant programs and making inquiries about the nature of document creation and retention in those programs. See 1 DCMR § 402.5; see also *Truitt v. Dep't of State*, 897 F.2d 540, 545 n. 36 (D.C. Cir. 1990) (quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess. at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271)). (finding a request to not be vague when "a professional employee of the agency who [is] familiar with the subject area of the request ... [could] locate the record with a reasonable amount of effort."). Additionally, for item number 6, you have provided evidence that log books exist.

Conclusion

Based on the foregoing, we remand to DOC to promptly conduct an adequate search and provide to you any non-exempt responsive records found.

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: Oluwasegun Obebe, Records, Information & Privacy Officer
DOC (via email)