

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-192**

September 14, 2022

VIA ELECTRONIC MAIL

Mr. Donald Crowell

RE: FOIA Appeal 2022-192

Dear Mr. Crowell:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”), on grounds that the District Department of Transportation (“DDOT”) failed to properly respond to your DC FOIA request for public records.

Background

On June 29, 2022, you submitted a DC FOIA request to DDOT seeking the following:

All email, attachments to emails, reports, studies, communications, graphics, analyses, electronic communications, correspondence files, calendar files, records of meetings, text messages, other direct/instant electronic communications, talking points, background materials, notes, and memoranda related to any bicycle lane project on Arizona Ave NW in Washington, DC. Substantively duplicate records are not requested. (Date Range for Record Search: From 01/01/2020 To 06/30/2022)

On July 18, 2022, DDOT responded to your June 29, 2022 request, as well as your May 12, 2022 request seeking the same records for the narrower timeframe of September 1, 2021 to May 12, 2022, by providing you with hundreds of pages of responsive records. DDOT informed you that it had located 422 pages of responsive records but was withholding 157 pages “as they are exempt in their entirety due to deliberative process privilege (internal discussions) D.C. Official Code § 2- 534(a)(4)[(“Exemption 4”)] (2012).” DDOT also informed you “[s]everal pages of [the records provided] have been redacted since portions of the documents are exempt from disclosure personal privacy concerns disclosed therein, such as names, addresses, and e-mail addresses and also due to deliberative process (internal discussions. D.C. Official Code §§ 2-534(a)(2),(4) (2012).”

On July 27, 2022, you filed an appeal with this Office asserting, DDOT constructively denied your request by only producing 248 of the 265 pages DDOT identified as “readily producible,” DDOT did not conduct an adequate search, and DDOT “has failed to demonstrate whether factual portions of the records it withheld under DC FOIA Exemption 4 are reasonably

segregable.” To support your contention that DDOT failed to conduct an adequate search, you noted that a record dated January 6, 2021 is the earliest dated record DDOT produced, “[n]o records dated between mid- May 2022 and June 30, 2022 were produced” even though responsive records exist for that time period, and several email attachments appear to be missing. On August 11, 2022, we notified DDOT of your appeal and requested a response. DDOT responded on August 18, 2022. In its response, DDOT explained that “when uploading documents into FOIAXpress, it converts the files into PDF format which can alter the number of pages. The number of pages may have been altered but all releasable pages were forwarded to the requester.” DDOT also stated that because both your June 29, 2022 request and your May 12, 2022 request “pertained to the Arizona Avenue NW bike lane project,” the agency did not submit a second request for documents but would do so. Additionally, DDOT represented that it would “review the withheld documents and generate copies of the emails providing any reasonably segregable material.”

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). In this case, DDOT had until July 21, 2022 to respond to your request. By sending a response letter and some responsive documents on July 18, 2022, DDOT fulfilled its responsibility to respond within the statutory time period. The fact that the exact number of pages received differs from what is stated in the response letter does not constitute a constructive denial. Therefore, we deny this portion of your appeal.

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).

Here, DDOT only conducted a search for the September 1, 2021 to May 12, 2022 portion of your request. For that time period, DDOT identified the Planning and Sustainability Division, Bicycle Program Division as the program office likely to have responsive records and received “a link to the files for the Arizona Avenue, NW Bicycle Lane Project” from a Bicycle Program Specialist. DDOT also submitted an email search request to the Office of the Chief Technology Officer (“OCTO”) covering the September 1, 2021 to May 12, 2022 timeframe. However, DDOT inexplicably did not ask the program specialist to provide responsive records for the January 1, 2020 to August 30, 2021 or May 13, 2022 to June 30, 2022 date ranges and DDOT did not submit an OCTO email search request for those date ranges. Therefore, we find that DDOT did not conduct an adequate search. Based on DDOT’s representation that it “will submit a new OCTO search for [your June] request for emails to or from DDOT from January 01, 2020, to September 01, 2021, and from May 12, 2022, to June 30, 2022” remand to the agency to complete its search is appropriate.

Conclusion

Based on the foregoing, we remand to DDOT to promptly complete an adequate search and segregability analysis.

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. Official Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Karen R. Calmeise, Hearings/FOIA Officer
DDOT (via email)