

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-219**

January 27, 2023

VIA ELECTRONIC MAIL ONLY

Mr. Nate Jones

RE: FOIA Appeal 2022-219

Dear Mr. Jones:

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 Deputy Mayor for Planning and Economic Development (“DMPED”) to your DC FOIA request.

Background

On May 16, 2022, you submitted a DC FOIA request to DMPED, identified as 2022-FOIA-06436, which sought the following:

All emails sent between sarosh.olpadwala@dc.gov and any account ending in @commanders.com, @washingtonfootball.com, @federalcitycouncil.org, mail.house.gov, nps.gov and/or @dc.gov from Jan. 1, 2021, to the date this request is completed, mentioning any of the following terms: “RFK,” “R.F.K.,” “stadium,” “Commanders,” “Redskins,” “Football Team,” “football” and/or “lease.” (Date Range for Record Search: From 01/01/2021 To 05/16/2022)

On August 5, 2022 DMPED provided you with a copy of the non-exempt records that were identified as being responsive to your request. DMPED further advised you that additional records were being withheld pursuant to D.C. Code § 2-534(a)(4), the deliberative process privilege.

You filed an appeal with this Office on September 20, 2022 requesting “re-review [of] the withheld records to ensure that no records prepared by an organization other than the government of the District of Columbia (including federal government agencies) were withheld under D.C. Code § 2-534(a)(4).” Additionally, you assert DMPED’s search was inadequate because “records that [you] know to exist, including legislative planning documents that were sent from DMPED to the Commanders, were not provided to [you] and were not described as being withheld.”

On September 26, 2022, we notified DMPED of your appeal and requested a response. To date, DMPED has not responded and this decision is based on the current record before this Office.

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).

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.

Here, DMPED has not provided an explanation of its search nor addressed your contention that “legislative planning documents that were sent from DMPED to the Commanders, were not provided to [you] and were not described as being withheld.”

D.C. Code § 2-534(a)(4) (“Exemption 4”) – Deliberative Process Privilege

Because DMPED has not submitted the withheld records to this Office for an *in camera* review, we are unable to determine the applicability of Exemption 4.

Conclusion

Based on the foregoing, we remand this matter to DMPED to provide a detailed explanation of the search performed and the applicability of D.C. Code § 2-534(a)(4) to the withheld records. In the absence of this information, this Office is unable to make an appropriate determination.

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: Erika Satterlee, DMPED FOIA Officer (via email only)