

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-220**

February 13, 2023

**VIA ELECTRONIC MAIL ONLY**

Mr. Rob Hawkins

RE: FOIA Appeal 2022-220

Dear Mr. Hawkins:

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 District Department of Transportation (“DDOT”) to your DC FOIA request.

Background

On July 18, 2022, you submitted a DC FOIA request to DDOT, identified as 2022-FOIA-08221, which sought the following:

All enforcement communications (to include but not limited to emails, texts, messaging apps, letters, notes, electronic communications) from DDOT employees to dockless electric scooter operators since December 1, 2021 to present relating to warnings, notices of violation, suspension, enforcement protocol or procedures, or similar. (Date Range for Record Search: From 12/01/2021 To 07/18/2022)

On July 18, 2022, you submitted a DC FOIA request to DDOT, identified as 2022-FOIA-08222, which sought the following:

DDOT’s enforcement manual, protocol, or similar used by DDOT employees or contractors to determine operator/dockless electric scooter violations

Training manual, program, or similar used to instruct DDOT employees prior to authorization to conduct dockless electric scooter enforcement operations

List of DDOT personnel trained or otherwise authorized to conduct dockless electric scooter enforcement operations

All emails, text messages, photos or other communications written and electronic by and between DDOT employees since December 1, 2021 to

present which address suspected violations by an operator of the dockless electric scooter Terms and Conditions or rules

All emails, text messages, photos or other communications written by and between DDOT employees and dockless electric scooter operators since December 1, 2021 with the term “Bird”.

(Date Range for Record Search: From 12/01/2021 To 07/18/2022)

On September 8, 2022, DDOT responded to 2022-FOIA-08221 with the following:

We have located 227 pages of public records held by DDOT that are responsive to your FOIA request. Several pages of these records have been redacted since portions of the documents are exempt from disclosure due to personal privacy concerns disclosed therein, such as latitude and longitude, email addresses, Tax Identification Numbers and also due to deliberative process privilege (internal discussions). D.C. Official Code §§ 2- 534(a)(2),(4) (2012).

On September 8, 2022, DDOT responded to 2022-FOIA-08222 with the following:

We have located 1449 pages of public records held by DDOT that are responsive to your FOIA request. Several pages of these records have been redacted since portions of the documents are exempt from disclosure due to personal privacy concerns disclosed therein, such as latitude and longitude, email addresses, Tax Identification Numbers and also due to deliberative process privilege (internal discussions). D.C. Official Code §§ 2- 534(a)(2),(4) (2012). Of these records 166 pages have not been provided to you because, although responsive, they are exempt in entirety from being disclosed based on the deliberative process privilege (internal discussions). See D.C. Official Code § 2-534(a)(4) (2012).

You filed an appeal with this Office on September 21, 2022 asserting DDOT conducted an inadequate search and that “the deliberative process privilege does not apply here” because “DDOT’s enforcement protocols, guidelines, and decisions are not part of a deliberative process to formulate a public policy— they are the policy.” In challenging the adequacy of DDOT’s search, you noted that “the bulk of the documents produced relate to materials that only one e-scooter operator produced” and “there are no documents from text messages, no messaging through popular communication technologies like Microsoft Teams or Slack, and no handwritten materials.”

On September 26, 2022, we notified DDOT of your appeal and requested a response. DDOT responded on October 6, 2022 and subsequently provided a copy of the unredacted documents for our *in camera* review. In its response, DDOT explained that it searched for responsive records by submitting your requests “to the DDOT Project Delivery Administration Bicycle Program Specialist who oversees the program” and it “also submitted an OCTO search for e-mail communications with the search terms included in [your] request.” DDOT also asserted that the agency “does not conduct business via text messaging and the Agency does not

operate via Slack.” Additionally, DDOT explained that it “has one person responsible for enforcement communications between the dockless bicycle contractors.” Finally, DDOT offered to review the 166 withheld documents to see what communications could be redacted in part.

### 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 . . .” *Id.* at § 2-532(a).

DC FOIA was modeled on the corresponding federal Freedom of Information Act. *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. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

### *Adequacy of Search*

In determining whether an agency conducted an adequate search in response to a records request, 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. 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.*

Here, DDOT asked the employee overseeing the dockless scooter program to identify and provide any responsive records. Further, DDOT conducted an email search through OCTO with the terms contained in your request. DDOT also explained, it did not provide you with text messages or Slack communications because the agency does not conduct business via text message or Slack. Given the foregoing, there is nothing to suggest that DDOT has failed to conduct an adequate search for the records sought.

*D.C. Code § 2-534(a)(4) (“Exemption 4”)*

Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” This exemption has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). As a result, Exemption 4 encompasses the deliberative-process privilege, *see McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011), as well as the attorney-client and attorney work-product privileges. The deliberative-process privilege protects agency documents that are both pre-decisional and deliberative. *Coastal States Gas. Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it was generated before the adoption of an agency policy, and it is deliberative if it “reflects the give-and-take of the consultative process.” *Id.* The point is to encourage open, frank discussions on matters of policy between subordinates and superiors; protect against premature disclosure of proposed policies before they are finally adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

Upon review, we agree with DDOT’s determination that the redacted portions in the “Rob Hawkins Appeal (269518-2xBAE61) (002)” file are deliberative intra-agency communications that are exempt from disclosure as they include drafts and discussion about proposed agency actions.

Further, this Office accepts DDOT’s assertion that “HAWK A\_WITH-HELD ENTIRETY” consists of documents protected from disclosure by Exemption 4. This document is an email between two DDOT employees and contains what appears to be a draft email to outside individuals as it lacks a header or other information indicating that it was actually sent, i.e. it does not appear to be a forwarded email.

With respect to “Hawk B\_WITH-HELD ENTIRETY”, while the document is also an email between two DDOT employees, with the exception of one line of text, which may be redacted, the majority of the content consists of a forwarded email (with attachment) from a Lime employee to a DDOT employee. Lime is an entity outside of the District government. Accordingly, for the deliberative process privilege of Exemption 4 to apply to communications between Lime and DDOT, an exception must exist to the threshold requirement that the records are “inter-agency or intra-agency” documents. A notable exception to the inter- or intra-agency requirement is the consultant corollary exception, which applies when a party outside the government provides advice, effectively functioning as an agency employee. *See Dep’t of*

*Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (U.S. 2001) (noting that the deliberative process privilege may apply when documents provided by outside consultants “played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done”). The consultant corollary exception is not applicable when the outside party is acting in its own interest or seeking a government benefit at the expense of other applicants. *Id.* at 12. Here, we find that that the consultant corollary does not apply.

Notwithstanding this Office’s disagreement with DDOT as to the applicability of Exemption 4 to the documents contained in “Hawk B\_WITH-HELD ENTIRETY”, there is a question as to whether this material is exempt pursuant to D.C. Code § 2-534(a)(1)(“trade 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 of the person from whom the information was obtained.”). Given this question, a remand is appropriate.

### Conclusion

Based on the foregoing, we affirm the adequacy of DDOT’s search, and its withholdings pursuant to Exemption 4 as presented in the files “HAWK A\_WITH-HELD ENTIRETY” and “Rob Hawkins Appeal (269518-2xBAE61) (002)” (by way of redaction). The matter is otherwise remanded back to DDOT to produce the “Hawk B\_WITH-HELD ENTIRETY” in the absence of a determination that it is exempt from disclosure pursuant to D.C. Code § 2-534(a)(1).

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 the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Karen R. Calmeise, DDOT FOIA Officer