

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

August 1, 2017

Mr. Vaughn Bennett

RE: FOIA Appeal 2017-109

Dear Mr. Bennett:

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"). In your appeal, you assert that the Department of Energy and Environment ("DOEE") failed to respond to a request you made under the DC FOIA.

Background

On June 16, 2017, you submitted a request under the DC FOIA to DOEE seeking:

copies of any Department of Energy and Environment (DOEE) documents or records, from January 2010 to June 16, 2017, that contain information regarding 2504 and 2520 10th Street NE, Washington, D.C., (Dahlgreen Courts) . . . This request includes, but is not limited to any and: All letters, applications, reports, inspections, clearance reports, notes, memoranda, certificates, accreditations, permits, administrative orders, financial records, budgets or other documents, which include, summarize, or relate to lead-based paint, lead-based paint hazards or lead-safe practices at Dahlgreen Courts.

DOEE did not respond to your request. Subsequently, you appealed to this Office asserting that your request had been constructively denied. On appeal, you challenge the adequacy of DOEE's search as you believe responsive documents exist that have not been provided to you. You further argue that "[u]nless the requested information specifically falls within one of these categories, and DOEE chooses to assert the exemption, the record must be released."

DOEE responded to your appeal in a July 31, 2017, letter to this Office.¹ DOEE's response explained that it has initiated a search of its Lead-Safe and Healthy Housing Division which has returned a voluminous number of documents which it is currently reviewing. Additionally, DOEE attached a *Vaughn* index to its response. DOEE has represented that it has not yet begun

¹ DOEE's response is attached. Please note that DOEE issued a consolidated response for this appeal, and the related FOIA Appeal 2017-110.

reviewing these 509 files for release. Lastly, DOEE provided a signed declaration from an Environmental Protection Specialist of the Lead Enforcement and Compliance Branch of the Lead-Safe and Healthy Housing Division in the DOEE, which stated that “[t]he Lead-Safe and Healthy Housing Division (LSHHD) is the only likely repository in DOEE for the records requested under FOIA Appeal No. 2017-109. Records from LSHHD are cross-checked with DOEE Central Records and the Office of Enforcement and Environmental Justice (OEEH) to ensure completeness.”

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. Official 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. Official Code § 2-532(a). The right created under the 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. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

The 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), and 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).

There are two primary issues in this appeal: (1) the constructive denial of your request; and (2) the adequacy of DOEE’s search.

Constructive Denial

You submitted your request to DOEE on June 16, 2017. DOEE failed to provide you with responsive records within the 15 days prescribed by D.C. Official Code § 2-532(c)(1). Further, based on the record before this Office, it appears that DOEE did not seek an extension to respond to your request by “written notice . . . setting forth the reasons for extension and expected date for determination,” as contemplated by D.C. Official Code § 2-532(d)(1). As a result, this Office finds that DOEE constructively denied your request. D.C. Official Code § 2-532(e).

Upon receipt of this appeal, DOEE began conducting a search and is presently in the process of reviewing responsive records and making appropriate redactions. Because your appeal is based on a lack of initial response from DOEE, this Office would normally order the search be completed and dismiss this matter at moot. However, because of the volume of records that need to be reviewed by DOEE, and the relatively preliminary stage of this review, we believe it is appropriate to offer DOEE guidance now instead of waiting for it to complete the remainder of its production to you. Accordingly, we will analyze the adequacy of DOEE’s search as it has been represented to us to date.

Adequacy of Search

DC FOIA requires only 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).

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 may include a determination of 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.* An agency can demonstrate that these determinations have been made by a “reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched . . .” *Id.* Conducting a search in the record system most likely to be responsive is not by itself sufficient; “at the very least, the agency is required to explain in its affidavit that no other record system was likely to produce responsive documents.” *Id.* (internal quotations omitted).

Here, DOEE has identified the Lead-Safe and Healthy Housing Division as the only record repository likely to contain records responsive to your request. The search that DOEE conducted of the Lead-Safe and Healthy Housing Division has identified “509 records consisting of 5,466 pages” that may be responsive and need to be reviewed. DOEE has certified that it has searched all record repositories likely to contain records responsive to your request, and as a result, we find that DOEE’s search on appeal is adequate.

Conclusion

Based on the foregoing, we remand this matter to DOEE. Within 10 days from the date of this decision, DOEE shall: (1) begin reviewing responsive records for applicable exemptions; and (2) begin producing documents to you on a rolling basis.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Ibrahim Bullo, FOIA Officer, DOEE (via email)