

**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 2017-110

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 the Environment ("DOEE") failed to respond to a request you made under DC FOIA.

Background

On June 16, 2017, you submitted a request under the DC FOIA to DOEE seeking, from an enumerated list of email addresses, "copies of any Department of Energy and Environment (DOEE) emails, from January 2010 to June 16, 2017, that contain information regarding 2504 and 2520 10th Street NE, Washington, D.C., (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.<sup>1</sup> DOEE's response explained that it has initiated a search which has returned a voluminous number of documents which it is currently reviewing. Attached to DOEE's response is an appendix which describes the email search initiated by DOEE. In response to an inquiry from this Office today, DOEE has initiated an additional search with new search terms. Lastly, DOEE attached a *Vaughn* index to its response.<sup>2</sup> DOEE has represented that it has already released to you approximately 800 pages of documents, of which 20 pages were redacted.

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<sup>1</sup> DOEE's response is attached. Please note that DOEE issued a consolidated response for this appeal and the related FOIA Appeal 2017-109.

<sup>2</sup> Please note that DOEE erroneously conducted a search for Department of Consumer and Regulatory Affairs email records, and some of these records appear in the *Vaughn* index. DOEE is only responsible for providing records

## 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 four primary issues in this matter: (1) the constructive denial of your request; (2) the adequacy of DOEE’s search; (3) the redactions for non-responsiveness made by DOEE; and (4) the redactions made pursuant to an exemption under DC FOIA.

### *Constructive Denial*

You submitted your request on June 16, 2017. DOEE failed to provide the requested 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 conducted 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.

### *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 initiated a search upon learning of the appeal. In its response, DOEE has identified the terms used to conduct its search of emails. Your request was for records “that contain information regarding 2504 and 2520 10th Street NE, Washington, D.C., (Dahlgreen Courts).” Today, this Office inquired about the absence of the addresses or “Dahlgreen Courts” in the search terms. In response, DOEE indicated that it had initiated a new email search with the terms “Dahlgreen Courts,” “Dahlgreen,” “2504 10th” and “2520 10th”. As a result, until this search has been completed, we find that DOEE has not conducted an adequate search. DOEE shall complete this search, review responsive documents, and begin production to you within 10 business days.

#### *Redactions and Withholdings For Non-Responsiveness*

DOEE’s response indicates that it has withheld or redacted 731 pages of records because portions of them are “Non-Responsive” to your request. This Office asked for clarification on this – noting to DOEE that if an email chain was determined to be responsive, then all subsequent emails that retransmitted the responsive email would also be a responsive record. DOEE indicated that some of the responsive records redacted in this way are large datasets that

contain information that would be subject to other exemptions, and which DOEE assumed you would not be interested in because they are unrelated to the property you identified.

The practice of withholding ‘Non-Responsive’ documents, while a reasonable conservation of energy, is not permissible under DC FOIA. Once a record has been identified as responsive, it must be released in its entirety, unless an exemption applies. This was made clear in a recent ruling that disavowed the practice of withholding or redacting a record on the basis that it is “Non-Responsive.” To wit:

The statute thus sets forth the broad outlines of a process for agencies to follow when responding to FOIA requests: first, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records. The statute does not provide for withholding responsive but non-exempt records or for redacting non-exempt information within responsive records.

In light of the Supreme Court’s instruction that FOIA’s exemptions are “explicitly made exclusive and must be narrowly construed,” *Milner*, 562 U.S. at 565 (internal citations and quotation marks omitted), we do not see how [agency’s] non-responsive redactions here can be squared with the statute. Those redactions find no home in FOIA’s scheme. Rather, once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information falling within a statutory exemption.

*Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016)

Under DC FOIA, once a document is identified as responsive, the entire document is subject to release, albeit portions that are exempt may be redacted. This Office recognizes the volume of responsive documents and the amount of time it would take to properly review and redact all of the documents at issue here. Further, this Office recognizes that the requester may very well have no desire to receive heavily redacted documents that are not related to the requester’s interest but are still technically responsive to his request.

With that being said, in light of the provisions in 1 DCMR § 402.5,<sup>3</sup> this Office encourages DOEE and you to discuss possibly refining your request and clarifying if there are portions of responsive documents that you do not desire. If there is information that will take many hours to redact and which you have no interest in receiving, then that should be established so that DOEE

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<sup>3</sup> 1 DCMR 402.5 states, “Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. Every reasonable effort shall be made by the agency to assist in the identification and location of requested records.”

can focus its resources on reviewing and providing documents that you actually want. Further, to the extent that fulfilling the voluminous request in its entirety is burdensome, DOEE may have the right to charge fees to recoup costs. *See* D.C. Official Code § 2-532(b-3) (“No agency or public body may require advance payment of any fee unless . . . the agency or public body has determined that the fee will exceed \$250.”); 1 DCMR § 408.

To restate, once a record has been identified as responsive it is impermissible to redact or withhold the record on the basis that portions of it are ‘Non-Responsive’; such records must be reviewed, redacted, and released unless you explicitly agree that you are not interested in them. DOEE shall review all records withheld or redacted in such a manner, and provide to you all non-exempt portions of such records.

#### *Redactions For Exemptions*

Upon request, DOEE provided this Office with the approximately 20 pages of documents that it had provided to you redacted. We have reviewed those documents *in camera*. Summarily, we agree with DOEE’s assertions of D.C. Official Code § 2-534(a)(2) to redact the names and personally identifiable information of persons identified in the documents. Similarly, we agree with DOEE’s assertions of deliberative process privilege, D.C. Official Code § 2-534(a)(4), as the email chain reviewed appears to be the sort of back and forth discussion between government employees contemplated by the privilege. As a result, we affirm DOEE’s redactions that were made pursuant to an exemption.

#### Conclusion

Based on the foregoing, we remand this matter to DOEE. Within 10 days from the date of this decision, DOEE shall: (1) complete conducting its second search for responsive documents; (2) review responsive records for redactions consistent with this decision; and (3) begin a rolling production of documents.

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)