

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



Mayor's Office of Legal Counsel



August 21, 2017

Mr. Arthur Slade

RE: FOIA Appeal 2017-130

Dear Mr. Slade:

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 Office of the Inspector General (“OIG”) improperly withheld records you requested under the DC FOIA.

Background

In June and July of 2017, you submitted requests under the DC FOIA to OIG seeking documents relating to alleged cronyism and nepotism at the Department of Insurance, Securities and Banking (“DISB”). Your requests included asking OIG for emails, stored on DISB servers, between three individuals from June 1, 2012 to present. On July 20, 2017, OIG responded to your request providing you with two pages of responsive documents. OIG also stated that it did not have any responsive emails.

On appeal you challenge OIG’s denial for not producing the emails of the individuals requested. You disagree with OIG’s closure of your nepotism complaint against DISB and assert that the emails you requested would verify whether or not there was actual misconduct. OIG provided this Office with a response to your appeal on August 7, 2017.¹ In its response, OIG reasserts that it reviewed its files and it does not possess any emails that would be responsive to your request.

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.

¹ A copy of OIG’s response is attached for your reference.

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). Accordingly, 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).

The primary issue in this appeal is whether or not OIG conducted an adequate search for DISB emails. 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). 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, the most likely location for responsive email records would be the DISB email servers maintained by the Office of the Chief Technology Officer (“OCTO”). Pursuant to Mayor’s Order 2008-88, OCTO can search and disclose emails sent or received by the District’s employees when there is legal authority - e.g. pursuant to a FOIA request, investigation, or litigation. While OIG does have authority to request emails from OCTO for an investigation, the request here is pursuant to your FOIA request, not OIG’s own investigation. Because your FOIA request is for DISB emails, DISB must authorize the email search from OCTO, not OIG. *See* Mayor’s Order 2008-88.

As a result, the remaining likely location for responsive emails would be the files OIG created and maintained in response to your allegation of nepotism in DISB. OIG asserts that it searched its files and found no responsive emails. It is unclear from OIG's response if OIG never requested emails for its investigation or if email records were purged following the conclusion of OIG's investigation. Although OCTO may maintain responsive emails stored on its servers for DISB, under applicable FOIA law the test is not whether any additional documents might conceivably exist, but whether OIG's search for responsive documents was adequate. *Weisberg*, 705 F.2d at 1351. Based on the low likelihood of OIG maintaining DISB emails and OIG's declaration that it does not have responsive emails, we find that the search OIG conducted was adequate.

Conclusion

Based on the foregoing, we affirm the OIG's decision and hereby dismiss your appeal. 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: Daniel W. Lucas, Inspector General, OIG (via email)