

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

Mayor's Office of Legal Counsel



August 22, 2017

Mr. John McFarland

RE: FOIA Appeal 2017-131

Dear Mr. McFarland:

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 Consumer and Regulatory Affairs (“DCRA”) improperly withheld records you requested under the DC FOIA.

Background

On April 10, 2017 you submitted a FOIA request to DCRA for “copies of all forms of electronic, written, taped and video communication from or to [named DCRA employee] and the below listed former or current Government of the District of Columbia employees,” “[w]ithin the date range of January 1, 2011 to December 31, 2011.” Your appeal also included a copy of an April 30, 2017 letter to the District of Columbia Human Resources (“DCHR”) FOIA officer that contained 30 search terms.¹

It appears that DCRA informed you that your request was granted by email on July 12, 2017 – and that you picked up a CD of responsive records from DCRA on July 13, 2017.²

On August 8, 2017, you filed this appeal. In relevant portions, your appeal offers your belief that DCRA did not provide you with specific emails that you believe exist. Specifically, you contend that DCRA did not attach an email accompanying a PDF that was provided to you. Additionally, you assert that a particular email chain from June 14, 2011, appears to be incomplete. Your appeal reiterated your request, stating that you “want to receive those e-mails and any other documents, and all forms of electronic, written, taped and video communication that [employee]

¹ This letter was in regards to a separate FOIA request to DCHR. Based on conversations between DCRA and this Office it appears that DCRA was in receipt of this document at the time it issued its response.

² We say “it appears” because DCRA’s response to your request was not included in your appeal as required by 1 DCMR § 412.

sent to DCRA.”³ Additionally, your appeal asserts complaints regarding your unfair treatment as an employee and states your desire for “compensation for the injustice [you] have been subject to.”⁴

Your appeal also appears to include your concerns in relation to a FOIA request to DCHR that was the subject of FOIA Appeal 2017-64.⁵ You did not include a denial letter for the DCHR request as required by 1 DCMR § 412. Further, you did not include a copy of the original DCHR request as required by 1 DCMR § 412. As a result, this Office has interpreted the instant appeal as solely challenging the adequacy of DCRA’s response. DC FOIA appeals are agency specific; if you wish to challenge the separate actions of two agencies in response to two requests then you must file two appeals.

On August 14, 2017, DCRA provided a response to your appeal to this Office.⁶ DCRA’s response explained that the specific emails identified in your appeal as missing were actually provided to you. DCRA provided a copy of these emails to this Office. In communications with this Office, DCRA indicated that pursuant to your request, the Office of the Chief Technology Officer (“OCTO”) conducted a search of the email inboxes of all 11 employees identified in your request. DCRA further indicated that the search returned a voluminous number of records and that the responsive documents provided to you consisted of a selection from the larger OCTO search results that had been retrieved using the keywords “McFarland” and “desk audit.”

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). Accordingly, decisions construing the

³ Your appeal also states “I want to receive all e-mails that were transmitted before and after that June 14, 2011 date between [named employees].” Your original request limited your request to the “the date range of January 1, 2011 to December 31, 2011.” You cannot expand the scope of your request on appeal; you must file a separate request if you would like to expand the date range of DCRA’s search.

⁴ These issues, of course, are beyond the scope of the instant FOIA Appeal and will not be addressed in this determination.

⁵ 2017-64 was dismissed without prejudice as prematurely filed; this Office has not received a subsequent substantive challenge.

⁶ A copy of DCRA’s response is attached.

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 DCRA conducted an adequate search for correspondence you requested. 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).

Your request was for all communication between named DCRA employees within a specified time range. The repositories likely to contain such responsive email records would be the email accounts maintained by OCTO. Pursuant to Mayor's Order 2008-88, OCTO can search and disclose emails sent or received by District employees when there is legal authority to do so (e.g., pursuant to a FOIA request, investigation, or litigation). Here, DCRA has indicated that it conducted an OCTO search of the mailboxes of 11 named employees for the date range provided in your initial request. This portion of the agency's search was reasonable.

DCRA indicated to this Office that the search resulted in a voluminous number of records and that it engaged you in several telephone conversations concerning your request. In lieu of reviewing the entirety of the search results, it appears that DCRA took the voluminous results of

the OCTO search and narrowed them using the keywords “desk audit” and “McFarland.”⁷ Unless you agreed to this narrowing of search terms, pursuant to 1 DCMR § 402.5, this was improper. Your request by its own terms unambiguously sought all emails between the employees in the provided date range. If the search results were voluminous, DCRA’s remedy was to acquire your consent to narrow the terms of the search, or to release the documents on a rolling basis and charge you fees in accordance with 1 DCMR § 408.⁸ Unilaterally narrowing the scope of your request, even in good faith, renders the search DCRA conducted inadequate.

Conclusion

Based on the foregoing, we remand DCRA’s decision and hereby dismiss your appeal. Within 15 days of this decision, DCRA shall begin providing to you on a rolling basis the remainder of responsive documents identified by its OCTO search, subject to appropriate exemptions. If DCRA determines that this production will incur fees, then you may either agree to pay the fees or discuss with DCRA narrowing the scope of your request. This constitutes the final decision of this Office; however, you are free to challenge DCRA’s subsequent response by separate appeal.

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: Runako Allsopp, Assistant General Counsel, DCRA (via email)

⁷ These search terms appear to be related to your DCHR FOIA request in which 30 search terms were identified.

⁸ If DCRA were to make the good faith determination that fees for review and production would exceed \$250, then DCRA may require advance payment before disclosing records pursuant to D.C. Official Code § 2-532(b-3)