GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

Mayor's Office of Legal Counsel

September 13, 2017

Mr. Gianluca Pivato

RE: FOIA Appeal 2017-143

Dear Mr. Pivato:

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 Metropolitan Police Department ("DCRA") improperly withheld records you requested under the DC FOIA.

Background

On May 23, 2017, you submitted a request under the DC FOIA to DCRA seeking "all records, including but not limited to emails, notes, correspondence, and memos" relating to a specific address. You specified the date range of January 1st, 2017 to May 23rd, 2017, for emails and communications. You also provided email addresses of DCRA employees and third parties to be searched.

FOIAXpress, the electronic portal that DCRA uses to process requests, indicates that DCRA closed your request on July 25, 2017, stating that it had been granted in full.

On appeal you challenge DCRA's response, asserting your belief that additional responsive documents should exist that have not been disclosed to you. You cite five emails you received from DCRA, which you assert indicate that additional records exist. You further claim that your request was not limited to emails and should have included all forms of responsive records.

DCRA provided this Office with a response to your appeal on August 30, 2017.[1] In its response, DCRA asserts that pursuant to your request, it directed the Office of the Chief Technology Officer ("OCTO") to conduct an email search of the addresses identified in your request. DCRA claims that it also asked the DCRA employees identified in your request to search their own files for responsive documents. DCRA maintains that the only information it withheld was an employee's private telephone number, which was redacted to protect personal privacy. DCRA asserts that all the responsive records from its search efforts were provided to you between July 27, 2017 and August 14, 2017.

[1] A copy of DCRA's response is attached for your reference.

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 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 your belief that additional responsive records exist; therefore, we consider whether or not DCRA conducted an adequate 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). 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).

In response to your appeal, DCRA explained the likely location for responsive records at issue here would be the email servers maintained by OCTO and the files of the DCRA employees identified in your request. DCRA had OCTO conduct a search of the email addresses provided in your request for the date range you requested. DCRA also directed its employees identified by your request to search their own files for responsive documents. DCRA asserts that it provided you with all the responsive records that resulted from these searches with only minor redaction.

Your appeal cites five emails that you claim provide evidence that additional responsive records exist which you have not received. In general, these emails involve requests for computations, data, reports, and additional information. These requests alone do not indicate that actual responses were sent or that more records exist; it is possible the requests were not fulfilled. You also believe that one of the emails should have been forwarded. Your beliefs do not amount to substantial evidence that additional responsive records exist. Although you contend that DCRA has failed to disclose responsive records that you believe should exist, under applicable FOIA law the test is not whether any additional documents might conceivably exist, but whether DCRA's search for responsive documents was adequate. *Weisberg*, 705 F.2d at 1351. Based on DCRA's description of its search, which it provided us in response to your appeal, we find that the search DCRA conducted was adequate.

Conclusion

Based on the foregoing, we affirm the DCRA'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: Erin Roberts, FOIA Officer, DCRA (via email)