

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



Mayor's Office of Legal Counsel



October 3, 2017

VIA ELECTRONIC MAIL

Mr. Shuntay Brown

RE: FOIA Appeal 2017-166

Dear Mr. Brown:

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”), on the grounds that the District of Columbia Water and Sewer Authority (“DC Water”) improperly denied your request for certain records.

Background

On March 17, 2017, you submitted a request to DC Water seeking the date that DC Water and the landlord at a particular property replaced the lead service pipe and the cost and type of pipe that was removed and replaced. DC Water denied your request on May 23, 2017, stating that in order to receive the records you requested, you must provide proper authorization from the owner of the subject property.

You appealed DC Water’s denial to this Office on the grounds that it was improper. This Office notified DC Water of your appeal, and it responded on October 2, 2017.¹ In its response, DC Water indicated that it reconsidered its initial denial on the basis of privacy concerns and conducted a search for the records you requested. The results of the search were attested to in a declaration submitted by Michael J. Walsh, the database manager for the Lead Service Replacement Program at DC Water. Mr. Walsh stated that he searched DC Water database records pertaining to lead service line replacement but found no records associated with the property you identified. He further explained that property owners are not required to report replacement of their water service lines to DC Water; therefore, it is possible that the water service line at the subject property has been replaced without notification being provided to DC Water.

¹ A copy of DC Water’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).

You initially appealed to this Office on the grounds that DC Water improperly denied your records request. Upon receipt of your appeal, however, the agency reconsidered its denial and conducted a search for the documents you requested. DC Water concluded that no records exist that are responsive to your request. As a result, we consider whether DC Water 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, DC Water identified the relevant locations where records responsive to your request would be found if they existed: electronic databases under the purview of the Lead Service Replacement Program, which is a unit within the Department of Engineering and Technical Services at DC Water. Michael J. Walsh, the database manager for the Lead Service Replacement Program, asserted that he conducted a search of DC Water's databases and determined that DC Water has no records that show that a water service line has been replaced at the property you specified. He further indicated that because property owners are not required to report replacement of their water service lines to DC Water, it is possible that the water service line at the property has been replaced without DC Water's knowledge.

Based on the declaration that Mr. Walsh provided to this Office, we find that DC Water made a reasonable determination as to the locations of the records you requested and conducted an adequate search of these locations.

Conclusion

Based on the foregoing, we affirm DC Water's final response to your request, insofar as the searches it conducted were adequate.

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: Victoria A. Fleming, FOIA Officer and Senior Paralegal, DC Water (via email)