

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-34**

April 3, 2017

VIA EMAIL

Ms. Stacy Amador

RE: FOIA Appeal 2017-34

Dear Ms. Amador:

This letter responds to the administrative appeal submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In the appeal, you assert that the District of Columbia Department of Corrections (“DOC”) did not adequately respond to a request for records under the DC FOIA.

Background

On December 28, 2016, your office submitted a FOIA request, on behalf of Mr. David Stewart, to DOC seeking records related to Mr. Stewart from a three month time period. On February 14, and March 7, 2017, DOC responded by providing responsive medical and psychological records.

This appeal challenges the adequacy of DOC’s search. The appeal asserts that DOC did not provide investigation records and that responsive DOC records should have included an incident form completed on or after November 2, 2016.

DOC provided this Office with a response to your appeal.¹ In its response, DOC describes an additional search that it conducted after your appeal was filed. After conducting this second search, DOC identified two classes of documents it had not found in its previous search: (1) records relating to an ongoing investigation; and (2) records relating to a complaint of sexual harassment. The records relating to sexual harassment were provided to your office but were redacted pursuant to D.C. Official Code § 2-534(a)(2) and (a)(3)(C), and the records relating to the ongoing investigation were withheld in their entirety pursuant to D.C. Official Code § 2-534(a)(3)(A)(i).²

¹ A copy of DOC’s response is attached.

² DOC’s response provides the incomplete citation of “D.C. Code § 2-534(a)(3).” We presume DOC is withholding the responsive records in their entirety pursuant to D.C. Official Code § 2-534(a)(3)(A)(i), which prevents disclosure of investigatory records that would interfere with enforcement proceedings.

In response, you have furnished to this Office and DOC a copy of an authorization for release of records, signed by Mr. Stewart.

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).

Adequacy of the Search

The primary issue raised by your appeal is whether DOC conducted an adequate search for the records at issue. 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 make a reasonable determination as to the locations of records requested and 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.* 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 appeal challenges the adequacy of DOC's search and requests a "more thorough search of records pertaining to ... Mr. David Stewart . . ." On appeal, DOC conducted an additional search and provided to this Office a more detailed description of its search efforts. DOC identified the relevant location for records responsive to investigative records as the Office of Investigative Services. DOC clarified that the type of investigation referenced on appeal is a type of record that is normally maintained in a segregated record system within the Office of Investigative Services, which had not been searched until DOC received additional information. When this segregated system was searched, DOC identified two categories of responsive documents: (1) records relating to an ongoing investigation; and (2) records relating to a complaint of sexual harassment. DOC provided you with a redacted copy of the records pertaining to a complaint of sexual harassment. DOC withheld in its entirety records relating to the ongoing investigation. Based on the description and documentation DOC provided in response to your appeal, we find that the search it conducted was adequate.

Personal Privacy – Reasonable Redaction

DOC redacted the names and other identifiers of third parties in the released report pursuant to D.C. Official Code § 2-534(a)(2) and (a)(3)(C). Summarily, this Office finds redactions of this type to be proper, and to be consistent with past decisions relating to protecting personal privacy interests when releasing records.

Interference with Enforcement Proceedings

The documents being withheld in their entirety are a separate matter. On appeal DOC has cited to "D.C. Code § 2-534(a)(3)" – which without further information is ambiguous. If DOC is instead citing to § 2-534(a)(3)(A)(i), a claim that release would interfere with an ongoing enforcement proceeding, then it must provide more clarity. Location of a record in an investigative file is not enough to prevent disclosure; in order to withhold an investigatory record a release must foreseeably harm an enforcement proceeding. *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (finding that agency failed to demonstrate that disclosure would interfere with enforcement proceedings). As a result, we find that DOC has not sufficiently described the potential interference to enforcement proceedings to allow withholding the responsive records in their entirety. Further, it does not appear that DOC addressed the segregability of the withheld records, whether portions may be disclosed without causing the harms contemplated under D.C. Official Code § 2-534(a)(3) et seq.

Conclusion

Based on the foregoing, we affirm DOC's decision in part and remand in part. Within 10 business days from the date of this decision, DOC shall either: (1) provide you with previously withheld records; or (2) clarify to you by letter the nature of each withheld record and the exemption asserted for each such record. This constitutes the final decision of this Office; you may file a separate appeal for a subsequent denial.

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: Oluwasegun Obebe, Records, Information & Privacy Officer, DOC (via email)