GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-47

April 24, 2017

VIA ELECTRONIC MAIL

Mr. Nathan Bresee

RE: FOIA Appeal 2017-47

Dear Mr. Bresee:

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 March 22, 2017, you submitted a FOIA request to DCRA for records relating to the company "AQUARIUS ENTERPRISES GP."

On April 7 2017, DCRA granted your request in part and denied your request in part, stating that it could not provide DCRA communications to you because you provided email addresses of third party non-government employees to be used as search terms, therefore release of the records would constitute an invasion of personal privacy pursuant to D.C. Official Code § 2-534(a)(2).

This Office received your appeal of DCRA's partial denial on April 7, 2017. In your appeal, you argue that there is no expectation of privacy between government employees and third parties, and that "[d]isclosure of communications between administrative agencies and third-parties is at the heart of D.C. Code 2-531." Your appeal further argues that DCRA has misapplied the privacy standard found in D.C. Official Code § 2-534.

This Office notified DCRA of your appeal. In response, DCRA advised us of the genesis of the search it conducted.[1] Upon receiving your request for DCRA communications, DCRA asked you to identify a government employee whose account should be searched. You responded by providing DCRA with the email addresses of several private individuals to be used as search terms. DCRA then denied your request on the basis that publicly identifying individuals who communicate with DCRA would create a chilling effect on concerned citizens reporting violations to the agency.

[1] A copy of DCRA's response to your appeal is attached.

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

One of the primary issues in your appeal is whether DCRA 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.*

DCRA did not satisfy the first element of conducting a reasonable search here because it failed to determine which record repositories were likely to contain responsive documents. Instead, DCRA improperly shifted the burden to you by refusing to conduct a search until you identified the government employees associated with the records you sought. This was improper, as your request as submitted was not overly broad or vague, and DC FOIA does not require a requester to know the names of agency employees in order to request their email communications. Further, once you complied with DCRA's request for additional information by providing email addresses of third parties to be searched (presumably because you could not identify the relevant DCRA employees), DCRA used your identification of specific email addresses as a basis to withhold records.

It was the responsibility of the DCRA FOIA officer to make a determination as to where the requested documents were likely to be located – a responsibility that can be met by identifying agency employees in the relevant programs and making inquiries about the nature of document creation and retention in those programs. *See Truitt v. Dep't of State*, 897 F.2d 540, 545 n. 36 (D.C. Cir. 1990) (quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess. at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271)). (finding a request to not be vague when "a professional employee of the agency who [is] familiar with the subject area of the request … [could] locate the record with a reasonable amount of effort.") Absent your direction to search a specific government employee's email account, DCRA should have made an effort to identify the relevant programmatic DCRA employees who were likely to have communicated about the subject of your request. As a result, we find that DCRA did not conduct an adequate search.

Reasonable Redaction

D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, one interpretation is that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009).

Here, DCRA has withheld documents in their entirety instead of redacting personally identifying information. DCRA must conduct an additional search and then revisit the issue of reasonable redaction, ensuring that any record or portion of a record withheld is done in a manner consistent with D.C. Official Code § 2-534(b).

Conclusion

Based on the foregoing, we remand DCRA's decision. DCRA shall conduct a reasonable search for responsive records and provide you with non-exempt responsive records (subject to redaction) on a rolling basis beginning 10 days from the date of this decision. You may challenge DCRA's subsequent response by filing a separate 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Keith Chambers II, Attorney Advisor Fellow, DCRA (via email)