

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-60**

May 8, 2017

VIA ELECTRONIC MAIL

Mr. Donald Durkee

RE: FOIA Appeal 2017-60

Dear Mr. Durkee:

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 challenge the response you received from the Office of Risk Management ("ORM") to a request you submitted under the DC FOIA.

Background

On April 5, 2017, you submitted a FOIA request to ORM for a copy of the inspection report pertaining to a tree located at 3912 Morrison Street, N.W. The inspection report is referenced in notes that Peter Clark, acting director of ORM's Torts Division, entered in an ATS Note Report¹ on January 5, 2017, for a specific claim.² You also asked for a copy of any request by ORM for an agency report on the tree since October 22, 2016 similar to a request described by an ORM employee in his ATS note entry of December 6, 2016, concerning a tree at 3908 Morrison Street, N.W.

On April 14, 2017, ORM responded to your request by indicating that it had conducted a search for the information you requested and enclosing records responsive thereto. ORM further stated, "Please note that Mr. Clark's ATS entry does not specify the location of the tree and that ORM . . . has already provided you with all tree inspection reports in your file for [a related claim]. The enclosed documents reflect all requests made to and responses by agencies (including attachments) concerning the falling of the tree formerly located at 3912 Morrison Street, NW."

You appealed ORM's response on the grounds that ORM provided you with 77 email exchanges and attachments, none of which appears to be the 2 reports you requested. As a result, you are uncertain as to whether the documents exist.

¹ ATS is the software program ORM uses to maintain electronic records of claims against the District.

This Office notified ORM of your appeal. ORM subsequently provided us with an explanation of the underlying response you received, in which the agency concluded that “Given the clarification by Mr. Durkee in his appeal that he is only looking for a single tree report – one that relates to 3912 Morrison Street, NW – ORM’s response to [his FOIA request] is to be nonresponsive, since that document does not exist in his claim file.”³

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

We have interpreted your appeal as challenging the adequacy of ORM’s search for the records you requested. DC FOIA requires that a search be 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).

³ A copy of ORM’s response is attached to this decision.

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.*

Your first request sought an inspection report of a City tree at 3912 Morrison Street N.W. that is described in a January 5, 2017 entry made by Peter Clark, acting director of ORM's Torts Division, in the ATS Note Report for a specific claim. ORM provided this Office with a copy of Mr. Clark's ATS entry. The entry provides, in relevant part, "inspectors inspected the tree months prior and found no issues." According to ORM, the original claim at issue indicated 3910 Morrison Street, N.W. as the location of a fallen tree. After Mr. Clark made his January 5, 2017 entry, it was clarified that the tree at 3912 Morrison Street, N.W. had fallen. Mr. Clark's remark that inspectors had observed the tree (located at 3910 Morrison Street, N.W.) and found no issues stems from the fact that ORM had previously received tree reports from the District Department of Transportation pertaining to trees located at 3906 and 3908 Morrison Street, N.W. Thus, Mr. Clark deduced that trees in the nearby vicinity of 3910 Morrison Street, N.W. were inspected and only the trees at 3906 and 3908 were found to be problematic. Mr. Clark's January 5, 2017 ATS entry does not reference an inspection report for a tree located at 3912 Morrison Street, N.W., and ORM accordingly maintains that it does not possess such a report.

Your second request sought a copy of any request by ORM for an agency report on the City tree located at 3912 Morrison Street N.W. since October 22, 2016 "similar to the request for an agency report described by Adnan Suleman in his ATS Note entry of 12/6/2016 concerning a City tree at 3908 Morrison Street NW." In response to your appeal, ORM advised us that the agency made general requests for reports on trees on Morrison Street, N.W. and within a limited area within the neighborhood, which would have included the tree you specified. ORM's requests were provided in the documents the agency disclosed you. In other words, ORM maintains that no tree report or request for a tree report related to 3912 Morrison Street, N.W. exists.

Having reviewed ORM's response to your appeal, as well as Mr. Clark's January 5, 2017 ATS entry, we find that ORM made a reasonable determination as to where the documents you are seeking would be located if they existed. We find that ORM conducted an adequate search for the documents, and we accept ORM's representation that no responsive documents were retrieved.

Conclusion

Based on the foregoing, we affirm ORM's response to your request 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Robert Preston, ORM (via email)