



SECRETARY OF THE
DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20004

VIA ELECTRONIC MAIL TRANSMISSION

May 11, 2017

Mr. Jarrod Sharp
370 East Diamond Avenue
3004
Gaithersburg, MD 20877

jarrod@jarrodsharp.com

RE: FOIA Appeal 2017-65

Dear Mr. Sharp:

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 Executive Office of the Mayor ("EOM") improperly withheld records you requested under the DC FOIA.

Background

On April 5, 2017, you submitted a request under the DC FOIA to EOM seeking "any and all processes, instructions, guidelines, procedures, and/or legal authority used in the processing of FOIA appeals."

On appeal you challenge the adequacy of EOM's search on the grounds that you do not believe that "FOIA appeals attorneys and staff do not rely on written instructions, guidelines, and legal authority in processing their FOIA appeals. On May 4, 2017, EOM provided the Office of the Secretary ("OS") with a response to your appeal.¹ EOM states that upon receipt of the April 5, 2017 FOIA request, it contacted the Mayor's Office of Legal Counsel ("MOLC"). Because MOLC typically adjudicates FOIA appeals, it determined that if any such documents existed, they would reside with that office. EOM inquired as to whether or not any such guidelines or instructions existed. MOLC's attorney informed EOM that it did not.

Upon receipt of OS's request for a response to your FOIA appeal, EOM states that it "had a follow-up conversation with MOLC to re-examine" original your request. EOM noted that

¹ A copy of EOM's response is attached for your reference.

in adjudicating appeals, MOLC relies on the FOIA Statute, D.C. Official Code § 2-537, as well as the D.C. Municipal Regulation 1-412. Additionally, MOLC relies on case law in adjudicating appeals. The case law used varies on a case-by-case basis, depending upon the content of the original request and the reasons for the denial. As such, there is no comprehensive record of “any and all” legal authority used in processing FOIA appeals, and any case law used for a particular appeal would be exempt from disclosure pursuant to D.C. Official Code § 2-234(a)(4) and (e), deliberative process privilege.

Consequently, EOM concluded, and found again, that no documents exist that are responsive to your appeal.

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).

Since EOM asserts that it has not withheld any responsive records from you, the primary issues in this appeal are your belief that more records exist and your contention that EOM conducted an inadequate 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, EOM identified the relevant locations for records responsive to your request: the Mayor's Office of Legal Counsel. Although you believe EOM has failed to disclose additional records that may exist, under applicable FOIA law, the test is not whether any additional documents might conceivably exist, but whether EOM's search for responsive documents was adequate. *Weisberg*, 705 F.2d at 1351. Based on the letter EOM provided this Office in response to your appeal, we find that the searches it conducted were adequate.

In terms of your request for "any and all legal authority used in processing FOIA appeals," under the law, an agency "has no duty either to answer questions unrelated to document requests or to create documents." *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). Under these principles, the courts have held that an agency is not required to provide statutes and regulations in response to a FOIA request. *See Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003)(agency not required to identify and list regulations meeting the description in its FOIA request); *West v. Jackson*, 448 F. Supp. 2d 207 (D.D.C. 2006)(citing *Landmark Legal Found. v. EPA*, FOIA request which sought HUD statutes, regulations, and policies regarding discrimination investigations, Section 8 housing, and emergency housing for the homeless improper); *Tolotti v. IRS*, 2000 U.S. Dist. LEXIS 12083 (D. Nev. 2000)(request for described regulations improper).

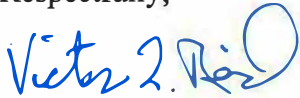
Accordingly, pursuant to the legal principles set forth above, your request for "any and all legal authority used in processing FOIA appeals," is improper under DC FOIA. *See Freedom of Information Act Appeal: 2014-41*, 61 DCR 004619 (May 2, 2014).

Conclusion

Based on the foregoing, we affirm the EOM'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,



Victor L. Reid, Esq.
Administrator, Office of Documents & Administrative Issuances
Office of the Secretary

cc: Erika Satterlee, Associate Director, FOIA Office, Executive Office of the Mayor (via email)
Lauren C. Vaughan, Secretary of the District of Columbia (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

VIA ELECTRONIC MAIL

May 4, 2017

Victor Reid
Administrator, Office of Documents & Administrative Issuances
Office of the Secretary

Re: FOIA Appeal

Dear Mr. Reid:

This letter is in response to the above referenced Freedom of Information Act (“FOIA”) appeal. The appeal arose out of the Executive Office of the Mayor’s (“EOM”) determination that there were no documents found to be responsive to the following request submitted by Mr. Jarrod Sharp on April 5, 2017:

“Any and all processes, instructions, guidelines, procedures, and/or legal authority used in the processing of FOIA appeals.”

Upon receiving the request, I contacted the Mayor’s Office of Legal Counsel (“MOLC”). Because MOLC adjudicates FOIA appeals, I determined that if any such documents existed, they would reside with that office. I inquired as to whether or not any such guidelines or instructions existed. MOLC’s attorney informed me that they do not.

In addition, upon receiving this request, I had a follow-up conversation with MOLC to re-examine Mr. Sharp’s request. In adjudicating appeals, MOLC relies on the FOIA statute, D.C. Official Code § 2-537, as well as the D.C. Municipal Regulation 1-412. Additionally, MOLC relies on case law in adjudicating appeals. The case law used varies on a case-by-case basis, depending upon the content of the original request and the reasons for denial. As such, there is no comprehensive record of “any and all” legal authority used in the processing of FOIA appeals, and any case law used for a particular appeal would be exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(4) and (e), deliberative process privilege. Consequently, EOM concluded, and finds again, that no documents exist that are responsive to Mr. Sharp’s instant request.

Sincerely,

Erika Satterlee
Associate Director,
FOIA Officer, Executive Office of the Mayor