August 26, 2024

**VIA ELECTRONIC MAIL**

[redacted]
Washington, D.C. 20004
[redacted]

**RE: Denial of a Public Records Request to the Office of the Deputy Mayor for Planning and Economic Development Under the Freedom of Information Act of 1976**
**# OOG-2023-006_AO**

Dear [redacted]:

This advisory opinion responds to your December 11, 2023, request for an advisory opinion [redacted]. You requested that the Office of Open Government (OOG) evaluate DMPED's denial of a request by an individual ("the Requester") for public records under the Freedom of Information Act of 1976 ("D.C. FOIA").[1] DMPED denied the request as unreasonable because searching for, retrieving, redacting, and delivering such a large number of e-mails would "significantly interfere with the operation of [DMPED]'s automated information system."[2]

It is the public policy of the District of Columbia government (the "District") "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."[3] To support the District's public policy, as Director of Open Government, I am authorized to "issue advisory opinions on the implementation of [D.C. FOIA]" pursuant to section 205c(d) of the Government Ethics Act of 2011.[4]

## I. QUESTION PRESENTED

This Advisory Opinion addresses the question of whether an agency may justifiably deny a D.C. FOIA request when the agency's information technology system would be disrupted or disabled by the process of reviewing emails that the agency received from the Office of the Chief

[1] Title II of Pub. L. 90-614, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*).
[2] (Quoting D.C. Official Code § 2-532(a-2) (section 202(a-2) of D.C. FOIA).)
[3] D.C. Official Code § 2-531.
[4] Title II of D.C. Law 19-124, effective October 30, 2018 (D.C. Official Code § 1-1162.05c(d)).

Technology Officer (OCTO). As explained herein, an agency may justifiably deny a D.C. FOIA request if the review process actually disrupts its information technology system.

Though DMPED already denied the D.C. FOIA request, I am issuing this advisory opinion to aid appellate review and disposition of future requests. I conclude that DMPED correctly denied the request as unreasonable. The justification for the conclusion follows.

## II. SIGNIFICANT FACTS

On August 17, 2023, the Requester used the District of Columbia's FOIAXpress Public Access Link portal (PAL)[5] to submit the D.C. FOIA request, including a public interest fee waiver request.[6] As later amended through counsel, his D.C. FOIA request sought "[o]ne copy of every document, email or audio recording to or from the director (or acting director) of DMPED[7] and one copy of every document, email or audio recording to or from any staff members of DMPED [between 01/01/2022 and 11/29/2023] containing any of the following": "5625 Connecticut", "Square 1866", "Sq. 1866", "Sq 1866", "NC-18", "NC-19", "Civic Core", "Ward 3 Vision", "3/4G", "3G", "NMU-4", "@btlaw.com", "@willco.com", or "@cassidylevy.com". The Requester asked for all attachments as well as the main bodies of the e-mails.

The Requester included a public interest fee waiver request to the extent that a non-profit organization[8] would use the records to "overs[ee] the up-zoning of four blocks of Connecticut Avenue" (*i.e.*, near the Chevy Chase Branch Library and the Chevy Chase Community Center, the site of the "Civic Core" theme within the Chevy Chase Small Area Plan) as "to land use, stewardship of public land, and preservation of public open space." Again, I am granting the assumption that the Requester's stated purpose would fulfil a general public interest and that DMPED would have granted a waiver to cover records falling under those enumerated subjects. The Requester also requested records outside of the issue of the Civic Core. On PAL, he entered his "Amount Willing to Pay ($)" as "0.00" and left "Willing to Pay All Fees" unchecked.

You had immediate concerns about the breadth of the search and called the Requester on August 31, 2023. The Requester provided some details about his underlying research goal. As you summarized the call in your follow-up e-mail to the Requester: "[Y]ou [(the Requester)] expressed the goal of this request as learning more information about the surplus, disposition, and zoning process & how it has played out over the past few years with regards to Chevy Chase Library, the Civic Center, and the zoning of upper Connecticut Ave[nue Northwest]. . . . [Y]ou [(the Requester)] were most interested in the communications that pertain to the city's plans for the area.

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[5] foia-dc.gov. The District of Columbia Data Policy set forth in Mayor's Order 2017-115, §§ II.A, IX.B.2 (Apr. 27, 2017), 64 DCR 004282, 004284, 004299 (May 5, 2017), requires that "each . . . office . . . subject to the administrative authority of the Mayor . . . [u]se [FOIAXpress] to track all [D.C.] FOIA requests and appeals."

[6] *See* D.C. Official Code § 2-532(b).

[7] The Requester probably meant "to or from the Deputy (or Acting or Interim Deputy) Mayor for Planning and Economic Development." There is no "Director of DMPED" as such.

[8] The Requester, an individual, did not allege his connection, if any, to the non-profit organization, but, for ease of analysis, I am assuming that he (1) was authorized to speak for the organization's purpose; (2) accurately represented the organization's purpose; and (3) would have shared with the organization any pertinent records DMPED delivered.

You [(the Requester)] also understood that the search terms as currently listed would turn up a lot more than this . . . ."[9]

You volunteered to help the Requester narrow the search string into reasonable parameters, but he did not accept or apply your assistance. In total, you sent at least five unanswered e-mails to the Requester (later, through counsel) to discuss your concerns about the scope of the search in comparison to his research goal. Finally, on November 28 and 29, 2023, the Requester (through counsel) proposed to alter the search terms and the time range-, but left at least two of the most general and common terms ("3G" and "Frumin" (*i.e.*, D.C. Councilmember Matt Frumin)) intact as disjunctive ("OR") search terms, and left the time-range at almost two years.

On December 4, 2023, the Office of the Chief Technology Officer (OCTO) informed you that it had searched its stored corpus of e-mails. That search yielded "approximately 16.5 thousand emails" consuming 39 gigabytes of storage, equivalent to over 10 hours of Netflix movies.[10] According to the details provided in the complaint, you were unable to convert the emails provided by OCTO to Adobe to enable you to review the records. The effort significantly slowed your computer such that you were unable to use your computer to perform tasks, such as opening Outlook, during work hours.

In your January 5, 2024, letter of denial on behalf of DMPED, you wrote that "DMPED is not required to search for records when the efforts would either be unreasonable or 'significantly interfere with the operation of the public body's automated information system.' "

## III. DISCUSSION

D.C. FOIA provides a right of access to public records and requires a reasonable search but limits an electronic search for records if it "would significantly interfere with the operation of a public body's electronic system." [11] D.C. FOIA also defines what it means to search for a record. The definition of term "search" is "to review manually or by automated means, public records for the purpose of locating those records which are responsive to a request."[12] This law mirrors the federal Freedom of Information Act (federal FOIA), which provides "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system."[13] Similar to D.C. FOIA, federal FOIA also details what a search means. It states, "the term 'search'

[9] (Emphasis added.)
[10] *See* help.netflix.com/en/node/87.
[11] D.C. Official Code §2-532(a-2).
[12] D.C. Official Code §2-532(f)(1A).
[13] 5 U.S.C. § 552(a)(3)(C).

means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."[14]

D.C. FOIA was modeled on the corresponding federal FOIA; accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law.[15] The analysis below demonstrates that the similarities between District and federal FOIA law permit a D.C. agency to refuse to fulfil a D.C. FOIA request when processing the request causes an actual interference with the agency's information technology system.

A. DMPED conducted a "search" as defined by Section 2-532(a-2) when its FOIA Officer attempted to review the files provided by OCTO.

DC FOIA requires a public body to "make reasonable efforts to search for records" (D.C. Official Code § 2- 532(a-2)); and to attest that a search for documents was reasonably calculated to discover responsive documents. *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Agencies are required to conduct a thorough, good faith search for records. *Goland v. CIA,* 607 F.2d 339, 352 (D.C. Cir. 1978)

To establish an adequate search for records, an agency need not search every record system. It must, however, "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 Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An adequate search is one that is "reasonably calculated to uncover all relevant documents," *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)

DMPED maintains that it is not required to process the instant FOIA request because it is too broad to process given the search terms provided. In accordance with DC FOIA, a request must "reasonably describe the desired record(s)." 1 DCMR § 402.4. A communication to a FOIA Officer that that does not reasonably describe a record is not considered a proper request for that record; when a FOIA officer receives such a communication, he or she is obligated to reach out to the requester to ask for supplemental information and to make "[e]very reasonable effort . . . to assist in the identification and location of requested records." 1 DCMR § 402.5. Once a requester has clarified the communication such that it "reasonably describe[s] the desired record(s)," then the request is "deemed received" by the FOIA officer and the deadline for the agency's response is set. 1 DCMR § 405.6.

In this matter, DMPED is required to conduct a reasonable search. The facts presented demonstrate that DMPED's FOIA Officer, with the assistance of OCTO, did attempt to conduct a

[14] 5 U.S.C. § 552(a)(3)(D).
[15] *Barry v. Washington Post Co.,* 529 A.2d 319, 321 (D.C. 1987); *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

reasonable search when he revised the search terms to conduct a search that would yield the results that the requester sought.

B. The failure of DMPED's information technology when its FOIA Officer attempted to use an application to review the files provided by OCTO is a "significant interference" under D.C. FOIA.

DMPED's FOIA Officer attempted to narrow the scope of the request to facilitate production, but the requester refused. DMPED's effort to fulfill the request, as written, caused an actual disruption to the agency's system. DMPED is not required to undertake a reasonable search of the electronic records if the search would "significantly interfere" with DMPED's automated information system. It is the agency's burden to demonstrate such an interference exists.[16]

A case that presents similar facts to this matter is *Pinson v. United States Department of Justice*, 80 F. Supp. 3d 211 (D.D.C 2015). In *Pinson*, the requester sought "[a]ny documents, records, or electronic messages containing the name or making reference to Jeremy Vaughn Pinson, which were generated after April 2007."[17] The United States Department of Justice (DOJ) responded advising the requester that it "[l]ocated one hundred and seventy-three pages responsive to his request, but that it would only release eighty-nine pages because the remaining eight-four pages were withheld under 5 U.S.C. § 552(b)(5) due to the nature of the documents." [18] The requester submitted a second FOIA request for "all settlement agreements entered into, or involving the Bureau of Prisons arising from civil litigation challenging the conditions, or conduct of staff, at the U.S. Penitentiary Administrative Maximum at Florence, Colo[rado]." [19] DOJ refused to conduct the search and requested that the requester narrow the request. The requester appealed to the Office of Information Policy (OIP), which affirmed DOJ's basis for the denial, providing that the search would be unreasonably burdensome.[20] OIP opined that DOJ cannot search for civil litigation related to a particular Bureau of Prisons facility because its system is not configured to "catalog its cases in such a way that it would be able to search" for the requested records.[21]

The court in *Pinson* held that the agency's claim that to search the system in the manner dictated by the search request was "unreasonably burdensome" was not supported by a "sufficient explanation" so the denial was not proper.[22] There was not sufficient evidence presented, such as affidavits explaining why the search is unreasonably burdensome, for the court to rule in the agency's favor.[23]

Similarly, DMPED's refusal to conduct the specific search requested from the Requester could be proper if the agency provides affidavits or other support detailing the reason that the specific search terms utilized resulted in a significant interference with its system. To make this

[16] *Pinson v. United States Department of Justice*, 80 F. Supp. 3d 211, 216 (D.D.C. 2015).
[17] *Id.* at 213.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 214.
[21] *Id.*
[22] *Id.* at 217.
[23] *Id*. at 216.

assertion in a manner that a court will accept, DMPED must have OCTO and its FOIA Officer affirmatively and specifically state there was and actual disruption of the system. There must be an actual determination of a disruption – a "proscriptive determination of undue burden" is prohibited.[24]

C. DMPED should have conducted the search that would yield the results of the request, even though the requester insisted upon specific search terms.

DMPED should have conducted the search that OCTO recommended under relevant case law. The Requester himself appeared to recognize, his terms, not refined such as with the use of mandatory ("AND") terms, would necessarily elicit e-mails outside of the subject of his request.

In *Pinson*, the court opined that the agency has the responsibility to conduct a search that is most likely to yield the records requested.[25] The court describes two cases where the agency, when presented with a burdensome search, resolved the issue by conducting a search for records in a manner it deemed most appropriate. While agencies are not expected to be "ad hoc investigators for requesters," an agency that conducted numerous searches to find records was deemed to have met its burden under federal FOIA (*citing Blakey v. DOJ*, 549 F. Supp. 362, 366-67 (D.D.C. 1996)).[26] Also, when an agency was not able to conduct a search as written, but instead conducted a broader search that produced the records sought, the court found that the agency met its burden under federal FOIA (*citing Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998)).[27]

In the same vein, DMPED is not bound to use these specific search terms in the execution of a reasonable search. It should conduct a search most likely to yield the results the requester is seeking. The Requester's list of keywords and phrases was overinclusive to retrieve the records requested. The request for any e-mail containing even one of the following overbroad terms would necessarily generate unresponsive records. OCTO estimated that the search would produce 16,500 e-mail records, many of which would not be responsive. As DMPED advised, the Requester did not limit his request to focused terms or concepts, like "zoning," "planning," "stewardship," or "preservation" (or their related grammatical forms), that would likely yield the records sought. However, instead of abandoning the search altogether because of the burden to the system, DMPED should have conducted the search using the terms the FOIA Officer and/or OCTO believed would produce the records requested.

## IV. CONCLUSION

The FOIA requester insisted on this specific search instead of the search the agency determined would yield the results he requested without compromising its system. It is permissible for an agency to refuse to conduct a search that would compromise its system; however, this does not relieve the agency from conducting a search which may yield the results the requester is seeking. When faced with a demand to conduct a specific electronic search, the agency is not

[24] *Fraternal Order of Police v. District of Columbia*, 139 A.3d 853, 863 (D.C. 2016).
[25] *Pinson* at 216.
[26] *Id.*
[27] *Id.*

bound by the specifics of that request. The agency's FOIA Officer should instead conduct an electronic search that will yield the records the requester is seeking that will not compromise its systems.

Please contact me or OOG staff (open.govoffice@dc.gov) if you want to discuss this matter further.

Sincerely,

Niquelle M. Allen

Niquelle M. Allen, Esq.
Director of Open Government
Board of Ethics and Government Accountability