

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



May 13, 2017

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser
D.C. Open Government Coalition
P.O. Box 73771
Washington, DC 20056
fmulhauser@aol.com

VIA ELECTRONIC MAIL

Ms. Archana Vemulapalli
Chief Technology Officer
Office of the State Superintendent
of Education
810 1st Street, N.E. Ninth Floor
Washington, DC 20002
archana.vemulapalli@dc.gov

RE: OOG-0004_5.13.17_FOIA AO

Dear Mr. Mulhauser:

The Office Open Government (OOG) is in receipt of your April 13, 2017 request for a Freedom of Information Act (FOIA) advisory opinion on the legality of OCTO's¹ use of search request forms which require a FOIA requestor to provide both the name of the sender and the recipient of an email to conduct the search for responsive records.

The foregoing non-binding legal advisory opinion is issued by the OOG pursuant to section 503(c) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593(c)), which empowers the OOG to issue advisory opinions on the implementation of Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*), the Freedom of Information Act of 1976.

This legal advisory opinion resolves the issue of whether a FOIA request that provides the agency with an individual's name whose email box is to be searched and a specific date range for the search constitutes a reasonable description of public records sought under FOIA.

¹ OCTO was established by section 1812 of the Fiscal Year 1999 Budget Support Act of 1998, effective March 26, 1999 (D.C. Law 12-175; D.C. Official Code § 1-1401).

This issue is not a case of first impression in the District of Columbia and was decisively answered by the D.C. Court of Appeals in *FOP v. District of Columbia*, 139 A.3d 853 (2016) (*FOP*). In the *FOP* case the court held that a request for emails from a discrete time period that are sent to or by particular individuals, or that are about a particular entity constitutes a reasonable description of the public records in compliance with FOIA. The court also held that a request which meets these criteria does not require further clarification by the requestor to the agency. Since the description of the emails in the instant case mirrors those of the requestor in the *FOP* decision, the *FOP* court's holding is dispositive of this issue.

BACKGROUND

On February 23, 2017, the Office of the State Superintendent of Education (OSSE) received the following FOIA request² from Mr. Fritz Mulhauser:

Please provide all emails (in the period January 1, 2017, to the date of search) to or from Catherine Dellinger and any member of the staff at the Office of the State Superintendent of Education. (Date Range for the Record Search: From 01/01/2017 to 03/01/2017.

In a February 26, 2017, electronic correspondence with "foia,osse" as the addressee, Mr. Mulhauser provided the correct name of the individual whose email box was to be searched to Catharine Bellinger. Mona Patel's electronic response to Mr. Mulhauser on February 27, 2017 states:

Good morning,
Thank you for reaching out with the correction. I would like some clarification on whose emails you are requesting – we have a large body of personnel and cannot search every individual email box.³
Please provide me with names of individuals.
Thank you for your assistance and cooperation.

Mr. Mulhauser's electronic response to Ms. Patel later that same day modified his original request by providing the names and email addresses of OSSEE staff and states:

Requiring requestor to know all possible addresses among staff of agency (because of inability to search for "all agency staff" is unreasonable. But for now, please search for:
Hanseul Kang, Superintendent, plus "leadership team" shown on website:

- * Donna Anthony<<mailto:Donnam.Anthony@dc.gov>>, Assistant Superintendent of Health and Wellness
- * Gretchen Brumley<<mailto:Gretchen.Brumley@dc.gov>>, Director of Student Transportation
- * Thomas "Tom" Fontenot<<mailto:Thomas.Fontenot@dc.gov>>,

² The request was assigned to Mona Patel as 2017 –FOIA-02041.

³ The D.C. Court of Appeals was unmoved by the defendant's contention that the number of email boxes to be searched in the *FOP* case were too numerous. In response to this argument that court stated: "[O]n this record we have no idea why searching all of MPD's email accounts was infeasible, much less why it might have been reasonable for her to limit her search to the eight accounts selected." *FOP*, at 865, 866.

Chief Information Officer

* Sarah Jane Forman<<mailto:SarahJane.Forman@dc.gov>>, General Counsel

* Elizabeth Groginsky<<mailto:Elizabeth.Groginsky@dc.gov>>, Assistant Superintendent of Early Learning

* Jessie Harteis<<mailto:Jessie.Harteis@dc.gov>>, Deputy Chief of Staff

* Amy Maisterra<<mailto:Amy.Maisterra@dc.gov>>, Assistant Superintendent of Elementary, Secondary & Specialized Education

* Antoinette Mitchell<<mailto:Antoinette.Mitchell@dc.gov>>, Assistant Superintendent of Postsecondary and Career Education

* Patience Peabody<<mailto:Patience.Peabody@dc.gov>>, Director of Communications

* Paris Saunders<<mailto:paris.saunders2@dc.gov>>, Agency Fiscal Officer

* Pete Siu<<mailto:Pete.Siu@dc.gov>>, Director of Talent and Human Resources

* Shana Young<<mailto:Shana.Young@dc.gov>>, Chief of Staff

Due to the information he received from OSSE regarding his FOIA request, on March 1, 2017, Mr. Mulhauser sent an electronic correspondence to Niquelle Allen, OCTO's FOIA Officer seeking clarity about how to transmit a FOIA request to OCTO. The correspondence states:

I have a FOIA request. It is not clear how to submit it.

OCTO appears not to be listed as one where requests are submitted through the FOIXpress portal.

Yet OCTO is listed in the table of those where requests should go to the FOIA officer. Perhaps a request goes to another office such as EOM?

Later that same day, Ms. Allen sent an electronic response to Mr. Mulhauser which said if the request was for OCTO's records that he should submit the FOIA request to her at Niquelle.Allen@dc.gov.

In response, on March 3, 2017, Mr. Mulhauser submitted a FOIA request to Ms. Allen for "all records related to an OCTO policy that the office limits searches of DC government employee email in response to agency requests (submitted based on FOIA requests) – specifically that in the case of searches requested of incoming email, a name of sender and possibly agency staff member recipient(s) are both needed. The request includes formal policies or internal guidance, as well as any writing or emails establishing the policy by announcement to staff, explaining the policy to agencies, training materials (slide, handouts, etc.) or any other relevant record⁴" The date range for the request was from January 1, 2015 forward.

On April 13, 2017, Ms. Allen provided an electronic response to Mr. Mulhauser that included the following as responsive documents to the FOIA request: (1) Mayor's Order 2088-88, dated June 18, 2008 (Mayor's Order) whose subject is "Access to Email Traffic of District Government

⁴ Mr. Mulhauser's FOIA request provided the reason why he was seeking this FOIA request and cited the following example to illustrate the change in OCTO's policy: "DC government agencies formerly ask OCTO to search for emails from an external sender to any address associated with staff of any agency. Please search for email from V> Putin to any member of the staff of the CIA."

Employees”]; and, (2) the CTO⁵’s Email Search Request form (Search Form). Embedded within the email text was the court decision styled *Dale v. Internal Revenue Service*, 238 F. Supp. 2d 99 (2002) (*Dale*). Mr. Mulhauser responded to Ms. Allen that same day. In relevant part his response states:

The pages that you sent do not describe any policy such as I asked about, that prohibits searches and requires OCTO to respond without any substantive review.

You sent an OCTO search request form. It requires a mailbox entry for the sender and recipient. But the design of the form requires a basis in law and regulation; a form can only impose restrictions on access of the public records for which there is no authority. The records you provided do not show any basis in law or policy for that limit.

For your information, agencies that have denied search for “email form X to all staff of agency Y have cited OCTO policy” not the statutory provisions in D.C. Code {sic} 2-532(c) that requests reasonably describe the records. The case you cited also provides no authority in this regard.

Using these explanations of the correct legal standard, it should be clear that a request for “all emails between X and any employee of agency Y is precise enough to qualify as reasonable.

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. Subject to certain enumerated exemptions, “a public body, upon request reasonably describing any public record, shall within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.” D.C. Official Code § 2-532(c)(1).

The Request Meets the Statutory Mandate of Reasonably Describing a Public Record.

Mr. Mulhauser’s initial February 23, 2017, FOIA request⁶ described the public records as follows:

. . . all emails (in the period January 1, 2017, to the date of search) to or from Catherine Dellinger and any member of the staff at the Office of the State Superintendent of Education. (Date Range for the Record Search: From 01/01/2017 to 03/01/2017.

⁵ This acronym stands for the Chief Technology Officer.

⁶ On February 27, 2017, Mr. Mulhauser provided OCTO a list of specific names of individuals whose email mailboxes were to be searched for responsive records. In the *FOP* case, OCTO indicated it needed the same information and would be able to conduct a search on that basis.

The description which the *FOP* court determined reasonably described the public records that the plaintiff was seeking from OCTO and the Metropolitan Police Department was as follows:

(1) “all email sent to or from Mark Tuohey, including but not limited to or from his email addresses at two law firms, Brown Rudnick LLP and Vinson and Elkins LLP, and one address at the Washington D.C. Police Foundation; (2) all email sent to or from Eric Holder, including, but not limited to all email sent to or from his email address at the law firm Covington & Burlington LLP; (3) all email referencing or mentioning the Washington D.C. Police Foundation. *FOP* stated that it sought the documents from these categories generated over a four-year period, from November 1, 2006 to present.” *FOP*, at 855.

The *FOP* decision makes it abundantly clear that a FOIA request for emails reasonably describes a public record when the request states a specific time frame and identifies a particular sender or recipient of the email. The court’s language in *FOP* is unambiguous and states:

As we read *FOP*’s request, it reasonably described what *FOP* sought. *FOP* requested MPD emails from a discrete time period (November 1, 2006 to September 24, 2010) that were sent to or by particular individuals (Eric Holder and Mark Tuohey), or that were about a particular entity (the Washington, D.C. police Foundation). *We fail to see why MPD or OCTO struggled to discern what was meant by this request. Ibid*, at 861 (Emphasis added).

Mr. Mulhauser’s initial February 23, 2017, FOIA request⁷ described the public records he was seeking from OSSE in the following manner:

. . . . all emails (in the period January 1, 2017, to the date of search) to or from Catherine Dellinger and any member of the staff at the Office of the State Superintendent of Education. (Date Range for the Record Search: From 01/01/2017 to 03/01/2017).

Analogous to the public record request in the *FOP* case, Mr. Mulhauser’s request states a discrete time period (January 1, 2017 to March 1, 2017) for emails that were sent to or by particular individuals (to or from Catherine Dellinger and any member of the staff at the Office of the State Superintendent of Education). Strengthening the case for the reasonableness of the description of Mr. Mulhauser’s request is his subsequent identification by name and email address of the senders or recipients of Catherine Dellinger’s emails as the “staff of the State Superintendent of Education.” Mr. Mulhauser’s modified description of the public records is more specific than the request the court stated as reasonably describing the records sought in the *FOP* case, where no recipients of the emails or their email addresses were identified. Based on the foregoing case law and reading of the FOIA statute, the OOG finds Mr. Mulhauser’s request complies with FOIA’s reasonable description standards.⁸

⁷ On February 27, 2017, Mr. Mulhauser provided OCTO a list of specific names of individuals whose email mailboxes were to be searched for responsive records. In *FOP*, OCTO indicated it needed the same information and would be able to conduct a search on that basis.

⁸ Pursuant to 1 DCMR § 402.4, “A request shall reasonably describe the desired record(s). Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied.” 1 DCMR § 402.1 provides, “A request for a record of an agency may be made orally or in writing and shall be directed to the particular agency.” Mr. Mulhauser’s request clearly meets these regulations.

Based on the identical description of the emails in Mr. Mulhauser's initial request with that in *FOP*, FOIA does not require that he provide OCTO the additional information they requested. This is because the court found the description of the records in *FOP* legally sufficient under FOIA.⁹

OCTO Misstates FOIA Law to Support its Unlawful Practice.

To justify the need for names of both the sender and recipient of email to conduct the search for responsive records, OCTO relies on *Dale v. IRS*, 238 F.Supp. 2d (2002). The court in *Dale* rightly found that the FOIA request did not reasonably describe to the agency the records the plaintiff was seeking.¹⁰ In reference to the failure of this request to comply with the requirements of federal FOIA, the court stated:

Such a request does not describe the records sought with "reasonably sufficient detail" in light of both statutory guidance and case law. Notwithstanding the IRS's initial August 27, 2000, letter explaining the additional information needed, Dale did not provide the necessary reasonably specific information to perfect his FOIA request. See 26 C.F.R. § 601.702(c)(4)(i)(A). Nor did he direct his search requests to specific regional offices from which he sought records. Dale's broad request would not permit an IRS employee to locate the records with a "reasonable amount of effort," since his FOIA request does not specify what records he seeks, for what years, and located at which office of the IRS. Dale's FOIA request was for "any and all documents, including but not limited to files, that refer or relate in any way to Billy Ray Dale." Compl., Ex. 1 (letter from Dale to IRS dated July 13, 2000) (emphasis added). Such a request does not describe the records sought with "reasonably sufficient detail" in light of both statutory guidance and case law. Notwithstanding the IRS's initial August 27, 2000, letter explaining the additional information needed, Dale did not provide the necessary reasonably specific information to perfect his FOIA request. See [26 C.F.R. § 601.702\(c\)\(4\)\(i\)\(A\)](#). Nor did he direct his search requests to specific regional offices from which he sought records. Dale's broad request would not permit an IRS employee to locate the records with a "reasonable amount of effort," since his FOIA request does not specify what records he seeks, for what years, and located at which office of the IRS. Absent some description of the actions the agency may have taken against him (investigation, audit, revocation of tax exempt status, etc.), the particular records sought, and any relevant dates and locations, agency employees would not know where to begin searching. On its face, then, Dale's request was deficient, and no effort was made to cure the deficiencies. *Dale*, at 104,105.

For the reasons already stated, the facts and rule of law in *Dale* are inapposite to the instant case and the *FOP* decision. Therefore, OCTO's reliance on *Dale* is misplaced and cannot be used to support its current email search requirements.

⁹ This is true even though Mr. Mulhauser modified the initial FOIA request as requested by OCTO.

¹⁰Notwithstanding its finding, the court held that despite the vagueness of the request, the IRS "itself determined the thrust of Dale's FOIA request and what responsive records the IRS possessed." *Dale*, at 105.

There is no Basis Under FOIA, Case Law or the Mayor's Order for OCTO to Require that a Requestor Provide Both the Name of the Sender and the Recipient of an Email to Conduct a Search for Responsive Records.

Relevant to this discussion is the language under the "Mailboxes to be searched*¹¹" section on the OCTO Search Form, which states:

Specify which users in the TO: field, the CC: field and the FROM: field. Please include the full email address of the accounts you want to have searched (i.e. John.Smith@dc.gov, johnsmith@yahoo.com etc. . .)

The Mayor's Order that OCTO provided in response to Mr. Mulhauser's April 13, 2017 FOIA request is no more than a directive as to how OCTO will respond to FOIA requests it receives from agencies to search email boxes. The Mayor's Order does not mandate the use of OCTO's Search Form. Ironically, the Mayor's Order was discussed and explained to the court in the *FOP* decision. The relevant language states:

The same day Ms. Cenatus wrote this letter, OCTO for the first time responded to FOP's FOIA request. Effectively disavowing a "substantial interest in the determination of [FOP's] request" under D.C. Code § 2-532 (d)(2), *OCTO stated that, pursuant to Mayor's Order 2008-88, it was "require[d]" to "transfer" all FOIA requests to "the agency within the DC government that is the subject of the requested emails." OCTO explained that the subject agency was responsible for "formulating an email search request, review of results, possible redaction or withholding, and transfer of final results to the requester."* OCTO then claimed that it was "unable to transfer [FOP's] request as required, or to process it in any way, because of its extreme and extraordinary breadth." OCTO stated that the request "identifie[d] no subject agency . . . and would require searching all of the approximately 39,000 email mailboxes of the District Government." OCTO thus asked FOP to "make [its] request specific enough to enable the appropriate agency or agencies to process them by identifying the email mailboxes to be searched." *FOP*, at 856, emphasis added.

The Mayor's Order, FOIA and case law do not mandate the use of the OCTO's Search Form to conduct searches for responsive records. In summary the *FOP* court's holding is dispositive on the issue of whether Mr. Mulhauser's request reasonably described the documents sought. The following statement from the *FOP* case makes this abundantly clear. The Court of Appeals stated:

Instead we conclude that FOP submitted a request that reasonably described the documents it sought, triggering MPD's and OCTO's obligations under D.C. FOIA to identify and produce responsive material. *Ibid*, at 864.

¹¹ Language on the Search Form makes clear that fields marked with the asterisk are required.

RECOMMENDATIONS FOR COMPLIANCE WITH FOIA

Taking into account the *FOP* decision, the OOG is duty bound to advise OCTO to immediately cease and desist the practice of requiring both the name of the sender and the recipient of an email to conduct a search for responsive records. If necessary, this would include OCTO making modifications to its Search Form to implement this recommendation.

CONCLUSION

The OOG finds OCTO's request that Mr. Mulhasuer provide both the name of the sender and the recipient of an email to conduct the search for responsive records in violation of D.C. Official Code § 2-532(c). For the reasons stated herein Mr. Mulhauser's initial request reasonably describes the documents sought. The OOG findings are supported by case law on analogous facts involving OCTO, the agency which is involved in the instant matter. The D.C. Court of Appeals has held that OCTO's current practice contravenes FOIA. The description of the public records in the instant case mirrors the description of public records in the *FOP* decision. Therefore, the *FOP* court's holding is dispositive of this issue. District government agencies including OCTO must strictly adhere to the *FOP* court's ruling in their future responses to FOIA requests.

Sincerely,



TRACI L. HUGHES, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability