

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-18

April 13, 2011

Lieutenant Alberta R. Holden

Dear Lieutenant Holden:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) (“DC FOIA”), dated March 18, 2011 (the “Appeal”). You (“Appellant”) assert that the Department of Real Estate Services (“DRES”) improperly withheld records in response to your request for information under DC FOIA dated February 5, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the following information:

1. The number and status of all equal employment opportunity employment complaints against the protective service police department for the past 5 years. Appellant specifically excluded personal identifying information, but requested information including the race and gender of each complainant.
2. The total number of vacancies and promotions (and presumably appointments) for the past 3 years, including race and gender of appointees and persons promoted.

In response, DRES provided records to Appellant for the first portion of the request and, after extending the response period for 10 days pursuant to D.C. Official Code § 2-531(d), provided records to Appellant for the second portion of the request. The production for the for the second portion of the request was made subsequent to the filing of the Appeal.

On Appeal, Appellant challenges the response to the first portion of the request as incomplete and consequently, in part, a denial of the FOIA Request. First, Appellant states that DRES did not furnish the race and gender of the complainants and that, as most complainants work for the agency, DRES should be able to compile that information. Second, Appellant states that the records were furnished for a 2-year period rather than the requested 5-year period.

In its response, dated March 31, 2011, DRES maintains that it has provided all agency records responsive to the request and states three contentions in support of its position. First, it contends that Appellant did not request records, as required by DC FOIA, but improperly requested an answer to a question. Second, reaffirming its prior position, it contends that the agency does not maintain records for the all of the information and for the entire period requested by Appellant. Third, it contends that documents, not requested by Appellant, may have information relating to the inquiry, but that such records are exempt from disclosure because such disclosure would constitute an unwarranted invasion of privacy.

Discussion

It is the public policy of the District of Columbia (the “District”) government 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 § 2-537(a). In aid of that policy, the DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that the DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

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), and 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).

As to the first contention of DRES, we believe that the FOIA Request was properly stated as it described records to be produced. Indeed, DRES was able to identify and produce responsive records. As to the third contention, as noted by DRES, the actual complaints and determination memoranda were not requested by Appellant and are not at issue.

The second contention of DRES goes to the heart of the matter. DRES states that it does not maintain records for the race and gender of complainants and that it only has records for last two years. We have no reason to doubt the veracity of this representation and it is dispositive of the matter. DC FOIA only requires production of records in the possession of an agency. While Appellant maintains that DRES should be able to compile that information, an agency is not required to create or maintain records.

It is well established that an agency is not "required to reorganize (its) files in response to (a plaintiff's) request in the form in which it was made," [footnote omitted] and that if an agency has not previously segregated the requested class of records production may be required only "where the agency (can) identify that material with reasonable effort." [footnote omitted].

Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978).

While Appellant may feel that DRES should have maintained the requested records, both with respect to content and for the specified time period, DC FOIA provides no warrant to second-guess the management practices of an agency in the compilation and maintenance of its records. FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). We are satisfied that DRES made a good-faith search.

Conclusion

Therefore, we UPHOLD the decision of DRES. This appeal is hereby DISMISSED.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Camille D. Sabbakhan, Esq.