

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

Freedom of Information Act Appeal: 2012-04

November 4, 2011

A. Scott Bolden, Esq.

Dear Mr. Bolden:

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 October 17, 2011 (the “Appeal”). You (“Appellant”) assert that the Department of Health Care Finance (“DHCF”) improperly withheld records in response to your request for information under DC FOIA dated August 23, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the records relating to District of Columbia Medicaid reimbursements to United Medical Center (“UMC”), a copy of the most recent change of ownership form submitted to the Centers for Medicare & Medicaid Services (“CMS”) filed on behalf of UMC, and all correspondence between DHCF and CMS relating to the ownership or operation of UMC by the District of Columbia since January, 2008.

In response, by email dated September 30, 2011, DHCF provided the requested records relating to District of Columbia Medicaid reimbursements to Appellant, but stated that it conducted a search for the other records requested and found no responsive documents.

On Appeal, Appellant challenges the response to the FOIA Request with respect to failure to produce a change of ownership form and any correspondence between DHCF and CMS. Appellant notes that UMC has undergone several ownership changes since 2008, including the most recent acquisition by the District of Columbia, and that submission of ownership and control information is required by federal law. “It is, therefore, inconceivable that there has not been any correspondence—not even a standard CMS change in ownership form—passed between DHCF and the Centers for Medicare & Medicaid Services since January, 2008 or submitted through the internet-based Provider Enrollment Chain and Ownership System (“PECOS”).”

In its response, by email dated October 28, 2011, DHCF reaffirmed its position. In support of its position, it provided declarations of the Manager of its Division of Public and Private Provider Services, Health Care Operations Division and its FOIA Officer. The Manager states that

Affiliated Computer Services, Inc. (“ACS”) is the fiscal agent for DCHF and maintains the provider files for all Medicaid fee-for-service providers, which files contain all documents and forms pertinent to a particular provider, including any change of ownership forms. The Manager requested that ACS provide DCHF with the change of ownership form, but that ACS, after searching for such form, stated that it could not locate the form. The FOIA Officer states that with respect to the correspondence requested, she requested that the Office of the Chief Technology Officer (“OCTO”), which processes electronic searches for agencies under DC FOIA, search the email accounts of John McCarthy, the former DCHF Medicaid Director, and David Chandra, the former DCHF Director of the Office of Health Care Innovation. These individuals “were responsible for leading the discussions with CMS with regards to the change of ownership and operation of UMC by the District of Columbia.” The request specified the search terms “UMC” or “United Medical Center” and the time period of January 1, 2008 to August 31, 2011. After review of the emails generated from this search, the FOIA Officer determined that there were no responsive emails.

On November 3, 2011, in response to an invitation to supplement its response to clarify the manner in which the search was conducted and obviate a possible reconsideration and delay to the resolution of the matter, DCHF indicated the following. First, paper-based files were searched as part of the search conducted pursuant to the FOIA Request and no responsive records were found. Second, the word processing files relevant to UMC are located on a shared file which is accessible to DCHF, such word processing files were searched, and no responsive records were found. Third, Messrs. McCarthy and Chandra were the only individuals in the agency involved in discussions with CMS regarding the ownership change and operations of UMC and such individuals terminated their service with DCHF after the date of the FOIA Request.

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, 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 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).

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. United States (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).

In this case, DHCF made reasonable determinations as to the location of records requested and made, or caused to be made, searches for the records. With the respect to the change of ownership form, it caused ACF, who would maintain such record on its behalf, to make a search for the record. With respect to correspondence between DHCF and CMS relating to the ownership or operation of UMC, it took the following steps. First, it identified the only individuals who dealt with CMS and caused a search of their email accounts to be made with terms which were reasonably calculated to locate the responsive records. Second, it searched word processing files of DHCF with respect to UMC, which should have located the electronic form of any correspondence. Third, it searched its paper-based files. However, it was unable to find any responsive records. Nevertheless, under the circumstances, this constitutes a reasonable and adequate search.

It is understandable that Appellant believes that responsive records exist and we would have expected the same. Indeed, we invited DHCF to supplement the administrative record in an attempt to determine the possibility of certain deficiencies in the search. However, DHCF has employed a search methodology which is reasonably calculated to locate such records and any deficiency in such methodology is not apparent to us. Accordingly, we are satisfied that DHCF has made a good-faith search and satisfied its statutory obligation.

Conclusion

Therefore, we uphold the decision of DHCF. The Appeal is hereby dismissed.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under 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: Irene Hui, Esq.