

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

Freedom of Information Act Appeal: 2012-21

January 20, 2012

Deborah Golden, Esq.

Dear Ms. Golden:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated December 30, 2011 (the “Appeal”). You, on behalf of the D.C. Prisoners’ Project of the Washington Lawyers’ Committee for Civil Rights & Urban Affairs (“Appellant”), assert that the Department of Corrections (“DOC”) improperly withheld records in response to your request for information under DC FOIA dated September 2, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records, including medical records, incident reports, disciplinary reports, internal investigations, and the institutional file, from April, 2011 to the present relating to a named inmate.

By letter dated November 28, 2011, DOC provided 140 pages of medical records, but stated that it could find no other records “other than the photograph that may be maintained in the institutional file.” It also stated that it had not completed the search of the institutional file. It offered to conduct an additional search if Appellant provided specific incident dates.

On Appeal, Appellant challenges the response to the FOIA Request. Appellant asserts that DOC did not conduct a reasonable and adequate search based upon the following:

1. Appellant knew that the named inmate had filed several Inmate Grievances, but none of the applicable forms was provided.
2. No records were provided from the institutional file. While conceding that certain records in the institutional file may have been created outside the time period specified in the

FOIA Request, Appellant states that the response of DOC indicates that the search of this file has not been conducted.¹

In its response, by email dated January 18, 2012, DOC modified its previous response. It states that it continues to search for the institutional file. However, it also states that it has located, and will produce, subject to redaction for privacy, the grievance records of the inmate and an incident report. In addition, DOC states that it has located a video, but also states that the video must be reviewed prior to making a determination regarding disclosure. Finally, it reaffirms that it has no other records requested. It offers to conduct an additional search if Appellant provides specific incident dates. In response to an invitation to supplement its response regarding the manner in which the search for records was conducted, by email dated January 19, 2012, DOC explains as follows. Its new FOIA officer, who had assumed his duties after the receipt of the FOIA Request, requested that its medical officer search for the medical records, that its records management liaison at the D.C. Jail search for the incident, disciplinary, and investigation records, and that the inmate institutional records archivist search for the institutional file. After receipt of the Appeal, the FOIA officer requested a follow-up search and, as stated above, the grievance records, incident report, and video were found. As of the date of the supplement, DOC indicates that the institutional file has been found, but that a search continues for other files.

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 § 2-531. 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 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

¹ Appellant also contests the photocopying charges assessed by DOC under the FOIA Request because DOC provided records which were outside the time period specified in the FOIA Request. It fixes the overcharge as \$9. However, we read our jurisdiction under D.C. Official Code § 2-537(a) to be limited to adjudicating whether or not a record may be withheld and not encompassing fee disputes. This is in accord with prior decisions under D.C. Official Code § 2-537(a). See MCU 406151, 51 DCR 4213 (2004); Matter No. 390592, 51 DCR 1527 (2004); OSEC 102301, 49 DCR 8641 (2002). We note that the time to be expended by each party and this office in resolving the issue exceeds the amount in controversy. (We also note that despite the contention that the presumed \$.25 per page fee exceeds a standard reasonable charge, this is the photocopying charge specified in DCMR § 1-408.1(c).)

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).

Appellant believes that, based on missing documents which it identifies, the search was not conducted in good faith or was not adequate. We believe that DOC has clearly established that it acted in good faith. Indeed, it has done a supplemental search for the inmate grievances that Appellant notes in its Appeal even though, as DOC correctly points out, it was not within the scope of the FOIA Request. Thus, the only issue is the adequacy of the 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. 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).

As we did in Freedom of Information Act Appeal 2012-04 and in Freedom of Information Act Appeal 2012-11, where we would have expected a search to produce a larger volume of records, we invited the agency to supplement the record to clarify the nature of the search. In this case, the supplementary response did not provide sufficient clarification as to allow us to conclude with the requisite degree of confidence that the search was reasonable and adequate. While DOC identified the DOC employees who would have knowledge of the location of the requested records and those employees searched agency records, it does not establish that it made reasonable determinations as to the location of records requested and made searches for the records in those locations. The fact that it has made an additional search and continues to find responsive records gives us pause. Nevertheless, it has made an additional search. Therefore, as ordering a new search would not seem to be productive, with the exception of medical records, which search does not appear to be in controversy, we are ordering DOC to provide what we sought when we invited them to submit their supplementary response: to state the manner in which each category of the requested records is maintained and the manner in which the search was conducted. DOC shall state which divisions maintain the records, in what form the records are maintained, e.g., electronic (email, word processing, or PDF files) or paper-based, and how such records were searched.

In its response, DOC stated that a more focused search could be made if it was given specific incident dates, citing the rule that a request must reasonably describe the records sought. In this case, the FOIA Request provided a date range beginning April 15, 2011, which appears to provide a reasonable description. In Freedom of Information Act Appeal 2011-06, records requested regarding calibrations for a mobile radar device or devices deployed at a particular location were kept in electronic form and were unable to be retrieved without information regarding a particular traffic citation. If DOC maintains records in such a manner as to require specific dates to conduct a search, it should explain in the statement required above.

Based on the foregoing, if Appellant is not satisfied with the search methodology employed by DOC, Appellant may submit a request for reconsideration identifying the deficiencies and proposing an appropriate order.

DOC has identified additional responsive records and has stated that it will provide them, subject to any applicable exemptions. This decision shall be without prejudice to Appellant to challenge any exemptions which are claimed.

Conclusion

Therefore, the decision of DOC is remanded for disposition in accordance with this decision, which disposition is summarized as follows:

1. Except as to medical records, DOC shall state the manner in which each category of the requested records is maintained and the manner in which the search was conducted. DOC shall state which divisions maintain the records, in what form the records are maintained, e.g., electronic (email, word processing, or PDF files) or paper-based, and how such records were searched.
2. DOC will provide additional responsive records which it has identified, subject to any applicable exemptions and without prejudice to Appellant to challenge any exemptions which are claimed.

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Oluwasegun Obebe, Esq.