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

Freedom of Information Act Appeal: 2012-22

January 18, 2012

Ms. Kimberly Russell

Dear Ms. Russell:

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 13, 2011 (the "Appeal"). You ("Appellant") assert that the Department of Employment Services ("DOES") improperly withheld records in response to your requests for information under DC FOIA dated November 21, 2011, and November 28, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records related to the processing of her unemployment claim. The FOIA Request consisted of eight categories of requests. By letter dated December 9, 2011, DOES provided one document, Form SF-50, in response to the FOIA Request and indicated that it could find no other records.

On Appeal, Appellant challenges the response to the FOIA Request. Based on the fact that the processing of her unemployment claim took more than 3 months and circumstances such as the fact that she received an email notifying her that a named DOES employee was processing her paperwork, Appellant believes that DOES did not conduct a reasonable and adequate search.

In its response, by email dated January 13, 2012, and supplemented January 17, 2012, DOES reaffirmed its position. In this case, DOES states that the search was conducted by examining the electronic database of unemployment compensation records and paper files. It also states that there was no search of emails because their "routine and customary business practice" is to request records via facsimile and receive them via facsimile. After the search, the only record that was responsive to the FOIA Request was the Form SF-50, which was provided to Appellant. In addition, DOES states that records regarding her communications with the agency was outside the scope of her 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 § 2-531. 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).

The crux of this matter is the adequacy of the search and the belief of Appellant that more records exist.

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).

In this case, based on the nature of the records requested, DOES made a reasonable determination as to the location of such records and made a search for the records in accordance with such determination. We find that the search was reasonable and adequate.

It appears that the result of the search may be, in part, a consequence of the formulation of the FOIA Request by Appellant. Appellant phrased the FOIA Request in terms of communications

between DOES and either her employer, a named individual, or a "federal desk" relating to District employment. Thus, while she was expecting records of DOES regarding her communications to them and regarding their processing of her claim, as DOES points out, this was not within the scope of the FOIA Request.

It also appears that the speculation of Appellant as to the existence of certain records is unfounded. While there was a question whether Appellant was discharged for misconduct, the determination letter attached to the Appeal by DOES indicates that her employer did not provide any evidence as to this issue and certain of the records requested do not, in fact, exist for that reason.

Appellant also asserts that certain of the records requested would be "found in, among other Departments, the Office of the Federal Desk." However, under DC FOIA, an agency is only required to search its own records, not those of other agencies and certainly not those of the federal government.

Finally, one portion of the FOIA Request stated: "Please provide an explanation as to how and when misconduct became part of the record involving the reason for Ms. Russell's termination." However, this was not a proper request under DC FOIA. Under the law, an agency "has no duty either to answer questions unrelated to document requests or to create documents." *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). See also *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). The explanation which Appellant seeks should be obtained by inquiry to customer service personnel at DOES.[1]

[1] In responding to the Appeal, DOES has explained why there are no records regarding misconduct and how it became part of the record. "When a person applies for unemployment, there are only 3 choices for reason for separation, Laid Off, Discharged for Misconduct, or Voluntary Quit. When the requestor applied over the telephone for unemployment benefits, the reason for separation was described as 'not a good fit'. The requestor was not 'laid off'. The requestor did not 'voluntarily quit'. Thus, the only option that fit her circumstances was 'discharged for misconduct'. This identifies the issue to be investigated by the agency and this designation is assigned by the agency. This designation did not come from the requestor or the employer. Thus, there are no documents sent by DOES to the employer that mention misconduct and there were no documents received from the employer that mentioned misconduct. The basis for removal supplied by the employer was 'unacceptable performance' as indicated in the document that was produced to the requestor. Further, the issue of misconduct is always raised when a person applies for unemployment compensation, as per law, it can disqualify a claim for benefits." Ironically, Appellant has obtained through the Appeal what she was not entitled to obtain under the FOIA Request.

Conclusion

Therefore, we uphold the decision of DOES. The Appeal is 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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Tonya Sapp, Esq.