**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**EXECUTIVE OFFICE OF THE MAYOR**
**OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**
**Freedom of Information Act Appeal: 2012-35**

April 5, 2012

Ms. Gail Collins

Dear Ms. Collins:

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 March 14, 2012 (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 October 26, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records associated with her social security number or certain married names which she set forth. By letter dated February 14, 2011, DOES provided responsive records. By email dated March 14, 2012, Appellant indicated that response of DOES was incomplete and provided the names of certain employers, including government agencies, where she worked. By email, DOES indicated that it did not have any records for any of those employers and provided a contact for the FOIA officer for the employer which was a District agency.

On Appeal, Appellant challenges the response to the FOIA Request as incomplete. Appellant states none of the records provided related to several named employers for whom she worked.

In its response, by email dated March 30, 2012, DOES reaffirmed its position. DOES stated that it "forwarded the request to the programs administered by DOES. The only documents found were in the Workers' Compensation Program." DOES supplemented its response by email dated April 2, 2012. It stated that the search request was sent to the Associate Director for each program administered by DOES. Those programs are workers compensation; unemployment insurance; Summer Youth Employment; Project Empowerment; and One Stop Career Centers. DOES also stated that, after receiving the email March 14, 2012 from Appellant, it searched the unemployment insurance database using the social security number of Appellant and found no additional results. DOES reaffirmed its statement that all responsive records had been provided to Appellant.

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).

An agency has the burden to establish the adequacy of its search. *See*, e.g., *Patterson v. IRS*, 56 F.3d 832, 840 (7th Cir. 1995). An administrative appeal under DC FOIA is a summary process and we have not insisted on the same rigor in establishing the adequacy of a search as would be

expected in a judicial proceeding. However, in this case, DOES has not established a sufficient basis to conclude that the search was, in fact, adequate.

In order to make a reasonable and adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. Such determinations may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files which the agency maintains. See, e.g., Freedom of Information Act Appeal 2012-05; Freedom of Information Act Appeal 2012-04, Freedom of Information Act Appeal 2012-26, Freedom of Information Act Appeal 2012-28, and Freedom of Information Act Appeal 2012-30. The determinations as to the likely locations of records would involve a knowledge of the record creation and maintenance practices of the agency. Indeed, in Freedom of Information Act Appeal 2012-28, DOES stated that its search was conducted by examining the electronic database of unemployment compensation records and paper files. It also stated 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. By contrast, in Freedom of Information Act Appeal 2012-28, while the agency identified its employees who would have knowledge of the location of the requested records and stated that those employees searched agency records, it did not establish that it made reasonable determinations as to the location of records requested and made searches for the records in those locations.

In this case, it appears that DOES has made a good-faith effort to locate all responsive records pursuant to the FOIA Request. Unfortunately, it has not placed on the administrative record an explanation sufficient for us to conclude that it has conducted a reasonable and adequate search. As was the case in Freedom of Information Act Appeal 2012-28 described above, it identified those employees who would have knowledge of the location of the records, but does not establish that it made reasonable determinations as to the location of records requested. Thus, as Appellant contends that a search should have produced records with respect to certain named employers, we cannot rule out the possibility that the records were not produced because some appropriate locations were not searched. On the other hand, we do not wish to order DOES to make unnecessarily duplicative searches. Accordingly, we will remand the matter DOES for disposition as follows:

1. DOES shall determine whether or not it has searched all relevant electronic databases for the requested records.

A. If DOES has searched all relevant electronic databases and has found no additional records, it shall so state in writing and indicate the manner in which such search was made.

B. If DOES has not searched all relevant electronic databases, it shall search all such relevant electronic databases and provide the responsive records, subject to any applicable exemption under DC FIOA, to Appellant. It shall also indicate, in writing, the manner in which such search was made.

2. DOES shall determine whether or not it has searched all relevant files for the paper-based forms of the requested records.

A. If DOES has searched all relevant files and has found no additional records, it shall so state in writing and indicate the manner in which such search was made.

B. If DOES has not searched all relevant files for the paper-based forms of the requested records, it shall search all such relevant files and provide the responsive records, subject to any applicable exemption under DC FIOA, to Appellant. It shall also indicate, in writing, the manner in which such search was made.

Conclusion

Therefore, we remand the matter to DOES for disposition as set forth above.

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.