

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

**Freedom of Information Act Appeal: 2012-61**

August 3, 2012

Ms. Deborah Lyles

Dear Ms. Lyles:

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 June 29, 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 June 1, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought certain specified records associated with her former employer, Premier Concierge Services, Inc. (“Premier”). Appellant has alleged that Premier had failed to pay unemployment taxes and file timely required returns. By letter dated June 19, 2012, and supplemented on June 19, 2012, DOES provided responsive records, with redactions, to Appellant. Between June 22, 2012, and June 27, 2012, Appellant and DOES exchanged email messages regarding the completeness of the response.

On Appeal, Appellant challenges the response to the FOIA Request as incomplete with respect to the following records alleged to be maintained by the Tax Division of DOES:

1. Forms MW508, 940, and FR-900B Sub-Employer filed by Premier for 2009 and 2010.
2. The employee earnings record (redacted) of the employees of Premier for 2009 through 2012.

In its response, by email dated July 17, 2012, DOES reaffirmed its position, as revised by a supplemental production on the same date of the employee earnings record (redacted) of the employees of Premier for 2011.<sup>1</sup> With respect to the first category of allegedly withheld records, DOES states that it searched its records and that such records were not in its possession. With respect to the second category of allegedly withheld records, DOES likewise states that it searched its records and that such records were not in its possession. In response to the invitation

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<sup>1</sup> DOES states that the July 17, 2012 supplement of the 2011 employee earnings record was made in response to supplemental request by Appellant.

of this office to clarify the manner in which the search for the records was conducted, DOES states as follows.<sup>2</sup> DOES explains that, pursuant to an investigation conducted as a result of the application for unemployment benefits by Appellant, and because Premier was not a registered business in the District of Columbia, the Tax Division of DOES conducted an investigation to determine where the business was registered. Accordingly, it was determined that the records in dispute in this Appeal would be found in the Tax Division. DOES further states: “The Tax Division searched paper files/word processing files, email files, and electronic files to locate documents responsive to the FOIA request. All documents found were provided to the requestor.”

### 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,

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<sup>2</sup> While DOES clarified the nature of the search for all records which were the subject of the FOIA Request, we will describe the nature of the search for the records which are alleged to be withheld and are the subject of the Appeal.

‘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 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 2012-22, 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 2012-29, 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, DOES made a reasonable determination as to the location of such records and made a search for the records in accordance with such determination. Based on the nature of the records requested, it identified the Tax Division as the unit which was likely to maintain such records and searched all of the types of files which it maintains. We find that the search was reasonable and adequate.

While Appellant may believe that DOES should have the records which are alleged to be withheld based on the fact that Premier is required to prepare them, there is no evidence that they were in fact prepared or provided to DOES by Premier. While it is not required to justify why it does not maintain the records requested, DOES does offer some insight on the issue.

Premier Concierge Services is not a registered business in the District of Columbia and thus is not required to file any documentation with the Tax Division with regard to its employees. . . . Premier Concierge Service is a Maryland business and despite having employees that work in the District of Columbia can make all filings with regard to its employees in Maryland. Thus, Premier Concierge Services was not required to file any documents with the District of Columbia and the documents that are the subject of the FOIA appeal are not in the possession of DOES. . . . DOES was only in possession of

the 2011 documents from Premier Concierge Services because they provided them in response to a request from the Tax Division.

Conclusion

Therefore, we uphold the decision, as revised, 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.