

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-94**

September 18, 2015

VIA ELECTRONIC MAIL

Ms. Sarah Fech

RE: FOIA Appeal 2015-94

Dear Ms. Fech:

This letter responds to the administrative appeal you filed with the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the District of Columbia Fire and Emergency Services Department (“FEMSD”) improperly withheld records you requested under DC FOIA.

Background

On July 24, 2015, you submitted a request to FEMSD seeking: (1) any record of a FEMSD dispatch to a “jail” or “correctional facility” involving a person with diabetes experiencing a diabetes-related medical emergency; (2) any record of a FEMSD patient who was in the custody of the Metropolitan Police Department or District of Columbia Department of Corrections when FEMSD provided medical services; and (3) any record of informal or administrative complaints made with FEMSD regarding the treatment of any patient with diabetes, along with the record of any action taken in response. Additionally, your request stated that personal information in the records could be redacted.

On August 17, 2015, FEMSD denied your FOIA request in its entirety on the grounds that the information is protected under D.C. Official Code § 2-534(a)(2) (“Exemption 2”)¹ and the Privacy Act of 1974, 5 U.S.C. § 552a.

On appeal, you challenge FEMSD’s denial, reiterating that your request indicated that personally identifying information should be redacted from the records. You also assert there is no violation of “Exemption 2” and 5 U.S.C. § 552a, because de-identifying the information would prevent any invasion of personal privacy. Further, you assert that D.C. Official Code § 2-534(b) requires that “any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure.”

¹ Exemption 2, often known as the personal privacy exemption, exempts from disclosure “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

FEMSD provided this office with a response to your appeal on September 11, 2015.² In its response, FEMSD reaffirms its decision to withhold the requested information under Exemption 2 to prevent an unwarranted invasion of personal privacy. FEMSD also claims that the information is protected by federal privacy laws, citing provisions of the Health Insurance Portability and Accountability Act (“HIPPA”), 45 CFR § 160.103, 45 CFR § 164.502, and 45 CFR § 164.514. FEMSD asserts that the only way it can legally release patient care information is if it receives an “Authorization of Release” for each patient whose records would be produced.

In its response, FEMSD also raises two new reasons for withholding the requested information. First, regarding the records for dispatch and services, FEMSD asserts that the information does not exist because the agency’s computer system is not programmed to query the type of information requested. FEMSD asserts that FOIA does not require agencies to create records but rather to provide access to records that exist and that an agency retains, citing *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 152 (1980) and *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982). Second, with respect to the request for administrative complaints, FEMSDS claims that it does not possess any responsive records because civil lawsuits against the district are handled by the Office of the Attorney General (“OAG”).

Along with its response, FEMSD provided documents to this office to review *in camera*, including a redacted “e-PCR.” This sample patient care report contains specific categories about the incident, the patient, the relevant dates/times, and present and pre-existing medical conditions.³ FEMSD also provided us with a “Diabetic Query,” which lists the number of incidents per month including those involving “diabetic problems.”

Discussion

It is the public policy of the District of Columbia 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). The right to inspect a public record, however, is subject to exemptions. *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). Accordingly, 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 first issue we shall address is FEMSD’s decision to withhold records in their entirety based on personal privacy under Exemption 2 and HIPPA. For Exemption 2 to apply there must be a substantial privacy interest in the requested information. *See Multi Ag Media LLC v. USDA*, 515

² A copy of DDS’s response is attached.

³ In the sample redacted patient care report provided, the patient had a pre-existing diabetic condition.

F.3d 1224, 1229 (D.C. Cir. 2008) (“[a] substantial privacy interest is anything greater than a *de minimis* privacy interest.”). There is no substantial privacy interest when information is provided without identifying data. See *National Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). Regarding HIPPA, the protections afforded under this federal statute are incorporated into DC FOIA under D.C. Official Code § 2-534(a)(6).⁴ 45 CFR 160.103, the regulation that defines terms under HIPPA, defines “protected health information” as “individually identifiable health information.” Therefore, if health information is not individually identifiable, it is not protected under HIPPA. As set forth in 45 CFR 164.514, HIPPA provides two methods by which personal information can be removed and health information can be designated as de-identified.⁵

We recognize that the requested records contain information exempt from disclosure under Exemption 2 and HIPPA; however, DC FOIA requires that after redactions are made to individually identifying information, the remaining portions of the records should be disclosed. See D.C. Official Code § 2-534(b). Having reviewed the redacted patient care report that FEMSD provided us, we conclude that FEMSD can and should disclose records responsive to your request with redactions sufficient to remove individually identifiable information as necessary under Exemption 2 and applicable federal laws and regulations.⁶

The remaining issues in this appeal pertain to the adequacy of the search FEMSD conducted to locate responsive records. DC FOIA requires that a search be 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).

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

⁴ This provision of DC FOIA exempts from disclosure information protected under a different statute if the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

⁵ The U.S. Department of Health & Human Services provides guidance and examples removing identifying information from health records:
<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/De-identification/guidance.html>

⁶ In the sample report provided to this office, FEMSD redacted the patient’s name, address, and all other personal information with the exception of a pre-existing diabetic condition. This is the type of redacted report that should be disclosed.

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 conducting an adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). The determinations as to likely locations of records would involve knowledge of the agency’s record creation and maintenance practices. See *Pub. Emps. for Env'tl. Responsibility v. U.S. Section Int'l Boundary and Water Comm'n.*, 839 F. Supp. 2d 304, 317-18 (D.D.C. 2012). Generalized and conclusory allegations cannot suffice to establish an adequate search or the availability of exemptions. See *In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

FEMSD claims that the records related to dispatch and services “do not exist because the Department’s Safety Pad system is not programed to query the detailed information requested in Appellant’s FOIA request in such a way that would be responsive to her request.” We interpret this to mean that FEMSD cannot search its computer system to produce reports based on a patient’s medical condition, whether the dispatch was sent to a correctional facility, or whether the patient was in the custody of the District’s Department of Corrections or the Metropolitan Police Department when FEMSD responded to the situation. While we accept FEMSD’s representations with regard to its computer search capabilities, these limitations do not mean that the records cannot be produced. To resolve this issue, FEMSD shall explain to you its capacity to conduct electronic searches, and you shall refine your search criteria accordingly. For example, if you provide a specific time period or address of dispatch, FEMSD may be able to produce responsive records. It would then be your obligation to search the records for the information you are seeking (i.e., diabetic conditions).

Lastly, we believe that FEMSD misconstrued your request for administrative complaints filed with FEMSD concerning the treatment of individuals with diabetes. FEMSD did not address your request for administrative complaints in response to your FOIA request, but it stated to this office that “the Department does not possess any records responsive to the information requested by the Appellant in Item 3. Ms. Fech can, however, contact the Office of the Attorney General (OAG), which defends civil lawsuits against District of Columbia agencies.” The complaints you appear to be requesting are not related to litigation; rather, they are administrative complaints filed with FEMSD. Accordingly, FEMSD shall determine if the records exist, where they are stored, search these locations for complaints related to treatment of issues related to diabetes, and disclose the results with redactions as necessary under DC FOIA.

Conclusion

Based on the foregoing, we reverse and remand FEMSD’s decision. Within 7 business days of this decision, FEMSD shall coordinate with you to refine the scope of your request based on the search capability of FEMSD’s records management system. Subsequently, FEMSD shall disclose records that are responsive to your refined request, with redactions made to personally identifying information in accordance with DC FOIA and other applicable statutes and

regulations. Finally, FEMSD shall conduct an adequate search for informal or administrative complaints related to treatment of individuals with diabetes. If the search reveals responsive records, those records shall be disclosed subject to applicable redactions and privileges.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor's Office of Legal Counsel

/s John A. Marsh*

John A. Marsh
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cc: Angela Washington, Information Privacy Officer, FEMSD (via email)

*Admitted in Maryland; license pending in the District of Columbia; practicing under the supervision of members of the D.C. Bar