

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-05**

November 2, 2015

Mr. Christopher Kutner

RE: FOIA Appeal 2016-05

Dear Mr. Kutner:

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 (“DC FOIA”). In your appeal, you assert that the Department of Insurance, Securities and Banking (“DISB”) improperly withheld records your client requested under the DC FOIA.

Background

On August 31, 2015, your client submitted a request under the DC FOIA to the DISB seeking a copy of the health insurance contracts issued to your client from 2003 to present by CareFirst, an insurance company, along with “any amendments, riders or supplemental provisions that describe [your client’s] benefits, applicable co-insurance, deductible, out-of-pocket maximums, etc.”¹

DISB’s FOIA coordinator responded to the request on September 11, 2015, by enclosing your client’s 2014 and 2015 contracts with CareFirst. The FOIA coordinator noted that “both documents were not in DISB’s files, but were submitted to us by CareFirst.” You responded to DISB on September 14, 2015, inquiring why policies, riders, and other related documents prior to 2013 were not included. DISB’s FOIA coordinator replied that FOIA does not require agencies to do research or create records to respond to a request. She further stated that “[a] search of the DISB’s Compliance Analysis Division program files . . . confirms that neither the electronic or paper based files contained or created any government or public documents. Nor did either file contain knowledge of the existence of such a document.” According to DISB, the 2014 and 2015 contracts it provided you were “not in DISB’s files, as they were not public records relating to the affairs of government and the official acts of officials or employees, but were submitted to [DISB] by CareFirst. It has been determined that . . . DISB has no records [of] responsive documents.”

¹ Your appeal refers to “six (6) years of requests to CareFirst and the DISB,” but provides no further details or documentation. Therefore, the scope of this appeal is limited to the FOIA request submitted to DISB on August 31, 2015.

You appealed DISB's decision on October 13, 2015, arguing that CareFirst "has deliberately withheld the subject policy," that you believe the insurance company² "may have destroyed evidence" and that DISB "may be in possession of other documents that were not released to us, like the policies, riders and description of benefits dated prior to 2013."

DISB responded to your appeal in an October 22, 2015 email to this Office reiterating that "DISB does not have documents responsive to the request." DISB further claimed that it had no obligation to do research to compile data that would be responsive to the FOIA request. Upon request from this Office, DISB provided a subsequent response that contained a short declaration describing the search it conducted for the records at issue.

Discussion

It is the public policy of the District of Columbia 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 . . ." D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18).

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 crux of this matter is the adequacy of the search and your belief 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).

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).

² We note that CareFirst is not a public agency and is therefore not subject to FOIA or this Office's jurisdiction.

To conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of records requested; and (2) 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). This first step 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 that the agency maintains. *Id.*

An agency can demonstrate that these determinations have been made by a “reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched” *Id.* Conducting a search in the record system most likely to be responsive is not by itself sufficient; “at the very least, the agency is required to explain in its affidavit that no other record system was likely to produce responsive documents.” *Id.* (internal quotations omitted).

Here, in response to your FOIA request, the DISB provided two documents: CareFirst contracts pertaining to your client for the years 2014 and 2015. DISB indicated that CareFirst submitted these contracts to DISB, but it is unclear whether the contracts were submitted to DISB in response to this FOIA request or in another context. In any event, the fact that CareFirst provided the documents to DISB is ostensibly the reason why DISB claims it “does not have documents responsive to the request.”

When this Office asked DISB to describe the search that led to its disclosure of your clients’ 2014 and 2015 contracts, DISB provided a declaration from Robley Backus, director of DISB’s Compliance Analysis Division. Mr. Backus described the search he conducted, in which he reviewed DISB’s complaint database “using the name ‘Hollander’ . . . All complaints are logged into this database . . . Since hard copy files are typically destroyed after six (6) months to twelve (12) months, the only place to find documents [] relating to a complaint over a year old is the complaint database.” Mr. Backus further indicated that he found one document responsive to your request – a “Scope of Coverage” document issued by CareFirst to your client, effective March 1, 2010. According to Mr. Backus, he forwarded this document to DISB’s FOIA officer on September 8, 2015. Notwithstanding this declaration, DISB made no reference to the 2010 scope of coverage in its correspondence to you or to this Office, to which it claimed that it possessed no documents responsive to your request.

We also find flaws with respect to the search Mr. Backus conducted. In his undated declaration, Mr. Backus states that he searched DISB’s complaint database for responsive records; however, your August 31, 2015 FOIA request did not ask for records pertaining to a complaint. Requests must be construed as drafted and not as how the requester or agency wishes they had been drafted. *Miller v. Casey*, 730 F.2d 773, 774 (D.C. Cir. 1984). The requested records were “the contract, insurance policy, summary and schedule of benefits.” It is unclear why the search was limited to complaints. DISB’s declaration does not indicate whether it determined the universe of possible record depositories where the insurance contracts might be located. Instead, DISB limited its search to a single database, using one search term - the requester’s last name.

DISB has paradoxically stated in its response to your appeal that despite having sent you two contracts, "DISB does not have documents responsive to the request." It appears that DISB has taken the position that documents that were not originally drafted by a government employee, but that are retained by government agency are not public records subject to FOIA. This is an incorrect interpretation of D.C. Official Code § 2-502(18), which defines "public record" as:

all books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Public records include information stored in an electronic format.

D.C. Official Code § 2-502(18).

Mere possession of a document by an agency makes it, subject to exemption, a public record; there is no authorship requirement for a record to be considered public. As a result of DISB producing two documents, it is unclear if the agency relied on its interpretation of the definition of public records in asserting that "DISB does not have documents responsive to the request."

Here, based on DISB's declaration and its responses to you and to our Office, we conclude that the search DISB conducted was not reasonable pursuant to its obligations under DC FOIA.

Conclusion

Based on the foregoing, we hereby remand your appeal. Within five (5) business days, DISB shall conduct a new search and provide you with: (1) the 2010 contract identified in the Backus declaration, subject to appropriate redactions; (2) an affidavit or declaration describing the new search conducted; and (3) all responsive records located, subject to appropriate redaction.

In conducting its second search, DISB shall:

- Identify all possible repositories likely to contain a responsive document;
- Search for the requested records, and not limit the search to complaints;
- Apply more search terms than the requester's last name (e.g, requester's policy number, the department file number); and
- Apply to its search the definition of public documents set forth in D.C. Official Code § 2-502(18).

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

cc: J. Carl Wilson, Acting General Counsel, DISB (via email)