

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2016-08**

November 9, 2015

VIA ELECTRONIC MAIL

Lucas M. Barnekow, Esq.

RE: FOIA Appeal 2016-08

Dear Mr. Barnekow:

This letter responds to the administrative appeal you submitted 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 Health (“DOH”) improperly withheld records the Public Defender Service for the District of Columbia (“PDS”) requested under the DC FOIA.

Background

On August 21, 2015, Carolyn Slenska, an employee of the PDS, submitted a request to the DOH for a copy of any and all records, files and information in DOH’s possession or control pertaining to the licensure of a particular physician, including her application for license, credentials, and other specified records. On September 28, 2015, the DOH responded to Ms. Slenska, stating that DOH had conducted a search of its records and could not find any information concerning the named physician in its files. Ms. Slenska inquired how this was possible since the named physician is licensed in the District through the year 2015 according to the medical license directory on the DOH’s website. DOH’s senior assistant general counsel responded, “[a]fter having checked with everyone connected with the licensing file for [the named physician], it has been determined that such file was either misplaced or lost, most likely in the move of DOH to its current location several years ago.” DOH further indicated that the physician is licensed until December 31, 2016, and any disciplinary action taken against her would be posted on DOH’s website.

On appeal, you challenge the DOH’s response to the PDS’ request, contending that DOH failed to establish that it made a reasonable or adequate search for the licensing file of the physician specified in the request and failed to consider whether any responsive records may be located somewhere other than the physician’s licensing file.<sup>1</sup> The PDS also argued that the disciplinary action database on DOH’s website contains records from 2009 to the present and does not satisfy PDS’ FOIA request because it does not include “records, files or other such information pertaining to the complaints or investigations that precipitated any such disciplinary actions, nor

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<sup>1</sup> DOH’s response to the appeal referenced a second named physician for whom you had requested information and for which you submitted a FOIA appeal. While this Office never received the appeal concerning the second physician, this decision applies equally to that request and appeal.

does it include records, files or other information about complaints or investigations that did not result in a public order of disciplinary action taken.”

This Office asked the DOH to describe its search for the physician’s records. The DOH provided responded on November 5, 2015,<sup>2</sup> describing its search of an electronic database, on-site file room, and off-site storage facility for the physician’s records. After multiple efforts on the part of DOH, on or around November 5, 2015, records for the physician were located at an off-site storage facility. The DOH stated that once it received the records, the records would be reviewed and disclosed subject to redactions for applicable exemptions under DC FOIA. On November 6, 2015, the DOH sent a follow-up response to clarify aspects of its search and plan for disclosure.<sup>3</sup> In its follow-up response, the DOH stated that in addition to records from the storage facility the DOH also located records related to licensure. The DOH attached both redacted and unredacted versions of the documents for this Office’s *in camera* review and reiterated that it would disclose to you records from the storage facility and from the electronic database subject to redactions for applicable exemptions under DC FOIA.

### 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. 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). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *See e.g.* D.C. Official Code § 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 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

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<sup>2</sup> A copy of the DOH’s response is attached.

<sup>3</sup> A copy of the DOH’s follow-up response is attached.

‘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).

To make a reasonable and adequate search, an agency must make reasonable determinations as to (1) the location of records requested, and (2) the 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). 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. *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).

In this matter, the DOH has adequately identified the locations for the requested records specifying the electronic database, file room, and storage facility where the responsive records could be located. Prior to the filing of your appeal the DOH did not adequately search those locations. After your appeal was filed, however, the DOH conducted a more thorough search and records were located in the storage facility and electronic database. As a result, we find that the DOH ultimately conducted searches that were adequate. The DOH has represented that it will disclose the responsive records discovered, subject to redactions made under applicable exemptions to the DC FOIA.

### Conclusion

Based on the foregoing, we find that your appeal is on moot on the grounds that DOH ultimately conducted an adequate search in connection with your FOIA request. Although we shall dismiss this appeal, you are free to assert any challenge to DOH’s disclosure by separate appeal.

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: Edward Rich, Senior Assistant General Counsel, DOH (via email)