

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel



October 4, 2017

VIA ELECTRONIC MAIL

Mr. Michael Dalton

RE: FOIA Appeal 2017-165

Dear Mr. Dalton:

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”), on the grounds that the Department of General Services (“DGS”) failed to adequately respond to your request for certain records.

Background

On August 8, 2017, you submitted a request to DGS seeking certified payroll records and wage determinations for 47 contractors involved with various projects in the District, which you identified in your request. On August 31 and September 8, 2017, you withdrew your request for records for 2 of the 47 contractors. DGS responded to your request on September 14, 2017, indicating that it provided you with records on September 13, 2017, pertaining to one of the contractors you identified. DGS further stated that “[d]uring our comprehensive search for the remaining records that would be responsive to your request, we were unable to locate or identify responsive records.”

Subsequently, you appealed DGS’ response to this Office on the grounds that the certified payroll records you are requesting are required by law to be submitted to DGS. The implication in your appeal is that because the law requires DGS to maintain the records you are seeking, the agency’s partial response to your request was inadequate.

This Office notified DGS of your appeal and it responded on October 3, 2017.¹ In its response, DGS indicated that upon receipt of your request, a program analyst in DGS’ Contracts and Procurement Division searched its files for responsive records. DGS determined that one of your requests was a duplicate and another referenced a project administered by the Office of the Deputy Mayor for Planning and Economic Development. Of the remaining 45 projects, 5 are on the electronic payroll system of the Department of Employment Services, to which DGS was

¹ A copy of DGS’ response is attached for your reference.

able to gain access; however, a search revealed that only 2 of the 5 contractors submitted records. Of the two contractors that submitted records, you had previously withdrawn your request for records pertaining to one; as a result, DGS provided you with records for the remaining contractor.

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 your appeal is that you believe DGS should possess more responsive records than it provided you because the District is required by federal law to maintain certain payroll records. DGS asserts that it conducted two searches (one initially in response to your request, and one after you submitted your appeal) and determined that of the 44 records at issue,² DGS possesses only records pertaining to a project that Progress Environmental LLC completed at Roosevelt High School. DGS provided you with these records on September 13, 2017. As a result, the issue we consider on appeal is whether DGS conducted an adequate search.

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. U.S. 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

² We say 44 because you withdrew 2 of your requests and DGS concluded that one of your requests was a duplicate.

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).

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 includes determining 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.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

In response to your request, a program analyst in DGS' Contracts and Procurement Division identified the relevant hard copy files and electronic databases where records responsive to your request would be found if they existed. DGS reviewed your request and determined that one request was a duplicate and one pertained to a project administered by the Office of the Deputy Mayor for Planning and Economic Development.³ By the time the search was conducted, you had withdrawn your request for 2 sets of documents. Thus, the program analyst searched hard copy and electronic files for the remaining 43 contractors. The search resulted in the retrieval of records for only one of the contractors you identified: Progress Environmental LLC, which performed a modernization at Roosevelt High School. DGS' Contracts and Procurement Division conducted a second search of hard copy and electronic records after you submitted the instant appeal to the Mayor and determined that the agency does not have any additional certified payroll records.

We understand your argument that the records you are seeking should exist pursuant to federal statutory requirements; however, the test under FOIA is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. We find here that DGS made a reasonable determination as to the locations of the records you requested and conducted two adequate searches of these locations.

Conclusion

Based on the foregoing, we affirm DGS' response to your request, insofar as the searches it conducted were adequate.

³ We interpret this assertion to mean that DGS does not have access to records associated with this project.

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.

Respectfully,

Mayor's Office of Legal Counsel

cc: Victoria Black Johnson, Program Support Specialist, DGS (via email)