

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-67**

May 19, 2017

VIA ELECTRONIC MAIL

Dalvaro K. Weaver

RE: FOIA Appeal 2017-67

Dear Mr. Weaver:

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 challenge the response you received from the Department of Human Services ("DHS") to your request for records related to the 801 East Shelter.¹

Background

On March 25, 2017, DHS received your request for records related to the 801 East Shelter. In its response, on April 24, 2017, DHS acknowledged 15 subparts of your request and asserted that it did not possess any records responsive to your request.

On May 4, 2017, your appeal was received by this Office. In your appeal, you assert that DHS must have at least some records responsive to your request because the 801 East Shelter is operated by the Catholic Charities of the Archdiocese of Washington ("Catholic Charities") pursuant to a contract with DHS. Additionally, you assert that the records are likely maintained and should be reported because the subject matter is in the public interest.

On May 18, 2017, DHS provided this Office with a written response to your appeal.² DHS' response explains that after further review it determined three agency divisions that may have access to responsive records: the Family Services Administration ("FSA"), Homeless Services Program ("HSP"), and Office of Program Review, Monitoring and Investigation ("OPRMI"). The FSA and HSP oversee DHS' vendor, the Community Partnership for the Prevention of Homelessness, of which Catholic Charities is a subcontractor. DHS explained that OPRMI,

¹ The FOIA request you attached to your appeal appears different from both the request DHS described in its denial letter and the one you described in your appeal; this determination will address the request as described in DHS' denial letter and your appeal. Additionally, your appeal references FOIA requests submitted to the Department of General Services and Catholic Charities; this determination will address only your appeal of DHS' denial because that is the only appeal for which you provided any information.

² DHS simultaneously sent you a copy of its response.

which performs monitoring of shelters and internal affairs, may also have responsive records. DHS provided a message from Catholic Charities indicating that Catholic Charities did not believe itself to be subject to FOIA. DHS concluded by requesting additional time to conduct its search and review its contractual relationship with Catholic Charities.

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).

Adequacy of Search

The primary issue raised in your appeal is whether DHS conducted an adequate search for the records at issue. 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 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 make a reasonable determination as to the locations 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). 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.* 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).

DHS' initial response to your request did not provide sufficient detail for this Office to determine whether the agency conducted an adequate search. DHS' response to your appeal indicates that upon further review, DHS identified the appropriate repositories for responsive records and is in the process of searching those locations. As a result, DHS is in the process of completing an adequate search.

One complicating factor is that Catholic Charities, a subcontractor of DHS' vendor TCP, potentially maintains records responsive to your request. Under D.C. Official Code § 2-532(a-3), "[a] public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function . . ." As a result, DHS must review the contracts with TCP and Catholic Charities to determine if, pursuant those contracts, records responsive to your request have been produced or collected.

Creating New Records

We note that the subparts of your request more closely resemble interrogatories or requests for DHS to create new records than a request for public records. An adequate search does not require FOIA officers to act as personal researchers on behalf of requesters. *See, e.g., Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters..."). DHS has no obligations under FOIA to create a new record or to answer interrogatories. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). As a result if the records do not already exist, DHS is not obligated to create the specific compilations of information you requested.

Conclusion

Based on the foregoing, we remand this matter to DHS. Within 10 business days of this decision, DHS shall: (1) conduct the additional search it described in response to your appeal; and (2) send you a supplemental response describing the subsequent search and provide you with any non-exempt responsive records.

This appeal is hereby dismissed; provided, that the dismissal is without prejudice. You are free to challenge DHS' subsequent response in a separate appeal to 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Robert C. Warren, Jr., Assistant General Counsel, DHS (via email)