GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-68

May 10, 2017

VIA ELECTRONIC MAIL

Mr. Robert Hornstein

RE: FOIA Appeal 2017-68

Dear Mr. Hornstein:

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 Youth Rehabilitation Services ("DYRS") to your request for monitoring reports, protocols, policies, and procedures for residential placements where DYRS has placed committed youth.

Background

On June 28, 2016, you submitted a request to DYRS for documents relating to DYRS placement of committed youth. In response, on February 13, 2017, DYRS granted your request in part and denied your request in part. DYRS denied part of your request and withheld responsive documents pursuant to the deliberative process privilege.

On April 26, 2017, your appeal was received by this Office. In your appeal, you assert that DYRS improperly invoked the deliberative process privilege, that it did not conduct an adequate search, and that it failed to produce a *Vaughn* index.[1] Specifically, you contend on information and belief that the lack of any documents relating to the Florida Institute for Neurologic Rehabilitation ("FINR") is indicative of an inadequate search.

DYRS provided this Office with a written response to your appeal, explaining that all previously withheld records have since been provided to you. DYRS asserted that when it initially responded to your request the responsive documents were still in draft form, but the documents have since been finalized and disclosed to you. Upon a follow up conversation with this Office, DYRS described the search that it conducted and explained that it has provided you with an

[1] Under DC FOIA, agencies are not required to create a *Vaughn* index at the initial administrative denial. *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) ("Agencies need not provide a Vaughn Index until ordered by a court after the plaintiff has exhausted the administrative process."), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996). However, agencies are required to explain why they are withholding each record in sufficient detail. 1 DCMR § 407.2(b).

additional document related to FINR. DYRS proffered to this Office that this production was gratuitous as "[i]t is not a monitoring report created by DYRS, and so is not directly responsive to any request made by the Requester, but rather was a document sent to DYRS by FINR relating to an allegation of improper use of force made by a youth who is placed there."

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 the Search

One of the issues raised in your appeal is whether DYRS 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).

This Office agrees with you that DYRS's search was inadequate. DYRS's response to this Office described the search that it conducted, which resulted in the discovery of a document that "is not a monitoring report created by DYRS, and so is not directly responsive to any request made by the Requester, but rather was a document sent to DYRS by FINR. . . ." This description of DYRS' search suggests that the agency may not have properly construed your request. Your request appears to be for all responsive records in the possession of DYRS and is not limited to documents created by DYRS. As a result of DYRS's interpretation of your request, it is not clear that DYRS has identified all likely record repositories where responsive records would be located if they existed.

Deliberative Process

DYRS has represented that it has provided to you all of the records that it previously withheld under the deliberative process privilege. This Office accepts DYRS's representation. As a result, this Office finds that the portion of your appeal dealing with the deliberative process privilege is moot.

Conclusion

Based on the foregoing, we affirm DYRS' decision in part and remand it in part. Within 10 days of this decision, DYRS shall: (1) conduct an additional search for all responsive records maintained by the agency, including those DYRS did not create; and (2) send you a supplemental response describing the subsequent search and any documents it yielded.

This appeal is hereby dismissed; provided, that the dismissal is without prejudice. You are free to challenge DYRS' 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: Ryan Miller, Assistant General Counsel, DYRS (via email)