

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



Mayor's Office of Legal Counsel

October 12, 2017

VIA ELECTRONIC MAIL

Ms. Natasha Rodriguez

RE: FOIA Appeal 2018-004

Dear Ms. Rodriguez:

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”) failed to provide you with a specific list that the Humane Rescue Alliance (“HRA”) is contractually required to provide to DOH on a quarterly basis.

Background

On July 10, 2017, you submitted a request to DOH for the “[q]uarterly report deliverable of contract CW42474 C.5.10.4 Known Managed Feral Cat Colony List.” DOH responded to your request via email on August 7, 2017. In its email, DOH indicated that it does not have information responsive to your request; rather, the only list of known feral cat colonies in DOH’s possession is from 2007, which DOH provided you. You responded to DOH’s email by advising DOH that the list is a “contractually required report” and by asking whether DOH is able to require the contractor to remit the data for the last 5 years. DOH replied that it had provided you with all responsive information in the agency’s possession in compliance with DC FOIA, and the issue of contract performance is under the purview of the contract administrator for the subject contract.

You appealed to this Office on October 4, 2017, on the grounds that DOH was unable to produce contractually required deliverables. You state in your appeal, “I am asking that DOH please request the contract deliverables as of October 2017, and redact the name and phone number of anyone person [sic] on the Known Managed Feral Cat Colony List.” This Office notified DOH of your appeal, and DOH responded on October 11, 2017.¹

DOH maintains on appeal that it is in full compliance with DC FOIA, having conducted a thorough search for information that would be relevant to your request and provided all such

¹ A copy of DOH’s response is attached.

information to you. DOH explained that as part of its search, the Animal Services Program contacted HRA, which indicated that it has not been preparing such a report, despite the contractual requirement.

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 (“FOIA”). *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).

In your appeal you do not appear to be challenging the adequacy of DOH’s search for the list you requested;² rather, you are asking DOH to enforce the terms of its contract and request from HRA the cat colony list as of October 2017.

It is well established that an agency is not obliged by FOIA to disclose documents it does not possess at the time of the request. *United States DOJ v. Tax Analysts*, 492 U.S. 136, 145 (1989) (“the agency must be in control of the requested materials at the time the FOIA request is made.”). Here, DOH has made clear that it has provided you with all responsive information in its possession. This representation is substantiated by HRA’s admission to DOH that it has not been preparing the reports. Under DC FOIA, if the Mayor determines that a public record is being withheld, she may order the public body to disclose the record immediately. D.C. Official Code § 2-537(a)(2). We accept DOH’s representation that it is not withholding any records from you. Therefore the only administrative remedy available under DC FOIA is not applicable here, as this matter is an issue of contractual compliance, not improper withholding.

Conclusion

Based on the foregoing, we affirm DOH’s response and dismiss your appeal. This constitutes the final decision of this Office.

² We will not engage in a lengthy analysis of the adequacy of the search because you are not contesting it, other than to note that DOH conducted an adequate search under the applicable case law.

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