

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel



October 24, 2017

VIA ELECTRONIC MAIL

Mr. Shuntay Antonio Brown

RE: FOIA Appeal 2018-11

Dear Mr. Brown:

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 Health (“DOH”) failed to adequately respond to your request for certain records.

Background

On November 27, 2016, you submitted a request to DOH seeking medical records related to yourself. On December 12, 2016, DOH informed you that it did not have any records responsive to your request.

You appealed DOH’s response based on your belief that records should exist. This Office notified DOH of your appeal, and it responded on October 11, 2017.¹ In its response, DOH describes its process of searching for responsive records, which it started on November 28, 2016. DOH’s response also asserts that its relevant program, which would have your records if the records existed, contacted you in December 2016, verified that it did not have responsive records, and instructed you to seek the records from your physician.

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.

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

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 your belief that DOH should possess records responsive to your request, despite DOH’s assertion that it does not possess the records. You do not offer any explanation for why you believe DOH should possess the records. 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: (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).

Here, DOH described the search it conducted in response to your request. In specific, the agency identified the program which would maintain the medical records responsive to your request if they existed, and then the program staff conducted multiple searches for your records. DOH further advised us that after determining that it did not possess records responsive to your request, DOH staff encouraged you to obtain the records from your physician. As a result, we find here that DOH made a reasonable determination as to the locations of the records you

requested and conducted an adequate search of these locations for responsive records in its possession.

Conclusion

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

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