

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel

February 20, 2018

VIA ELECTRONIC MAIL

Ms. Loretta Townsend

RE: FOIA Appeal 2018-74

Dear Ms. Townsend:

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 Metropolitan Police Department ("MPD") failed to adequately respond to a request you submitted under the DC FOIA.

Background

On October 5, 2017, MPD received your request for employment records related to your client, a former MPD employee. The request also sought copies of documents that MPD sent to your client's potential employers regarding her tenure at MPD.

MPD placed your request on hold to verify that you had authorization from your client to receive the employment records sought. On January 8, 2018, after you provided your client's authorization, MPD responded to your request indicating that it had conducted a search and no responsive records were found.

This Office received your appeal on February 5, 2018, and notified MPD on the same day, requesting its response. Your appeal asserts your belief that MPD's response is in error and states that your client wishes to know how MPD's records characterize her separation from employment. On February 12, 2018, MPD responded, stating that its Human Resources Division conducted a search for records pursuant to your request and no responsive records were located. MPD characterized your request as seeking employment documents the MPD released to other "law enforcement agencies that are considering [your] client for employment."¹ MPD's response further suggested that you contact its Human Resources Division to address your concerns about how it communicates to prospective employers.

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

¹ A copy of MPD's response is attached.

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 primary issues in this appeal are your beliefs that responsive records should exist and that MPD did not conduct 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 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 statements cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

You assert that MPD should possess your client’s employment records because she was previously employed by MPD. Your request sought your client’s employment records, including documents MPD sent to prospective employers. Based on its responses to your request and to this appeal, MPD appears to have narrowly construed your request as seeking only records MPD

sent to your client's prospective employers. MPD identified its Human Resources Division as the location where responsive records would be held. However, MPD has not provided an adequate description of its search or given an explanation as to why there would be no employment records for a former employee. As a result, MPD has not demonstrated that it has conducted a reasonable search pursuant to your request.

Conclusion

Based on the foregoing, we remand this matter to MPD. Within 10 business days from the date of this decision, MPD shall conduct a search for your client's employment records and describe the results of its search. If MPD's forthcoming searches result in retrieving additional responsive records, MPD shall disclose to you non-exempt portions in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by 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 the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)