

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-071**

January 22, 2020

VIA ELECTRONIC MAIL

Mr. Christopher Bangs

RE: FOIA Appeal 2020-071

Dear Mr. Bangs:

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 Employment Services (“DOES”) failed to properly respond to your FOIA request for the Tipped Wage Reports filed pursuant to D.C. Code Official Code § 32-1009.01.

#### Background

On October 28, 2019, you submitted a FOIA request to DOES seeking the Tipped Wage Reports filed with DOES for Q2 2019 pursuant to D.C. Code Official Code § 32-1009.01 and a list of any parties that failed to file this report. For the records maintained in electronic format, you also requested that you only receive records in an electronic format (no physical copies of documents). You also asked that if the data or records are maintained or can be retrieved in a searchable format (Excel, CSV file, data base or similar file format) that the information was to be provided in that format. You also asked DOES to notify you if the cost for production (absent a waiver) would exceed \$100.00. On November 21, 2019, DOES denied your request indicating that there were no responsive documents. In your appeal, you summarize a series of communications between you and DOES. Apparently, DOES’ initial denial of your request was attributed by DOES to its misunderstanding of the request. On December 31, 2019, DOES reversed its position and granted your request, in part. On January 7, 2019, even though 663 pages of records had finally been produced to you, this appeal was filed. In your appeal, you indicated that DOES had not provided you with the information in a searchable electronic format and had not provided the statutory authority for the redactions in some of the records that were provided to you. On January 14, 2020, DOES supplemented its response to your FOIA request providing you with an Excel spreadsheet containing thousands of entries from the Tipped Wage Report database. DOES also noted that it had not located any list of parties who had failed to file the Tipped Wage Report with DOES. On that same date, DOES also responded to your appeal, noting that 663 pages of records with redactions had been provided to you along with an Excel spreadsheet with extensive wage/tip information listed by employer and business location.<sup>1</sup>

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<sup>1</sup> A copy of DOES’s response to your appeal is attached to this decision.

In both the appeal response and the supplementation of the FOIA request, DOES indicated that it had redacted personally identifying information, pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”).

## Discussion

It is the public policy of the District of Columbia government 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, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe 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*

In this appeal, you initially challenged the sufficiency of the search because DCRA denied it had any documents (hard copy or electronic), then produced only hard copies of documents but no searchable electronic records, then produced the electronic records but indicated that there was no list of parties who had failed to file the required Tipped Wage Reports with DOES.

In determining whether an agency conducted an adequate search in response to a records request, the test is not whether any additional documents might conceivably exist, but whether the government’s search for responsive documents was adequate. *See 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).

In this instance, DOES's appeal response suggests that the initial search located no documents because DOES misunderstood your request. Over several months, and after numerous email exchanges between you and DOES, the agency finally conducted the search for the documents you sought and provided you with 663 pages of hard copy records and an Excel spreadsheet that was searchable. With this belated production, we have no reason to question the adequacy of the search overall or the statement that DOES did not locate a list of parties who had not filed the required Tipped Wage Report. And, the fact that not all of the data is contained in the Excel spreadsheet but in hard copy records does not undermine the adequacy of the search. DOES is only obligated to produce the information in the format in which it existed. DC FOIA does not require DOES to create a document or record by inputting the data from the hard copy records into the Excel spreadsheet. Therefore, we conclude that the search in this matter was adequate.

#### *Exemption 2 – Personal Privacy*

In this case, you have challenged the redactions by which information was withheld in the hard copy records and the Excel spreadsheet. DCRA indicates that it redacted the names of the individual employees whose wage/tips were included in the records provided to you, pursuant to Exemption 2.

The purpose of Exemption 2 is to protect personal privacy interests. To qualify for protection under Exemption 2, the analysis turns on the existence of a sufficient privacy interest and a balancing of this individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses is considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994).

In light of applicable case law, we find that more than a *de minimis* privacy interest exists in a private citizen's name that was redacted from the hard copy records and Excel spreadsheet DOES provided to you.

The second part of a privacy analysis examines whether the individual privacy interest is outweighed by the public interest. The Supreme Court has stated that this analysis must be conducted with respect to the central purpose of FOIA, which is

‘to open agency action to the light of public scrutiny.’” *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of ‘full agency disclosure unless information is exempted under clearly delineated statutory language,’ *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about “what their government is up to.” Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

*Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773.

The public interest inquiry for the purposes of DC FOIA “should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld.” *Schrecker v. United States Dep’t of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (internal citations omitted). Information is deemed valuable under FOIA when it would permit public scrutiny of an agency’s behavior or performance. *Id.* at 666. The wage/tip data provided to you may provide information on particular businesses but it sheds no light on DOES’s behavior or performance. Therefore, there is no public interest that outweighs the privacy interest of the private sector employees whose names were redacted from the records DOES provided to you.

#### Fee Waiver

Pursuant to D.C. Official Code § 2-532(b), “[a] public body may establish and collect fees not to exceed the actual cost of searching for, reviewing, redacting and making copies of records. Documents may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.” Based on the information you provided, DCRA decided to waive the fee for searching, reviewing and redacting the document. However, DOES charged you for the reproduction of the records at 25 cents per page, under D.C. Official Code § 2-532(b-1)(2). That statute provides that “fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution for scholarly or scientific research, or a representative of the news media.” DOES also states that since you requested an electronic version of the Excel spreadsheet, the agency waived the cost of reproduction of the Excel spreadsheet. According to DOES, this waiver reduced the number of responsive pages from 663 to 500. Therefore, DOES has indicated that the total cost for the production to you is \$125.00.

We note that you had requested that DOES contact you if the costs for producing the records would exceed \$100.00. You also requested that DOES not produce the documents to you in hard copy. However, in your January 7, 2020 appeal, you acknowledge that you continued to discuss your FOIA request with Tonya Robinson, General Counsel for DOES, and Ms. Robinson informed you that the records required redaction but that you would only be charged for printing the records. Your response was “I approved receiving the records and paying the corresponding fee, on that basis.”

We agree that since you had initially suggested that \$100 was the upper limit on the cost you were prepared to pay and stated that you did not want hard copy records, there would be no basis for the agency charging you for copying costs. However, when it became clear that a substantial portion of the request required production of records that would be printed, you agreed to pay for those costs. Therefore, we uphold the charge of \$125.00 (25 cents a page) for copying 500 pages of records.

#### Conclusion

Based on the foregoing, we affirm the agency’s decision and dismiss your appeal. This constitutes the final decision of this Office with regard to your appeal. 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: Tonya Robinson  
General Counsel/FOIA Officer  
DOES (via email)