

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-198**

September 29, 2021

VIA ELECTRONIC MAIL

Mr. William F. Marshall

RE: FOIA Appeal 2021-198

Dear Mr. Marshall:

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 Office of the Chief Medical Examiner (“OCME”) improperly responded to your FOIA request.

Background

On May 27, 2021, you submitted a request to OCME seeking “1. All complaints and records involving disciplinary actions involving [a named former Chief Medical Examiner]; and 2. All OCME hiring records for [a named former Chief Medical Examiner] including but not limited to applications for employment, resumes, letters of reference, academic transcripts, board certifications and licensures.”

On June 2, 2021, OCME advised you that it had completed a search for the records you requested and did not find any responsive records.

You appealed OCME’s response to this Office on June 10, 2021. Your submission states that “[you] request that a more thorough search for records responsive to this request be conducted, as copies of the records sought should be in the possession and/or control of OCME.” Since OCME indicated that it did not possess any responsive records, we construed your appeal as challenging the adequacy of OCME’s search.

We notified OCME of your appeal and requested that it respond, which it did on June 15, 2021.¹ In its response, OCME stated that its FOIA Officer identified two agency employees likely to hold documents responsive to your request, if they existed. OCME’s response reiterated that this search did not identify any responsive documents. Lastly, OCME asserts that the agency neither maintains nor controls records related to the appointment of the named Chief Medical Examiner and referred you to the Mayor’s Office of Talent and Appointments (“MOTA”) and to the DC Department of Human Resources (“DCHR”).

¹ A copy of OCME’s response to your appeal is attached.

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. . . .” *Id.* at § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See id.* at § 2-534. Under the DC FOIA, an agency is required to disclose public records only if they were “owned, used, in the possession of, or retained by a public body.” *Id.* at § 2-502(18).

DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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. *See Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

DC FOIA requires that a search be 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. *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. *See Marks v. U.S. Dep’t of Justice*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

‘[T]he 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.’ (citing [*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, (citing *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. *See Doe v. D.C. Metro. Police Dep’t*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). The 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).

It was OCME's responsibility to make a determination as to where the documents were likely to be located- a responsibility that can be met by identifying agency employees in the relevant programs and making inquiries about the nature of document creation and retention in those programs. *See* 1 DCMR § 402.5; *see also* *Truitt v. Dep't of State*, 897 F.2d 540, 545 n. 36 (D.C. Cir. 1990) (quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess. at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271)). (finding a request to not be vague when "a professional employee of the agency who [is] familiar with the subject area of the request ... [could] locate the record with a reasonable amount of effort.").

Here, OCME's response described the search it conducted. OCME first determined that its Human Resource Specialist and Chief of Staff would likely be familiar with the subject area of the request and be able to locate these requested records, if they existed, with a reasonable amount of effort. OCME has indicated that both employees have each searched for documents responsive to your request and that neither search yielded any responsive documents. We accept OCME's representations and find that it made a reasonable determination as to the employees likely to hold the records you requested and conducted an adequate search for responsive records.

This Office accepts OCME's representation that it neither maintains or controls records related to the appointment of Chief Medical Examiners, as MOTA is the agency responsible for the "identification, recruitment, and vetting of qualified candidates to serve the District government...as appointed Executive and Excepted Service staff." Mayor's Order 2015-063, February 2, 2015 (62 D.C. Reg. 2156). As a result, we agree with OCME that the agency most likely to maintain responsive records, if they exist, would be MOTA. Further, OCME was under no obligation to search the records of MOTA. DC FOIA requests are agency- specific. *See* 1 DCMR 402.1 ("A request for a record of an agency . . . shall be directed to the particular agency"). OCME also speculates that DCHR may maintain documents responsive to your request. OCME was obligated only to search records maintained by OCME. If you would like either MOTA or DCHR to search for certain records, you must submit separate FOIA requests to MOTA and DCHR.

Conclusion

Based on the foregoing, we affirm OCME's response to your request and hereby dismiss your appeal.

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 DC FOIA. *See* D.C. Official Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Rodney K. Adams, General Counsel
OCME (via email)