

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-73**

June 4, 2015

Mr. Bobby Hazel

RE: FOIA Appeal 2015-73

Dear Mr. Hazel:

This letter responds to your administrative appeal 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 Corrections (“DOC”) improperly withheld records you requested under the DC FOIA.

Background

On October 21, 2011, you submitted a request under the federal Freedom of Information Act<sup>1</sup> to the DOC seeking June 16, 1992 electronic surveillance recordings from specified cameras.

The DOC denied your request on December 6, 2011, stating that the facilities that contained the electronic surveillance equipment had been closed for over a decade and that a due diligence search yielded no records responsive to your request.

On May 20, 2015, you appealed the DOC’s decision, asserting that the DOC’s response was “inadequate and denied [you] of [your] rights according to the District of Columbia law.”

The DOC responded to your appeal on June 4, 2015. In its response, the DOC asserted that you had already exercised your right to appeal when you filed Civil Action No. 0001977-12 in the Superior Court of the District of Columbia (the “Civil Action”). The DOC provided this office with a copy of the complaint and summons associated with this Civil Action. In a second June 4, 2015 response to this office, the DOC added that it continues to assert that no responsive documents to your request exist.

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

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<sup>1</sup> Although your request cites to the federal FOIA, the DOC appears to have construed the request as having been submitted under the governing statute, the DC FOIA, and we shall do the same.

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 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 are “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), and 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).

First, we find the DOC’s argument that you have already exercised your right to appeal its FOIA response to be unpersuasive. While the statement of the of the case in the Civil Action makes a passing reference to your FOIA request, the Civil Action cannot be fairly construed to be a FOIA appeal. Instead of challenging a violation of DC FOIA through the production or lack of production of documents, the Civil Action contains two tortious causes of action. The Civil Action does not contain an allegation that your rights under DC FOIA have been violated. Accordingly, we deny DOC’s request to dismiss your FOIA appeal on the basis of your Civil Action.

The crux of this matter is the adequacy of DOC’s search for the documents you requested, and your belief that records exist despite DOC’s representation to the contrary. DC FOIA requires only that a search conducted in response to a FOIA request be reasonably calculated to produce relevant documents. The test is not whether any 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).

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 make reasonable determinations as to: (1) the location of records requested; and (2) the 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).

In this matter, DOC indicated in its November 29, 2011, response to you that: (1) the facilities where the surveillance was created closed more than 10 years earlier; and (2) DOC conducted a “due diligence search” and no responsive records were found. Given that the DOC conducted a search in 2011 that yielded no results, and given that the surveillance you requested is from a

date that occurred 23 years ago in a facility that closed approximately 15 years ago, we conclude that DOC's representation is reasonable. As a result, we must accept its position that that no responsive documents exist.

Conclusion

Based on the foregoing, we affirm the DOC's decision 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 the DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker  
Associate Director  
Mayor's Office of Legal Counsel

cc: Oluwasegun Obebe, Records, Information & Privacy Officer, DOC (via email)