

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-89**

August 24, 2015

Ms. Fynalle Fre

RE: FOIA Appeal 2015-89

Dear Ms. Fre:

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 Metropolitan Police Department (“MPD”) failed to conduct an adequate search with respect to records you requested under the DC FOIA.

Background

On July 23, 2015, you submitted a request under the DC FOIA to the MPD seeking a copy of an investigative report that you contend has been compiled on you by the MPD’s Intelligence Unit. The MPD responded to your request on July 27, 2015, stating that it conducted a comprehensive search for records responsive to your request but was unable to locate any.

Subsequently, you appealed the MPD’s decision to this office on the grounds that you believe the investigative report you are seeking exists, and MPD has failed to conduct an adequate search.

The MPD responded to your appeal in a letter to this office dated August 19, 2015.¹ MPD asserted that upon receipt of your FOIA request, staff of the MPD’s Intelligence Branch “conducted a search of all paper files, all storage areas within the office, all electronic mailboxes and archives assigned to the office, and all unit electronic files of the office that are contained on the department network. Staff did not locate any responsive documents or emails relating to Ms. Fre.” MPD maintains that the search it conducted is adequate under the standards established by judicial precedent and previous FOIA Appeals decisions issued by the Mayor.

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 this letter is attached.

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 this matter is the adequacy of the search and your belief that records exist. 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).

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 may include a determination of 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.* An agency can demonstrate that these determinations have been made by a “reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched . . .” *Id.*

Here, the deputy general counsel of MPD has asserted to this office that the staff of the MPD’s Intelligence Branch determined where the records you requested would be located if they existed and conducted a paper and electronic search of these locations, including storage areas. The staff of the Intelligence Unit did not locate any responsive documents.

Because the MPD has attested that it does not possess the record you seek, we are obligated to accept that representation. Therefore, our analysis is limited to whether the MPD’s search was reasonable under the DC FOIA, and we conclude that it was.

Conclusion

Based on the foregoing, we affirm the MPD'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: Ronald B. Harris, Deputy General Counsel, MPD (via email)