

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

September 8, 2008

Washington, DC 20001

Dear [REDACTED]:

This letter responds to [REDACTED]'s administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. §§ 2-351 *et seq.* ("DC-FOIA"), dated May 12, 2008 (the "Appeal") on behalf of [REDACTED] ("[REDACTED]"). On May 16, 2008, [REDACTED] also filed with our office a Supplement to the Appeal. We forwarded the Appeal to the Metropolitan Police Department ("MPD"), with a request for a response. MPD responded to the Appeal by letter dated July 28, 2008, via certified mail. On July 29, 2008, PDS filed a Second Supplement to the Appeal. The foregoing constitutes the appellate record.

Background

In [REDACTED]'s original FOIA Appeal, dated April 15, 2008, PDS requested from MPD:

- (1) "Any documents relating to a field study or experiment or other proposals for testing or trials of modifications to the methods or procedures used to collect eyewitness identification evidence in the District of Columbia, including the display of photographs or lineup participants simultaneously or sequentially" and
- (2) "Any documents relating to a general order, policy directive or any other official communication or document issued by the MPD to its officers, detectives, staff or employees regarding the procedures, protocols, guidelines or best practices for collecting eyewitness identification evidence."

At the time [REDACTED]'s Appeal was filed on May 12, 2008, MPD had not yet responded to [REDACTED]'s original FOIA request. However, on May 13, 2008, MPD granted [REDACTED]'s FOIA request, providing the agency with the following four documents:

- (1) Memorandum of Understanding between MPD and the Urban Institute, which was executed on February 13, 2008.

- (2) General Order 304.7, detailing procedures for obtaining Pre-trial Eyewitness Identification, effective June 15, 2007.
- (3) General Order Change to 304.07, which updated PD Form 122-A, Photograph Identification Instruction Viewing Sheet, effective October 25, 2007.
- (4) "Laws of Arrest Search & Seizure" excerpt from Metropolitan Police Academy Handbook.

On May 16, 2008, PDS replied to our office, indicating that it were unconvinced that MPD had conducted a thorough search for the documents requested, stating, "[i]t seems highly unlikely, that given the existence of the four documents produced, the MPD possesses *no* other documents responsive to [REDACTED]' April 15, 2008, D.C. FOIA request." [REDACTED] further requested that MPD issue a *Vaughn* index, of any documents that were withheld, all documents that were reviewed and any documents that were considered for review but not reviewed. *See Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973).

By letter dated July 28, 2008, MPD responded to [REDACTED]' Appeal Supplement, indicating that pursuant to this second request, MPD conducted another search for the same documents and subsequently identified additional documents that should have been released to [REDACTED]. MPD stated that these documents were grant documents related to the cost of the Eyewitness Identification Study. MPD stated that upon receipt of the grant documents, the agency would forward them to PDS. Additionally, MPD contended that it had searched the electronic mail accounts of specific department employees and attached the electronic mail responsive to [REDACTED]' request. However, MPD indicated that it was withholding fourteen e-mails from [REDACTED], an employee of the Office of the United States Attorney for the District of Columbia. In reference to withholding these e-mails, MPD stated:

"As these emails originated outside of the department, we have forwarded them to the USAO for a determination as to how we should handle them. We will advise Ms. Easterly when we receive a decision from the USAO regarding these emails."

In [REDACTED]' Second Supplement to Appeal dated July 29, 2008, [REDACTED] responded to our office, indicating again, that it was dissatisfied with the adequacy and results of MPD's search. Particularly, [REDACTED] asserted that the search was incomplete because MPD's July 28, 2008 production was limited to documents relating to the field study of eyewitness identification procedures; however, MPD did not provide any documents related to MPD's revised General Order 304.7. [REDACTED] also reiterated its belief that there are documents that pre-date both the Memorandum of Agreement and General Order 304.07 and that there is a "White Paper" on eyewitness identification in MPD's possession. Furthermore, [REDACTED] argued that the e-mails authored by [REDACTED] and withheld by MPD are subject to FOIA disclosure and should be released to [REDACTED]. Finally, [REDACTED] renewed its request that MPD provide a *Vaughn* index as previously detailed in [REDACTED]' May 16, 2008 letter. [REDACTED] further requested an MPD organizational chart.

Discussion

In this Appeal, [REDACTED] presents two issues: (1) Whether MPD conducted an adequate search for records pursuant to its FOIA request and (2) Whether MPD improperly withheld the e-mails authored by Office of the United States Attorney employee Patricia Riley.

1. *Did MPD Conduct an Adequate Search for Records In Response to [REDACTED]' FOIA Request?*

D.C. Code §2-531 states that "the public policy in the District of Columbia is 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." *See Id.* In furtherance of this policy, D.C. Code §2-532(a-2) provides that when searching for documents pursuant to a FOIA request, a public body should make "reasonable" efforts to search for the requested records. *See Id.* However, an agency's failure to turn up specific documents does not undermine the determination that it conducted an adequate search for the requested documents. *See Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). In its July 29, 2008 letter, [REDACTED] claims that MPD's search was deficient because, ". . . MPD's July 28, 2008 production was limited to documents relating to a field study of eyewitness identification procedures and contained no documents related to MPD's revised General Order 304.7." However, clearly, MPD's search was related to both of these items as reflected by the fact that pursuant to [REDACTED] original FOIA request, MPD initially provided four documents related to both the Eyewitness Identification Study and the General Order 304.7. The fact that MPD's second subsequent search only yielded information related to the Eyewitness Identification Study is not dispositive of the fact that MPD did not search for documents related to both parts of [REDACTED] request.

[REDACTED] further contends that MPD's search was inadequate because it alleges that MPD is in possession of but did not turn over to [REDACTED] documents that pre-dated both the General Order and the Memorandum of Agreement. In particular, [REDACTED] believes that MPD has in its custody a "White Paper" or position policy paper regarding eyewitness identification. The only basis for the belief that this White Paper exists, is that "other D.C. government officials" have told [REDACTED] that it exists and from this information, [REDACTED] has concluded that this White Paper is "presumably within the possession of the MPD." However, [REDACTED] does not allege or provide any other evidence that this document exists and that MPD must have it. For example, [REDACTED] does not allege that MPD actually drafted or helped to draft this White Paper, which would lend more support to the contention that it is in MPD's possession. At a minimum, [REDACTED] has simply heard that a White Paper exists. Although [REDACTED] claims that there *should* be additional documents that were generated prior to both the initiation of MPD's General Order and the Eyewitness Identification Study, this belief is insufficient for our office to find that MPD has failed to conduct an adequate search for the records pursuant to [REDACTED] FOIA request. Therefore, we find nothing in the record to support [REDACTED]' contention that MPD's search was inadequate and find no merit to this claim.

2. *Was it Improper for MPD to Withhold E-Mail Communications Sent from Office of the United States Attorney Employee Patricia Riley?*

[REDACTED] argues that MPD improperly withheld 14 e-mails authored by Office of the United States Attorney [REDACTED]. D.C. Code Section 2-532(a) provides that any documents that are in the possession of or retained by a public body, are subject to disclosure under FOIA. Should an agency determine that records should be excluded, the agency bears the burden of sustaining its action of withholding records. *National Res. Def. Council v. NRC*, 216 F.3d 1190 (D.C. Cir. 2000). In withholding the 14 e-mails, MPD does not cite any of the FOIA exemptions as a reason for failing to disclose these e-mails. The only explanation that MPD provides for not disclosing the e-mails is that they were sent from an outside party. This explanation does not satisfy MPD's burden. Without a description of these e-mails and an explanation as to why these were excluded from production, this office is unable to determine whether the e-mails were properly withheld.

In [REDACTED] second supplement dated July 29, 2008, it requests that MPD provide an organizational chart. However, since the request for an MPD organizational chart was not part

of the original April 15, 2008 FOIA request, this issue is not properly before this Office on appeal.

For the foregoing reasons, this matter is hereby REMANDED for MPD to provide to [REDACTED] within ten (10) days, a *Vaughn* index of the 14 withheld e-mails authored by Office of the United States Attorney employee [REDACTED] describing each of the e-mails and setting forth a basis upon which these e-mails are being withheld.

Sincerely,



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