

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-57

August 25, 2011

Mr. James Trainum

Dear Mr. Trainum:

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(a)(2001) (“DC FOIA”), dated July 29, 2011 (the “Appeal”). You (“Appellant”) assert that the Metropolitan Police Department (“MPD”) improperly withheld records in response to your revised request for information under DC FOIA dated June 24, 2011 (the “FOIA Request”).

Background

Appellant made a request under DC FOIA, dated February 4, 2011, seeking a list of homicide files that have been destroyed since 2001 and the names of the persons who authorized the destruction and the authorization letters. MPD provided records in response. As the records did not provide the information that Appellant sought, Appellant made an additional request which is the subject of the Appeal, the FOIA Request, which Appellant characterized as seeking “additional information or clarification,” as follows:

1. With respect to a chart listing files grouped by “accession numbers,” Appellant asked about the meaning of the asterisks placed next to some of the entries for certain accession numbers.
2. Appellant requested an inventory of destroyed files by their “Homicide Case Numbers (HO numbers).”
3. Appellant requested the names of the persons who authorized the destruction and the authorization letters. Appellant notes that a D.C. law enacted in 2004 requires the written approval of certain designated officials.

In response, by letter dated July 18, 2011, MPD replied to the above-numbered items as follows:

1. While noting that DC FOIA does not require an agency to answer questions, MPD stated that “a second search conducted by the Corporate Support Bureau did not result in public records revealing the use of the asterisks . . .”

2. A second search was conducted and no document listing an inventory by HO number was found. The most responsive document that was located was provided pursuant to the first search.

3. According to the manager of the Records Branch, which oversees document retention and destruction, “all homicide files that were previously stored (and also survived destruction) were retrieved and sent to the MPD’s Investigative Services Bureau, Criminal Investigation Division.”

On Appeal, Appellant challenges the response to the FOIA Request, as follows:

1. The inability of MPD to interpret its records is disturbing and it appears that MPD is destroying files in violation of the law.

2. Based on Appellant’s service with MPD through March, 2010, Appellant states that MPD creates an inventory of files in individual boxes. “Each box contained an itemized inventory list by their ‘HO’ number.”

3. By law enacted in 2004, documentation must exist for all destroyed files. Appellant states that he was advised that the destruction of all homicide files must “first be authorized in writing by the head of the MPD Records Bureau.”

In its response, dated August 15, 2010, MPD notes its prior response both to the initial request and the FOIA Request. It states that upon the receipt of the Appeal, it initiated an additional search and that, although no additional records have been found, such search will be completed upon the return from leave of “the person most responsible for maintaining the homicide files.” MPD also states: “We have determined that the asterisk next to some of the files on the list means that the files have been destroyed on the indicated destroy date. The files without an asterisk have been destroyed.”

Discussion

It is the public policy of the District of Columbia (the “District”) 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(a). 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). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

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).

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). Under the law, an agency "has no duty either to answer questions unrelated to document requests or to create documents." *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). See also *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009).

As to the first item, the question as to the meaning of the asterisks, it is clear under DC FOIA that a question is not a proper FOIA request and MPD was not required to respond. Nevertheless, although it was not required to do so, MPD did attempt to determine the answer, and respond, to the question when it received the request. Furthermore, although it was still not required to do so, it has made a further inquiry and responded with an answer in its response to the Appeal, which answer was set forth above.

As to the remaining two items, the documentation prior to the Appeal appears to indicate that MPD has conducted, in good faith, a search for responsive records both in the initial request and the FOIA Request. The decisions in FOIA appeals to this office evidence that in reviewing such appeals after receipt, MPD will review and reconsider its position. Appellant knows this to be the case from his appeal in Freedom of Information Act Appeal 2011-11, where MPD reconsidered and revised its position in two instances. In other cases, MPD has made, without order, an additional search after receipt of an appeal. See, e.g., Freedom of Information Act Appeal 2011-35. Similarly, in this case, MPD has initiated an additional search after receipt of the Appeal. We could view the Appeal as moot as, having no affirmative knowledge of whether other records exist, ordering MPD to conduct the additional search that they are already conducting is the most that we can order. Nevertheless, although the outcome will be the same, we can provide some assurances to Appellant by ordering MPD to complete the search that it has proffered, to report, in writing, the results of the additional search, and to provide any responsive records. We are satisfied that MPD has made, and is making, a good-faith search and will provide, or make available for inspection, all responsive records. Accordingly, this will be dispositive of the matter and all that remains is compliance with its response to the Appeal.

Conclusion

Therefore, we remand this matter to MPD for disposition in accordance with this decision. MPD shall complete the search that it has proffered in its response to the Appeal, report, in writing,

to Appellant the results of the additional search, and provide any responsive records to Appellant.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Ronald B. Harris, Esq.
Natasha Cenatus
Terry Ryan, Esq.