

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

Freedom of Information Act Appeal: 2012-11

January 3, 2011

Fritz Mulhauser, Esq.

Dear Mr. Mulhauser:

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 November 16, 2011 (the “Appeal”). You (“Appellant”) assert that Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under DC FOIA dated August 13, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought all records regarding the acquisition and use by MPD of cell phone location data. The FOIA Request set forth ten illustrative categories of “MPD acquisition of location data and MPD communications with cell phone providers.”

By letter dated September 16, 2011, MPD provided a response with respect to each of the illustrative categories:

1. With respect to “records showing the legal standard that MPD members must proffer to providers to obtain cell phone location records,” it identified General Order 702.03, but withheld the document because it “has been designated as a law enforcement sensitive directive.”
2. With respect to policies and procedures to be followed by MPD members to obtain cell phone locations, MPD stated that it “could not locate a directive specifically on obtaining cell phone location information.” However, it did provide one General Order that “may be responsive” and withheld another General Order which “may also be responsive,” the aforementioned General Order 702.03.
3. With respect to the acquisition and use of cell phone locations by MPD members to identify communities of interest in investigations, the acquisition and use of cell phone locations by MPD members to identify all of the cell phones at a particular location, and the request by MPD members to set up digital fences, MPD stated that the request was too broad in nature and, in order to search, would need information as to specific crimes as investigative files are maintained by criminal incident.

4. With respect to data retention policies and to records that are communications with cell phone companies and providers of location-based services, MPD stated that these records are maintained by the Federal Bureau of Investigation (“FBI”) and referred Appellant to their FOIA office.

5. With respect to records that are judicial decisions and orders ruling on MPD applications to obtain cell phone locations, MPD stated that the decisions and orders are sealed and may require a motion to the Superior Court of the District of Columbia.

6. With respect to statistics of MPD requests and receipt of cell phone locations, MPD stated that no records were found and that such statistics are not kept in the ordinary course of business.

7. With respect to records describing the form in which cell phone location records are provided to MPD (such as hard copy, databases), MPD stated that it found no records. (Nevertheless, as an accommodation, MPD advised Appellant that “cell phone location records are primarily received in paper form.”)

On Appeal, Appellant challenges the entire response of MPD. As a general matter, it sets forth four objections. First, MPD fails to cite statutory exemptions, which Appellant states are the only ground for withholding records. Second, it is unlikely that so few records could have been found if an adequate search was conducted. Third, MPD characterized some parts of the FOIA Request as overbroad without sufficient justification or requesting clarification. Fourth, MPD avoided its responsibility to conduct a search by referring Appellant to other agencies.

As to its requests for policies and procedures to be followed by MPD members to obtain cell phone locations and records showing the legal standard that MPD members must proffer to providers to obtain cell phone location records (the first and second categories identified above), Appellant generally has two objections. First, with respect to the only relevant record identified, General Order 702.03, it was withheld without citing a statutory exemption. Second, based on the comprehensive nature of the request and the fact that no other records were produced, Appellant believes that it must be concluded that the search was not reasonable and adequate. In this regard, as the request involves “cutting-edge technology with significant legal uncertainty,” Appellant states that it is “highly likely” that guidance for MPD members has been formalized in training materials, internal forms, and the like.

As to the acquisition and use of cell phone locations by MPD members to identify communities of interest in investigations, the acquisition and use of cell phone locations by MPD members to identify all of the cell phones at a particular location, and the request by MPD members to set up digital fences (the third category described above), Appellant states that the response of MPD that the request was too broad was not lawful. Agencies are not free to ignore broadly-worded requests and a statutory exemption must be cited to deny a request. Appellant states that if MPD has difficulty understanding a request or needs to narrow the scope of the request, it should talk to the requester “rather than provide a blunt and pro forma denial.”

As to data retention policies and to records that are communications with cell phone companies and providers of location-based services (the fourth category described above), Appellant asserts that the MPD response that these records are maintained by the FBI is implausible. Appellant believes that cell phone carriers, not the FBI, would maintain cell phone location records. Moreover, it finds it “hard to believe that one local police department gets to have the famous Federal Bureau of Investigation do its clerical chores.” Even if that were to be true, Appellant posits that it is reasonable to believe that there would be records regarding this relationship, evidencing communications between them, and it is not reasonable that all of the records are stored at the FBI.

As to records that are judicial decisions and orders ruling on MPD applications to obtain cell phone locations, (the fifth category described above), Appellant states that it is not seeking the sealed decisions and orders, but simply the ones in the possession of MPD which are not sealed.

As to records describing the form in which cell phone location records are provided to MPD (such as hard copy, databases), Appellant states that the response of MPD was to simply state that “the records ‘are primarily received in paper form.’” Appellant states that a responding agency cannot “substitute a written response for documents.”

In its response, by email dated by letter dated December 9, 2011, MPD stated that, upon review of the Appeal, it conducted another search for responsive records. It indicated that in connection with this effort, MPD, through its FOIA Officer, contacted three of its divisions as well as the FBI, the latter with respect to cell phone tracking data made pursuant to a search warrant. As part of those contacts, the FOIA Officer was advised by the Narcotics and Special Investigations Division that MPD no longer relies on the FBI database because it uses the services of a vendor. As a result of such search and contacts, MPD states as follows:

1. It does not have responsive records concerning:

A. Policies and procedures to be followed by MPD members to obtain cell phone locations;

B. Data retention policies related to cell phone locations;

C. The acquisition and use of cell phone locations by MPD members to identify communities of interest in investigations;

D. The acquisition and use of cell phone locations by MPD members to identify all of the cell phones at a particular location;

E. Digital fences; and

F. The legal standard that officers must proffer to obtain cell phone location records.

2. Documents related to search warrant applications that are approved are usually kept under seal. Documents related to search warrant applications that are not approved are not retained or are placed in criminal case investigation files. Identifying these files requires “a file by file search and an exorbitant amount of manhours.”

3. With respect to statistics of MPD requests and receipt of cell phone locations, MPD states that it maintains a log book that contains the basic information related to requests for cell phone data and will be available for review after the redaction for applicable exemptions.

4. With respect to records describing the form in which cell phone location records are provided to MPD and to records that are communications with cell phone companies and providers of location-based services, MPD states that it is withholding records pursuant to the exemption under D.C. Official Code § 2-534(a)(1) as the records constitute trade secrets and commercial or financial information obtained from outside the government which would result in substantial harm to the competitive position of the vendor from whom the information was obtained. MPD notes that there is a confidentiality agreement with the vendor. It does state that it will provide summaries of funds expended for cell phone data retrievals and, subject to applicable exemptions, invoices for cell phone location services. (As to records that are communications with cell phone companies and providers of location-based services, MPD states that it is withholding company manuals and policies. However, it does not state that it is releasing any records in this category other than as stated in the previous sentence.)

In order to clarify the record, MPD was invited to supplement the response to clarify or address the following (its responses, in pertinent part, follow each item):

1. The manner in which each category of the requested records is maintained, i.e., which units or divisions maintain each category of the requested records, and the manner in which the search was conducted. As the FOIA Request specified no time periods, whether MPD and Appellant agreed upon a time period and, if not, what time period was used.

“The Inspectional Services Bureau/Narcotics and Special Investigation Division (ISB/NSID) maintains cell phone location data that were obtained pursuant to court orders. This data is under court seal. Upon receipt of the data from a cell phone provider, the department forwards it to the assigned prosecutor and/or criminal investigator. Staff assigned to ISB/NSID conducted the search for responsive documents which entailed a physical search of paper files as well as of computer files. No time constraints were placed on the search as the ACLU did not give a time period. Staff searched for any and all records related to the request.”

2. With respect to third through fifth categories of the FOIA Request, which categories of request were stated to be too broad in scope by the September 16, 2011, response, whether a search was conducted subsequent to such response. If not, please clarify the number of files involved and amount of time needed to search if maintained in paper form or, if not maintained in paper form, the nature of the database, including search limitations.

“Subsequent to the September 16, 2011, response, former and current personnel in ISB/NSID and Criminal Investigations Division were contacted in an effort to locate any responsive records. During this effort, personnel advised that the department has not and presently does not: (1) engage in identifying communities of interest in investigations; (2) acquire cell phone data to identify all cell phones at a particular location; and (3) request cell phone providers to set up “digital fences”. Accordingly no responsive documents were located.”

3. The exemption under which General Order 702.02 is maintained and the reason why the exemption applies.

“General Order 702.02 has been designated law enforcement sensitive by the Chief of Police. Under FOIA the department asserts that D.C. Official Code § 2-534 (a)(3)(E) and (a)(4) applies. At any rate, we believe the general order is not at issue as directly responsive documents have been located. These documents consist of training materials prepared by the Office of the U.S. Attorney for the District of Columbia. The document is titled “Law Enforcement Telephone Investigations Resource Guide (Cellular, Satellite and VOIP Phone Providers)”. Contained within this guide is a document titled “Legal Framework (United States Constitution – 4th Amendment)”. As this document was wholly prepared by the Office of the U.S. Attorney for the District of Columbia, we have been advised by that office that the ACLU should be referred there for consideration of its request for the document. . . .”

4. With respect to judicial decisions and orders ruling on MPD applications to obtain cell phone locations, which the December 9, 2011 response states “are usually made under court seal,” whether all such records maintained by MPD are under seal. With respect to the records relating to applications that are not approved, the number of files involved and the time to search each file.

“ . . . There are a small number of files that contain data that was obtained pursuant to court orders are not under seal. The department is not able to easily identify these files without manually searching hundreds of files. Personnel estimates that it would take several weeks to conduct a manual search.”

5. With respect to the ninth and tenth categories and claim of the exemption under D.C. Official Code § 2-534(a)(1), a description of each category of records involved, including whether the records constitute a trade secret or commercial or financial information, the nature of the market involved, and the harm which would result from a disclosure.

“The records that the department is withholding pursuant to D.C. Official Code 2-534 (a)(1) consists of both financial and trade secret information. Contact was made with the vendor who advises that it deems release of any product or financial information extremely harmful to its competitive position. The vendor advises that there are a small number of companies in the market and that release of its information would adversely affect the vendor. The nature of the market is law enforcement surveillance hardware and software. The vendor also advises that it temporarily ceased its operations with a federal law enforcement agency that has homeland

security responsibilities for improperly releasing its commercial information. The vendor has reminded the department of the non-disclosure agreement with the vendor.”

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. 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).

As set forth above, the FOIA Request sought all records regarding the acquisition and use by MPD of cell phone location data and set forth ten illustrative categories. However, both Appellant and MPD have treated such illustrative categories as comprising the FOIA Request and we will do so in this decision. We will look at each category in the order set forth in the MPD response to the Appeal.

During the course of the Appeal, MPD has modified its position with respect to the FOIA Request. We will examine its modified position in light of the position of Appellant.

Request Categories One through Six

With respect to the first six categories, as set forth above in section 1(A) through (F) of the summary of the MPD response, after two searches, MPD states that it does not have responsive records.¹ Appellant contests the adequacy of the search, contending that the failure to yield records is unlikely in light of the nature of the FOIA Request.

An agency is not required to conduct a search which is unreasonably burdensome. *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep’t of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990).

¹ As stated above, MPD initially responded that the FOIA Request was too broad in scope as to three of the categories and Appellant contested such objection. However, subsequent to the filing of the Appeal, MPD has apparently withdrawn its objection and has made a search. Therefore, this issue is moot.

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). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

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).

Appellant contends that given the nature of the FOIA Request, it could reasonably be expected that more than a few records would have been produced in response. Appellant’s expectation is not unreasonable. Nevertheless, there must be more than mere speculation to conclude that the search of MPD was not reasonable and adequate. Appellant has requested that we order MPD to conduct an additional search, but the MPD response states that it has already made an additional search. Thus, simply ordering another search is likely to be fruitless. Therefore, in order to test the adequacy of the searches, we requested a supplement to the response to clarify the manner in which the search for each category was conducted.

Unfortunately, the MPD supplement only clarified the nature of the search with respect to certain categories. The main response was that the Inspectional Services Bureau/Narcotics and Special Investigation Division “maintains cell phone location data that were obtained pursuant to court orders.” However, this does not identify a specific category of the FOIA Request nor does the information described include every category. Moreover, the administrative record indicates that it was not the only division or unit involved in the search or which would maintain the requested records.

Nevertheless, in its supplementary response, MPD does shed light on the search with respect to the third through fifth categories. MPD states that it contacted both the Inspectional Services Bureau/Narcotics and Special Investigation Division and Criminal Investigations Division, which we presume to be the relevant divisions with knowledge of MPD activities and recordkeeping practices with respect to these categories, and those divisions advised that MPD activities do not generate, and have not generated, the requested records which would comprise these categories. As these divisions would have such requisite knowledge, we believe that the inquiry and response satisfy the requirement of a reasonable and adequate search.

MPD states that there are no responsive records which exist with respect to the other categories. However, while we do not question the good faith of MPD in making its responses, we do have some discomfort with its response, as modified, as to the other categories. MPD initially stated that it did not have statistics of MPD requests and receipt of cell phone locations, but subsequently located the same. It stated that certain records were maintained by the FBI, but that no longer turns out to be the case. The requests for the third through fifth categories were deemed to be too broad to search, but its response was revised, as discussed, to state that these documents are not generated by MPD activities. (As noted above, we have believed a sufficient explanation as to these categories.) In the case of these remaining categories, MPD stated that there are no responsive records; however, with respect to the first and sixth categories, it has at least identified General Order 702.03 as responsive.

As we did in Freedom of Information Act Appeal 2012-04, where we would have expected a search to produce a larger volume of records, we invited the agency to supplement the record to clarify the nature of the search. In this case, as we stated above, the supplementary response did not provide sufficient clarification as to allow us to conclude with the requisite degree of confidence that the search was reasonable and adequate. Therefore, as ordering a new search would not be productive, we are ordering MPD to do what we invited them to do in their supplementary response: to state the manner in which each category of the requested records is maintained and the manner in which the search was conducted. MPD shall state which divisions maintain the records, in what form the records are maintained, e.g., electronic (email, word processing, or PDF files) or paper-based, and how such records were searched.

Based on the foregoing, if Appellant is not satisfied with the search methodology employed by MPD, Appellant may submit a request for reconsideration identifying the deficiencies and proposing an appropriate order.

We stated above that, with respect to the first and sixth categories, MPD has “at least” identified General Order 702.03 as responsive. It initially withheld General Order 702.03 on the basis that it was “law enforcement sensitive.” As Appellant correctly asserts, this is not a proper basis for withholding a record under DC FOIA. Thus, we invited MPD to clarify its response to state the exemption upon which it relied and reasons that the exemption applied. However, we inadvertently specified General Order 702.02 rather than General Order 702.03. It appears that MPD responded regarding General Order 702.02. Nevertheless, it also appears that General Order 702.02 is responsive as well. While its supplementary response indicates that it was not “directly responsive,” that still indicates that it is responsive. (This would buttress the need for MPD to explain its search methodology as outlined above.) We will assume that the reasons for withholding General Order 702.03 are the same as for General Order 702.02.

MPD has supplemented its response to claim that the General Order is exempt from disclosure pursuant to D.C. Official Code § 2-534 (a)(3)(E) and (a)(4). However, it does not state the reasons why this exemption applies. This is insufficient. In Freedom of Information Act cases, “‘conclusory and generalized allegations of exemptions’ are unacceptable, *Found. Church of Scientology of Wash., D.C, Inc. v. Nat’l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 830

(D.C. Cir. 1979) (quoting *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820, 826 (1973)).” In *Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

Moreover, it does not appear that these statutory exemptions would be applicable. Although it is not specified, it would appear that MPD is asserting the attorney-client privilege pursuant to D.C. Official Code § 2-534(a)(4).

The attorney-client privilege applies to confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 78-79 (D.D.C. 2008); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980). However, “[n]ot all communications between attorney and client are privileged.” *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). “[T]he privilege ‘protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.’” *Fisher v. United States*, 425 U.S. 391, 403 (1976).” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980). “The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however.” *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977)

MPD identifies General Order 702.2 as training materials prepared by the Office of the United States Attorney for the District of Columbia, titled the Law Enforcement Telephone Investigations Resource Guide (Cellular, Satellite and VOIP Phone Providers). According to MPD, a portion of this guide is a document titled “Legal Framework (United States Constitution – 4th Amendment)”. While the record may have been prepared by the Office of the United States Attorney, it has been integrated into the records of MPD and is maintained and used by MPD in the ordinary course of its business. Accordingly, we find it to be an agency record. In *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980), the plaintiff sought agency legal interpretations of petroleum pricing and allocations regulations requested by auditors conducting audits pursuant to a compliance program established to assure compliance with the regulations. Such general advice was found not to be within the attorney-client privilege. “Rather than ‘counseling,’ intended to assist the agency in protecting its interests, the memoranda here seem to be neutral, objective analyses of agency regulations. They resemble, in fact, question and answer guidelines which might be found in an agency manual.” *Id.* at 863. Citing *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977), the court stated that, in order for the attorney-client privilege to apply, the documents must be circulated only among persons who are authorized to speak or act for the agency. In the *Coastal States Gas Corp.* case, it found:

The agency has admitted that it does not know who has had access to the documents, there is undisputed testimony that at least in some regions, copies of the memoranda were circulated to all area offices, filed and indexed for future use, relied on as precedent and used as training materials for new personnel.

Id. The court also stated:

There is nothing subjective or personal about the memoranda; they are simply straightforward explanations of agency regulations in specific factual situations. They are more akin to a 'resource' opinion about the applicability of existing policy to a certain state of facts, like examples in a manual, to be contrasted to a factual or strategic advice giving opinion.

Id. at 868.

This essentially describes the nature of General Order 702.2. MPD characterizes the General Order as training materials, to which, as *Coastal States Gas Corp.* indicates, the attorney-client privilege would not apply. Moreover, the legal interpretation sought is, as the *Coastal States Gas Corp.* characterized it, in the nature of a staff manual. It should be noted that D.C. Official Code § 2-536(a)(2) provides for the disclosure of "[a]dministrative staff manuals and instructions to staff that affect a member of the public." While the General Order may not fall within this provision, it is of the same nature. The *Coastal States Gas Corp.* states, although in the context of the deliberative process privilege, that agencies "will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege . . ." *Id.* at 867. That principle certainly applies to the claim of attorney-client privilege with respect to the General Order. We believe that the same analysis would apply to General Order 702.03.

MPD also maintains that disclosure of the records should be exempt under D.C. Official Code § 2-531(a)(3)(E), which exempts the production of investigatory records which would "[d]isclose investigative techniques and procedures not generally known outside the government." Again this is a conclusory statement. It is difficult to see how an interpretation of legal principles would reveal investigative techniques and procedures. This would be the case with respect to General Order 702.03, titled Search Warrants, and would apply to the legal interpretations under General Order 702.02. Because of the potential adverse consequences of the disclosure of investigative techniques and procedures not generally known outside the government (as opposed to legal interpretations), we do not wish to completely dismiss the possibility of the applicability of the exemption. D.C. Official Code § 2-534(b) provides, in pertinent part, that "any reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section." MPD shall provide General Order 702.2 and General Order 702.3 to Appellant, subject to redaction for those portions of the records which are not relevant to the FOIA Request or would disclose investigative techniques and procedures not generally known outside the government. Any redactions shall be subject to challenge by Appellant.

Request Category Seven

As set forth above, in response to the request of Appellant for records that are judicial decisions and orders ruling on MPD applications to obtain cell phone locations, MPD stated initially that the decisions and orders are sealed and require a motion to the Superior Court of the District of Columbia to unseal the orders. Appellant contested the blanket denial, stating that he is not seeking the decisions and orders are sealed, but simply the ones in the possession of MPD which are not sealed. On Appeal, MPD modified its response, indicating that such decisions and

orders granting the applications are usually kept under seal. Those not under seal, and those rejecting the applications which are retained, are kept in criminal investigation files. MPD states there are hundreds of files in which such records would be found and it would require a manual search to locate the records. MPD estimates that it would take several weeks to conduct the search.

Appellant has stated that the only reason for the denial of the provision of records is a statutory exemption. However, an agency is not required to conduct a search which is unreasonably burdensome. *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990). We presume that Appellant has the same argument on this request as he expressed with respect to the initial response of MPD that the request for categories three through five were too broad: courts require agencies to undertake major searches to respond to requests. In the case which it cited, *Judicial Watch, Inc. v. U.S. Secret Service*, --- F.Supp.2d ---, 2011 WL 3610077 (D.D.C. 2011), the issue raised by the government with respect to burden was the difficulty of evaluating individual FOIA documents for withholding or redaction. The court found that there would be at least some documents which could be easily located and separated and there was a possibility that exemptions could be asserted for a class of documents. Here, the issue is the burden of undertaking of a search for which a quantified estimate of time has been given. In this case, it appears that at least three to four weeks of full-time work by an MPD employee would be required to complete this search for this portion of the request. We believe that this would place an excessive strain on MPD resources and is unduly burdensome. We note, however, that Appellant has not specified, nor has MPD applied, a time period limiting this search. We suggest that Appellant propose a time range which would make the search less time-consuming so that MPD can proceed with a search.

Request Category Eight

Although it initially responded to Appellant that it did not have statistics of MPD requests and receipt of cell phone locations, MPD now states that it maintains a log book that contains the basic information related to requests for cell phone data and will produce the record, subject to redaction for applicable exemptions. Thus, this portion of the Appeal is moot. However, Appellant may challenge the revised response of MPD.

Nevertheless, for the reasons set forth with respect to the first and sixth categories, we are similarly ordering MPD to make the same disclosures regarding its search methodology with respect to this category as we did with respect to the first and sixth categories.

Request Category Nine and Ten

Initially, with respect to records describing the form in which cell phone location records are provided to MPD, MPD stated that it did not have such records. With respect to records that are communications with cell phone companies and providers of location-based services, MPD stated that such records are kept by the FBI. MPD has revised its position and states that the records in both of these categories are maintained by a third party. However, other than

invoices for cell phone location services and a summary of expenses for cell phone data retrievals, it is withholding all of the records on the ground that the records constitute trade secrets or commercial or financial information exempt under D.C. Official Code § 2-531(a)(1). It also advises that there is a confidentiality agreement with a vendor.

D.C. Official Code § 2-534(a)(1) exempts from disclosure “trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.” This has been “interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury.” *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). See *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989), citing *CNA Financial Corp. v. Donovan*. In construing the second part of this test, “actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply.” *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). See also *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption “does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would “likely” do so. [citations omitted]”).

MPD was invited to clarify its response to demonstrate the applicability of the exemption, i.e., a description of each category of records involved, including whether the records constitute a trade secret or commercial or financial information, the nature of the market involved, and the harm which would result from a disclosure. However, as was the case with respect to its claim of exemption regarding its General Orders, MPD has provided largely conclusory statements. It states that the records consist of both trade secrets and commercial or financial information, but gives no further indication of what the records are and why they would constitute proprietary information. MPD states that there are a few vendors in the market (law enforcement surveillance computer services), but does not indicate that they are, or would be, competitors for its current contract with the vendor or other customers. MPD states the conclusion of the vendor that the vendor would suffer substantial harm, but does not explain the nature of the harm and how it would occur.

It is not apparent that disclosure would involve trade secrets or commercial or financial information and that competitive harm would result from the disclosure of the information. With respect to the ninth category, records describing the form in which cell phone location records are provided to MPD, this request does not ask for trade secrets, such as underlying software programming codes or hardware configurations, or commercial or financial information, such as vendor costs of supplying services, but simply the form in which MPD receives or accesses information. With respect to the last category, records that are communications with cell phone companies and providers of location-based services, we first note, as a preliminary matter, that the request is not clear in light of the examples given by Appellant, such as “company manuals, pricing, and data access policies.” We interpret such request to relate to records regarding instructions for, and conditions, of using the vendor services, including price. As such, this would constitute end user information and, without more

explanation, we do not understand why this would be proprietary and subject to protection. MPD states that there is a confidentiality agreement which prohibits disclosure. However, an agency cannot bargain away the rights of the requesters under DC FOIA and both agencies and vendors are charged with the knowledge of applicable law when contracting. Moreover, given the small number of companies providing law enforcement surveillance computer services, it is unclear what, if any, effect the disclosures would have.

We do acknowledge that the exemption under D.C. Official Code § 2-534(a)(1) does apply to constituent or line-item pricing in a government contract if the requisite harm can be demonstrated. *See, e.g., Boeing Co. v. United States Dep't of the Air Force*, 616 F. Supp. 2d 40, 45 (D.D.C. 2009) ("Release of requested information is likely to cause substantial competitive harm if disclosure would allow a company's competitors to "accurately calculate" its "future bids and its pricing structure" so that they could "estimate and undercut its bids. [citations omitted]."; *Canadian Commer. Corp. v. Dep't of Air Force*, 514 F.3d 37 (D.C. Cir. 2008); *GE v. Dep't of the Air Force*, 648 F. Supp. 2d 95 (D.D.C. 2009)(finding that disclosure of line-item pricing results in likelihood of harm for actual competition over future contracts and negotiations by company's customers); *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1189 (D.C. Cir. 2004)(substantial competitive harm because disclosure would significantly increase the probability competitors would underbid contractor in the event the government rebids the contract). However, the exemption with respect to constituent or line-item pricing does not apply to the total contract price. The pricing here applies to the final price when a service is accessed, not to the underlying line items in determining the price.

Even where the exemption under D.C. Official Code § 2-534(a)(1) does apply, the exemption does not usually justify withholding of the entire document, but allows the agency to redact the exempt portion of the records. To the extent that D.C. Official Code § 2-534(a)(1) would have applied, redaction rather than withholding would have been the appropriate response.

MPD has not met its burden of justifying the claim of exemption. The records in these categories shall be provided to Appellant.²

Appellant Recommendation

It seems quite clear that there is a contentious relationship between Appellant and MPD. The tone of the Appeal is sarcastic, biting, and highly critical. Appellant ends its submission by asking the Mayor to bring about "systemic improvements in MPD's handling and processing of FOIA requests . . ."

² It appears that for some period, these records were not maintained by the FBI and not through a vendor. As the FOIA Request is directed at current practices, we presume that these records are not at issue.

We have considered various appeals from the decisions of MPD. We note that, unlike this instance, MPD has contacted requesters to attempt to narrow the scope of the request so that a search could proceed. In certain instances, it has conducted additional searches to accommodate requesters even where the original search was reasonable and adequate. It has also answered questions posed by requesters although it is not required to do so. (In this case, such an attempt at accommodation was interpreted as an abdication of its statutory obligation.) MPD has demonstrated in more than a few appeals a willingness to re-examine its position and achieve the correct balance between protection of individual and government rights and disclosure to the public in furtherance of the law and spirit of DC FOIA. Indeed, it did so, in part, in Freedom of Information Act Appeal 2012-02, another appeal filed by Appellant. However, it is also clear that, in this case, we do not agree with all of the determinations of MPD.

There is a limit to the orders which our office can make on appeal, especially in a detailed case such as this where both parties have superior knowledge of cell phone technology and its application to law enforcement. Appellant is a frequent requester and is likely to have more detailed requests of the sort involved here. We think that the first and perhaps most effective step is to encourage the parties to soften their positions and attempt to be more collaborative.

We are not expecting instant results. We would not be surprised to receive requests for reconsideration of this decision.

Conclusion

Based on the foregoing, the decision, as revised, of MPD is upheld in part, is moot in part, and is reversed in part. As set forth in this decision, MPD shall:

1. With respect to the first, sixth, and eighth categories, state the manner in which each category of the requested records is maintained and the manner in which the search was conducted. MPD shall state which divisions maintain the records, in what form the records are maintained, e.g., electronic (email, word processing, or PDF files) or paper-based, and how such records were searched.

2. Provide General Order 702.2 and General Order 702.3 to Appellant, subject to redaction for those portions of the records which are not relevant to the FOIA Request or would disclose investigative techniques and procedures not generally known outside the government. Any redactions shall be subject to challenge by Appellant.

3. Provide the records in ninth and tenth categories.

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

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Natasha Cenatus
Ronald B. Harris, Esq.