

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

**Freedom of Information Act Appeal: 2012-26**

February 16, 2012

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 January 20, 2012 (the “Appeal”). You (“Appellant”) assert that Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under DC FOIA dated November 14, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records relating to the establishment and operation of prostitution-free zones for the period beginning April 24, 2007. As part of the FOIA Request, Appellant set forth illustrative categories of information which would be included in the request, as follows:

1. Policies and procedure to be followed by officers to follow to gather information in order to suggest to the Chief of Police a need to establish any prostitution-free zone.
2. Establishment by the Chief of Police of any prostitution-free zone, including the supporting record with statutorily required findings.
3. Notices to commanders and the Council of the establishment of any prostitution-free zone.
4. Notices to the public, as required by statute, of the establishment of any prostitution-free zone.
5. Stops, warnings, and arrests by officers in each prostitution-free zone, including individual records and aggregate reports or statistics.
6. Arrests that yielded prosecutions by the Attorney General and the dispositions.

7. Analyses, studies, memoranda, or other records showing statistics on prostitution-free zone activity and any evaluation by the department of the statute, its operation in practice, its effectiveness in reducing prostitution, and any need for amendment.

MPD responded by letter, dated December 14, 2011, and provided documents to Appellant as part of the response. MPD also indicated that the response would be supplemented.

On Appeal, based upon “newly discovered information,” Appellant challenges the response to his FOIA Request. Appellant states that it has located Special Order 06-14, issued by Charles Ramsey, the former Chief of Police, which order requires that reports and other records relating to prostitution-free zones be prepared and filed and/or maintained. However, Appellant states that MPD provided neither the special order nor any of the required reports and other records in response to the FOIA Request. Based thereon, Appellant contends that MPD conducted an inadequate search. In addition, Appellant states that it has not received any supplementary records which MPD indicated that it would provide.

In its response, by email dated February 8, 2011, MPD maintains that it conducted a reasonable and adequate search for the records requested pursuant to the FOIA Request.

First, MPD set forth the records which it provided to Appellant, noting that it:

provided Special Order 11-16 in response to request for policies and procedures; provided Special Order 11-16 and copies of memoranda regarding the declaring of PFZs, copies of PFZ teletypes, and reference to the department’s website for the criteria for determining PFZs in response to the request for supporting documentation for establishing PFZs; provided copies of memoranda declaring PFZs and teletypes which served as notices to command staff in response to the request for notices to commanders and the Council; advised that the department does not retain copies of the notices to the public and that notices are posted on the department’s website as they are established in response to request for copies of public notices; provided memoranda containing arrest data and advising that a search was continuing for additional data in response to request for documents concerning stops and arrest; advised that the department does not possess disposition documents of prosecutions by the Attorney General in response to request for court dispositions; and provided statistics regarding PFZ declarations from 2008 to the present in response to the request for analyses, studies or statistics.

Second, MPD stated that Special Order 06-14 was not produced because it was rescinded, as indicated in Special Order 11-16.

Third, to show the manner in which it conducted the search for responsive records, MPD set forth the different constituent units which it consulted in conducting its search and the records which each provided:

1. Executive Office of the Chief of Police/Office of Strategic Change. This office had no records.

2. Policy Division. Paper-based records were searched and annual reports were located.
3. Research and Analysis Branch. Paper-based files consisting of documents filed from seven police districts were searched and memoranda, arrest data, and crime maps were located.
4. Patrol Services and School Security Bureau. This division was contacted regarding notices to the public of the declaration of a prostitution-free zone. This division advised that no notices were located and the notices are discarded after the expiration of a prostitution-free zone.

Fourth, with respect to additional information which was anticipated to be provided, MPD states that it has not received any additional arrest information.

As both submissions referred to Special Orders 06-14 and 11-16, but these documents were not made part of the administrative record, we invited the parties to supplement the administrative record by providing one or both of these documents and such documents were provided.

#### 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).

In the main, Appellant contests the adequacy of the search, contending that, in light of General Order 06-14, an adequate search by MPD should have yielded more responsive records.

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).

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).

Initially, we note that MPD did not provide Special Order 06-14 to Appellant pursuant to the FOIA Request. It appears that MPD deemed this record to be nonresponsive as it had been rescinded pursuant to Special Order 11-16. We would not interpret the FOIA Request in this manner. As the FOIA Request related to the period beginning April 24, 2007, Special Order 06-14 was in effect for most of this period and would have impacted matters regarding the establishment and operation of prostitution-free zones during this period. While we could order MPD to produce Special Order 06-14, as Appellant sensibly suggests, as Appellant already has the record, there would be little or no purpose to ordering its production at this point and we will treat the issue Appeal as moot.

The crux of the Appeal is the adequacy of the search. Based on the numerous records which MPD has already provided to Appellant, we believe that MPD has made a good-faith effort to fulfill the FOIA Request. The issue is the adequacy of the method it has employed to locate the responsive records.

We have examined Special Orders 06-14 and 11-16 and found that they provide a road map to the records which would be created as part of the establishment and operation of prostitution-free zones. The special orders are similar, but the latter order seems more expansive than the special order which it rescinded. In examining the special orders, we consulted the organizational chart of MPD, which chart MPD has posted as a public record on its website at [http://mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/about/org/pdf/MPD\\_main.pdf&group=1529&open=1](http://mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/about/org/pdf/MPD_main.pdf&group=1529&open=1).

Special Order 11-16 indicates that there would be a flow of documents within MPD as follows. A declaration of a prostitution-free zone by the Chief of Police would be approved pursuant to the submission of a five-part package, which package would include a statement from the Research and Analytics Division (listed on the organizational chart as the Research and Analytical Services Division, which is part of the Strategic Services Bureau) and a memorandum of request. The approved package would be sent to the District Commander, the Teletype

Office, and the Marketing and Internet Unit (which is part of the Strategic Services Bureau). The operation of the prostitution-free zone would generate a notification by agency teletype and notices/posters and could generate one or more of Stop or Contact Reports (PD Form 76). The District Commander is required to prepare a report to the Chief of Police upon the expiration of the prostitution-free zone. The District Commander is required to “[e]stablish and maintain a file at their organizational element.” These latter files are designated as the Prostitution Free Zone Files in the special order.

Thus, according to Special Order 11-16, the following divisions or units would be the locations where the responsive records would likely be located: the office of the Chief of Police; the Research and Analytical Services Division; the District Commanders; the Teletype Office; and the Marketing and Internet Unit. According to MPD, the following divisions or units were contacted as part of the search: the Executive Office of the Chief of Police; the Research and Analytical Services Division and the Policy and Standards Division, which are both part of the Strategic Services Bureau; and the Patrol Services and School Security Bureau.

MPD consulted both the Executive Office of the Chief of Police as consistent with the special order. It also consulted both the Research and Analytics Division and the Policy and Standards Division, which are both part of the Strategic Services Bureau. The Research and Analytics Division is named specifically in the special order. Although and the Teletype Office and the Marketing and Internet Unit are not listed in the organizational chart, as the Marketing and Internet Unit is listed in the special order as part of the Strategic Services Bureau, it would appear that consultation with two of the units of the Strategic Services Bureau would be sufficient to locate records which would have been in those units. To this extent, we believe that the search was reasonable and adequate.

MPD also consulted with the Patrol Services and School Security Bureau, the division under which the Division Commanders are located. However, it only contacted this division regarding notices to the public of the declaration of a prostitution-free zone. According to the special order, each District Commander is required to establish and maintain a Prostitution Free Zone File relating to the establishment and operation of each prostitution-free zone under his or her command. However, as indicated, the Prostitution Free Zone Files were not searched. A search reasonably calculated to produce the relevant records should have included a search of the records of the appropriate District Commanders for these files and their contents. Appellant states that it has not received, for instance, any reports to the Chief of Police required upon the expiration of the prostitution-free zone, which reports would have been included in the Prostitution Free Zone Files. Therefore, MPD shall search the records of the appropriate District Commanders for the Prostitution Free Zone Files and provide the responsive records, subject to any applicable exemption, to Appellant.

In addition to its main argument as to the adequacy of the search, Appellant also states that in its response to the FOIA Request, MPD promised to supplement its production by providing additional records with respect to posters and arrest data, but Appellant has not received any of those supplementary records. In its response to the Appeal, MPD stated that it has not received any additional arrest information pursuant to its search. It would appear that there were no

additional records with respect to both categories, but that MPD omitted to include posters in its response. As MPD will conduct an additional search and provide a response to Appellant as indicated above, as part of such response, MPD shall indicate that there are no additional posters which it has located or, if additional posters have been located, provide the records to Appellant.

Appellant also requests that we should include a fee waiver in our order. However, we read our jurisdiction under D.C. Official Code § 2-537(a) to be limited to adjudicating whether or not a record may be withheld and not encompassing fee disputes. This is in accord with prior decisions under D.C. Official Code § 2-537(a). See MCU 406151, 51 DCR 4213 (2004); Matter No. 390592, 51 DCR 1527 (2004); OSEC 102301, 49 DCR 8641 (2002). See also Freedom of Information Act Appeal 2012-21. Thus, we will not consider this request of Appellant.

### Conclusion

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

1. Search the records of the appropriate District Commanders for the Prostitution Free Zone Files and provide the responsive records, subject to any applicable exemption, to Appellant.

2. State in its response pursuant to this order that there are no additional posters which it has located or, if additional posters have been located, provide the records to Appellant.

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the response of MPD pursuant to this order.

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.