

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

Freedom of Information Act Appeal: 2012-64

August 2, 2012

James A. Frost, Esq.

Dear Mr. Frost:

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 14, 2012 (the “Appeal”). You (“Appellant”) assert that the Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under DC FOIA dated January 5, 2012 (the “FOIA Request”) by failing to respond to the FOIA Request.

Background

Appellant’s FOIA Request sought “records which show:

- (1) Whether one or more of the student-lessees of the property located at 1011 Irving Street in Northeast DC has ever personally told the police why the student-lessees moved out and didn’t move back into the premises;
- (2) Whether one or more of the student-lessees of the property located at 1011 Irving Street in Northeast DC and/or a spokesperson for The Catholic University of America has ever indicated to the Metropolitan Police Department whether and why one or more of the ten C.U.A. students who were in the house in question when Mr. Cayo, Mr. Sealy, and another black man showed up the evening of February 13, 2011, thereafter withdrew as a student enrolled at said university for the spring 2011 semester, and, if so, who made such a statement to the police and what he/she said; and
- (3) Which entity and or individual(s) paid to the lessor of the lot and house located at 1011 Irving Street, N.E., Washington, DC 20017 the balance of the money due to the lessor from the lessees under the lease agreement for the balance of the term of the lease.

Although MPD acknowledged the FOIA Request, when a final response was not received, Appellant initiated the Appeal.

In response, by email dated July 27, 2012, MPD stated that it had advised Appellant that it would provide records to Appellant when available. MPD further states that it “was then and is presently investigating a police officer use of force incident that occurred at 1011 Irving Street, N.E. on February 13, 2011.” Based on the pending investigation, MPD asserts that the records in the case file are exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A)(i) and (B) as “investigatory records compiled for law-enforcement purposes the release of which would interfere with enforcement proceedings and possibly deprive a person of a right to a fair trial or an impartial adjudication.” MPD advises that Appellant should periodically check with MPD to ascertain the status of the investigation.

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).

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). Subsection 1-402.4 of the District of Columbia Municipal Regulations provides: “A request shall reasonably describe the desired record(s).”

DC FOIA provides a right to access of documents, not a right to challenge the correctness or reasoning of an agency decision, to interrogate an agency, to require an agency to conduct research, or otherwise to require answers to questions posed as FOIA requests. *See Department of Justice Guide to the Freedom of Information Act* (2009) at 51, n. 127 (collecting cases, reported and unreported).

The FOIA Request, although nominally stated as a request for records, is an attempt to require answers to inquiries and necessitates factual analysis rather than identification of responsive records. Quite simply, Appellant has not made a proper request under DC FOIA.

We note that MPD has raised a claim of exemption which may otherwise be allowable. However, MPD has not sustained its burden of proof on the applicability of this exemption. It merely asserts that there is a pending law enforcement investigation, in effect contending that this is a per se exemption whenever there is a pending investigation or a related law enforcement proceeding. In order to sustain the exemption, it must show that disclosure “would interfere” with the law enforcement proceeding or that it would deprive a person of a right to a fair trial or an impartial adjudication. In this case, MPD has not explained how the interference or deprivation would occur (the FOIA office has not indicated that it has seen the records). *Cf.* Freedom of Information Act Appeal 2011-47.

Conclusion

Therefore, we uphold the decision of MPD. The Appeal is hereby dismissed.

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Ronald Harris, Esq.