

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-36**

March 23, 2015

VIA ELECTRONIC MAIL

Mr. David Wilson

RE: FOIA Appeal 2015-36

Dear Mr. Wilson:

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 (“DC FOIA”). In your appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

On November 10, 2014, you submitted a request under the DC FOIA to the MPD seeking “a true and correct copy of the tape recording and the transcript of the June 14, 1999 body recording,” made by a confidential informant (“CI”) as part of a homicide investigation operation run by Detective Michael J. Will. The MPD denied your request on January 6, 2015, stating that the information requested is exempt from disclosures pursuant to D.C. Official Code §§ 2-534 (a)(2), (a)(3)(C), and (a)(3)(D).

On appeal, you challenge the MPD’s response to your request, contending that: (1) the CI’s identity had already been revealed in a public jury trial; (2) that the public’s interest in preventing a wrongful homicide conviction outweighs any personal privacy interests; (3) that the identity of the CI could be redacted; (4) and that the person whose murder-confession the tape contains is now dead and therefore does not have a privacy interest in the matter.

The MPD responded to your appeal in a letter to this office on March 20, 2015. The MPD reaffirmed its position, asserting D.C. Official Code §§ 2-534 (a)(2), (a)(3)(C), and (a)(3)(D). However, the MPD failed to include a *Vaughn* index, indicate whether a search had been conducted, or explain what the scope of any such search had been.

On March 23, 2015, MPD supplemented its response by email to this office. The email included a declaration from Detective Daniel Whalen, a detective assigned to MPD’s Homicide Branch’s Cold Case/Major Case Squad. This declaration indicated that Detective Whalen had performed a search of the homicide file relating to the double homicide of Mr. Ronnie Middleton and Ms. Sabrina Bradley, and indicated that “[t]here is one file for this case in our current inventory.” The declaration went on to state that the one responsive file, a report, indicated the recording in

question had been surrendered to Special Agent Hester of the Bureau of Alcohol, Tobacco & Firearms (“BATF”), and that no transcript or recording had been found in the homicide file. The declaration concludes that if the BATF had provided MPD a copy of the transcript of the recording that “one would expect it to be contained within the MPD homicide case file.”

### Discussion

It is the public policy of the District of Columbia 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 . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *See e.g.* D.C. Official Code § 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 support of his position, you cite facts that weigh in favor of his entitlement to receive the records, primarily the fact that the CI’s identity has already been publicly disclosed and the fact that the speaker in the recording is now dead. In its supplemental response, MPD offers that it searched the homicide file and that no recording or transcript was found.

The crux of this matter is the adequacy of the search and your belief that more records exist.

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).

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).

Accordingly, in order to make a reasonable and adequate search, an agency must make reasonable determinations as to (1) the location of records requested, and (2) the search for the records in those locations. *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C.

2008) (citing *Oglesby*, 920 F.2d at 68). Such determinations may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files which the agency maintains. *Id.*

An agency can demonstrate that these determinations have been made by a “reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that **all** files likely to contain responsive materials (if such records exist) were searched . . . .” *Id.* (emphasis added). Conducting a search in the record system most likely to be responsive is not by itself sufficient; “at the very least, the agency is required to explain in its affidavit that no other record system was likely to produce responsive documents.” *Id.* (internal quotations omitted).

In this matter, MPD has indicated that it searched the homicide case file related to the recording in question and that the homicide case file is the most likely location of the recording. What MPD has failed to indicate is that the homicide case file is the **only** record system likely to produce a responsive document or that **all** files likely to contain a responsive document were searched. Moreover, while Detective Whalen has indicated that the Major Case Squad’s “current inventory” only includes one file, he did not indicate the search terms used to conduct the search, or whether another squad’s inventory or record system might contain a responsive document. Accordingly, we do not find that the search was reasonable and adequate.

### Conclusion

Based on the foregoing, we reverse the MPD’s decision and hereby remand your appeal. At the very least, MPD shall identify all other record systems in its possession likely to produce responsive documents, including the location where any written correspondence from the BATF regarding this case might be kept, the location of any files relating to the investigation of the alleged accomplices (Mr. Antonio Roberson or Mr. Antoine Draine) are kept, the location of any files pertaining to the confidential informant (Mr. Bobby Capies) are kept, the location of any files pertaining to the gang investigations (the 1-5 Mob and Congress Park Crew) are kept, or any possible archived records systems not included in the MPD’s description of its “current inventory.” If other record systems are identified, MPD shall conduct a search of them for responsive records and provide such records, subject to any applicable exemption. This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Sarah J Forman

Sarah Jane Forman  
Associate Director  
Mayor’s Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)