

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-63**

June 19, 2015

Mr. David Wilson

RE: FOIA Appeal 2015-63

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 as part of a homicide investigation operation conducted by Detective Michael J. Will.

The MPD denied that request on January 6, 2015, stating that the information sought was exempt from disclosure pursuant to D.C. Official Code §§ 2-534 (a)(2), (a)(3)(C), and (a)(3)(D). You appealed MPD’s decision, and this office issued FOIA Appeal 2015-36 on March 23, 2015, in which we remanded the matter to MPD to conduct another search. Accordingly, MPD conducted an additional search of all repositories likely to contain a responsive document but did not find any additional documents. On April 20, 2015, you submitted a subsequent appeal challenging the second search the MPD conducted for the documents you are seeking. In specific, you contend that: (1) a reasonable search of the requested records would have involved the MPD contacting the detective who led the operation that created the recording at issue; and (2) MPD’s failure to retain the records is in violation of D.C. Official Code § 5-113.32(g)¹.

The MPD responded to your appeal in a June 18, 2015 letter to this office reiterating the search process outlined in its April 3, 2015, declaration². MPD explained that there is a centralized filing system for all homicide files older than four years. Other than these files, the custodian of the homicide files is not aware of any paper file system that would contain a copy of the recording or transcript. The custodian personally searched the electronic system that would contain responsive documents and did not find any. The detective custodian further advised that

¹ You also cite to D.C. Official Code § 5-113.32(a), but this statute appears to be inapplicable because it concerns open investigations, and the double homicide investigation at issue here is closed.

² A copy of this letter is attached.

he is not aware of any files on the confidential informant, the “I-5 Mob,” or the “Congress Park Crew.”

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. *See* D.C. Official Code § 2-534. 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).

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 your most recent appeal, you cite D.C. Official Code § 5-113.32(g), which prohibits the destruction or disposal of evidence in a homicide investigation under any circumstances without written approval from the Chief or the Property Clerk of the MPD and the United States Attorney for the District of Columbia or the Office of the Attorney General of the District of Columbia,³ depending on which entity prosecuted the matter. In previous filings related to your FOIA request, MPD has stated that it searched the homicide file but has not located the recording or transcript you are seeking.

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).

³ The statute refers to the Corporation Counsel for the District of Columbia, but this office is now referred to as the Office of the Attorney General of the District of Columbia.

Accordingly, to conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of records requested; and (2) 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). This first step 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 that 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.* 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 by declaration that it conducted an adequate search and that no responsive records were found. In specific, the April 3, 2015, declaration of Detective Daniel Whalen states, “The Homicide File contains no audio and/or video recordings, nor transcripts of any such recordings.” Further, the declaration states both that “[a]ll files likely to contain the requested recording/transcript were searched,” and that “[n]o other record system and/or office are likely to produce the requested recording/transcript.” Although you contend that “[T]here are many files and many places where this requested record could be,” that is not the applicable legal standard, and we conclude that MPD’s search was reasonable.

With regard to your claim that MPD violated D.C. Official Code § 5-113.32(g) in failing to retain certain evidence, this office’s jurisdiction is limited to adjudicating appeals of DC FOIA decisions issued by District agencies.⁴ As a result, the propriety of MPD’s chain of custody and evidence retention is not properly before us. Because the MPD has attested in a declaration that it does not possess the record you seek, we are obligated to accept that representation and must limit our analysis to whether the MPD’s search was reasonable. Here, based on the provided declaration, we conclude that the second search conducted by MPD was reasonable pursuant to MPD’s obligations under DC FOIA.

⁴ If you believe that MPD has violated the law by not retaining this record, you may contact the Office of the Inspector General to investigate the matter. The DC Office of the Inspector General’s contact information is as follows: 717 14th Street, NW, 5th Floor, Washington, DC 20005; Email: oig@dc.gov

Conclusion

Based on the foregoing, we affirm the MPD's decision and hereby dismiss your appeal. 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 Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor's Office of Legal Counsel

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