

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-68**

June 1, 2015

VIA ELECTRONIC MAIL

Dr. Jennifer Doleac

RE: FOIA Appeal 2015-68

Dear Dr. Doleac:

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 April 21, 2015, you submitted a request under the DC FOIA to the MPD seeking data on gunshot incidents documented by ShotSpotter. Your request was similar to a previous data request that you submitted to MPD in 2013. The MPD denied your most recent request on April 28, 2015, stating that “The data provided to you in a previous request was a courtesy that Shotspotter technicians extended to MPD; however, it was also time consuming for them to provide the information to allow MPD to provide to requesters. We regret any inconvenience this may have caused.”

You appealed MPD’s April 2015 decision on May 9, 2015, arguing that the information you are requesting is identical to your 2013 request, which MPD granted. You further argue that there is a public interest in knowing the location of criminal activity occurring in the District, and that “[a]n inefficient database structure should not be a justification for withholding valuable information from the public.”

The MPD provided this office with responses to your appeal on May 27 and 28, 2015. The MPD explained that it has never had the capability to produce the report that was previously released to you. The Washington Post initially requested the 2013 gunshot information from MPD, and MPD informed the Post that its system could not generate it; whereupon, the Post requested the report directly from Shotspotter. In response, Shotspotter created and produced the report to MPD without charge, and MPD released a copy to you upon your 2013 request. Shotspotter has since informed the MPD that it will not produce similar data for free. With regard to your current FOIA request, MPD maintains that it is not obligated to create a document in response to a FOIA request.

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, and decisions construing the federal statute are instructive and may be examined to construe the local law. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987); *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

In support of your appeal, you note that an identical request of yours was answered in “just three days.” You posit that given the promptness in which the past response was provided, that MPD’s current position that answering the request would take “months” or considerable time” seems to be highly unlikely¹.

It appears that the crux of this matter is a failure in communication. In the instant matter, MPD has not asserted that the information requested is exempt from FOIA or that the cost of the search would be unreasonable. Indeed, MPD has stated that it does not know the cost for producing either the raw data or a report from Shotspotter.

MPD does not, however, have the capacity to deliver the data in the same form that it provided to you in 2013, because that report was gratuitously generated by MPD’s contractor, Shotspotter. In other words, the 2013 report is not the type of record normally maintained by MPD.

Because the record is not normally maintained by MPD, and because agencies are not required to create new records under DC FOIA, MPD is not required to pay Shotspotter to create the report you are currently seeking. MPD has indicated to this office that it possesses the raw data you have requested and could print each individual gunshot detection. Alternatively, MPD could ask Shotspotter for a cost estimate for the records you seek. In both of these scenarios, you would be responsible for bearing the costs of the documents, pursuant to DC FOIA.

Lastly, with respect to FOIA appeals, we note that this office’s jurisdiction is limited to “review[ing] the public record to determine whether [a record] may be withheld from public inspection.” D.C. Official Code § 2-537(a). As a result, we do not have the authority to review disputes over FOIA fees. To the extent that you object to any fees charged in connection with

¹ The fact that the 2013 report was produced to you within three days does not necessarily mean that it is the type of record that MPD normally maintains. As the MPD explained to this office, Shotspotter originally created the report in response to a request from the Washington Post. Because the report had already been created when you submitted your request, MPD was able to quickly provide you with a copy.

your request, you would need to challenge those fees in an action brought in the Superior Court of the District of Columbia.

Conclusion

Based on the foregoing, we remand the matter to MPD to contact you within five business days to determine whether you would like a cost estimate from Shotspotter or raw data from MPD for the years you are seeking.

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)