

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-69**

June 5, 2015

VIA ELECTRONIC MAIL

Ms. Chunyu Jean Wang, Esq.

RE: FOIA Appeal 2015-69

Dear Ms. Wang:

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 ("Appellant") assert that the Metropolitan Police Department ("MPD") improperly withheld records you requested under the DC FOIA.

Background

On March 18, 2015, Appellant submitted a request under the DC FOIA to the MPD seeking records relating to a 2006 armed robbery on behalf of the victim. To assist the MPD in its search, Appellant supplied the police report from the incident. On April 28, 2015, the MPD responded that it was unable to grant the request stating that the 2006 documents were no longer available due to a six (6) year document retention policy. The MPD asserted that the only document that remained was the Incident-Based Event Report that Appellant already possessed.

Appellant submitted an appeal to the Mayor in a letter received May 15, 2015, challenging the MPD's response to the FOIA request. On appeal, Appellant raises two arguments against the MPD's response. First, Appellant argued that the MPD's document retention schedule is not a valid exception under DC FOIA to prevent disclosure of documents. Second, Appellant asserted that the MPD neither stated that a search for the documents was actually conducted nor confirmed that the documents had been destroyed in accordance with the document retention schedule.

In a letter dated June 1, 2015, the MPD responded to the appeal stating that another search for responsive documents had been conducted. The MPD asserts that the police district station in the area where the crime took place ("Fifth Police District") and the Crime Scene Investigations Division ("CSID") are the only areas where responsive documents would be located. The searches of the paper files, electronic files, and storage rooms of the Fifth Police District did not locate any responsive documents. The search by the CSID located a film strip responsive to the request. An officer involved in the investigation of the robbery indicated that he had personal notes from the course of the investigation. The MPD asserts that it is in the process of reviewing the film strip and the investigating officer's notes for release to Appellant.

## 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 ...” *Id.* at § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request.

DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Appellant’s first argument that the MPD’s document retention policy cannot prevent disclosure under DC FOIA is without merit. An agency is only required to disclose records that are under its control at the time of the request. *DOJ v. Tax Analysts*, 492 U.S. 136, 145 (1989). The D.C. Code allows for certain “records which the Metropolitan Police Department considers to be obsolete or of no further value to be destroyed.” D.C. Official Code § 5-113.07. The statute of limitations to commence a criminal prosecution for the crime that forms the basis of this request is six (6) years. *See* D.C. Official Code § 23-113. Therefore, the MPD’s document retention policy of six (6) years is appropriate in this instance. If the 2006 records were destroyed in accordance with the document retention policy, the MPD cannot grant Appellant’s FOIA request.

The second issue presented by Appellant is that the MPD did not perform an adequate search for requested records. Regarding the adequacy of the search, 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).

In order to make a reasonable and adequate search, an agency must make reasonable determinations as to the location of records requested and 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). The determinations as to the likely locations of records would involve a knowledge of the record creation and maintenance practices of the agency. Generalized and conclusory allegations cannot suffice to establish an adequate search or the availability of exemptions. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

Here, the MPD's initial response was generalized and conclusory. The MPD stated that the documents would have been destroyed in accordance with document retention schedules but did not indicate that any search had been made. Further, the MPD did not state that any effort was expended to verify that the documents had in fact been destroyed.

However, in its response on appeal the MPD describes that it identified the locations where responsive records could be stored and searched for the records in those locations. The searches included the paper files, electronic files, and storage rooms of the Fifth Police District; the records of the CSID; and the files of an officer involved in the investigation of the crime referenced in the request. Through these searches, the MPD located a film strip from the CSID and the investigating officer's personal notes. The searches of the Fifth Police District did not reveal any responsive records. Given that records related to this crime were scheduled to be destroyed in 2012, we conclude that the search performed by the MPD is reasonable. As the MPD stated, the MPD shall review and disclose the responsive records to Appellant.

### Conclusion

Based on the facts that MPD has conducted a subsequent search, located responsive records, and stated that it will review and disclose the records, we consider this matter to be moot and dismiss it. The MPD shall disclose the response records, subject to applicable exemptions and redaction, to Appellant within five (5) business days. As Appellant has not had the opportunity to review the responsive records, this dismissal shall be without prejudice to Appellant to assert any challenge, by separate appeal, to MPD's disclosure.

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

/s John A. Marsh\*

John A. Marsh  
Legal Fellow  
Mayor's Office of Legal Counsel

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

\*Admitted in Maryland; license pending in the District of Columbia; practicing under the supervision of members of the D.C. Bar