

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-90**

August 28, 2015

Mr. Kel McClanahan

RE: FOIA Appeal 2015-90

Dear Mr. McClanahan:

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

Background

On November 9, 2014, you submitted a request to the MPD seeking “all records created or maintained by the Metropolitan Police Department about the investigation into the 16 May 1996 death of U.S. Navy Admiral Jeremy Michael Boorda.” MPD responded on July 13, 2015, by granting your request in part and denying it in part. Although MPD identified 239 pages of documents that are responsive to your request, it denied portions of these documents under D.C. Official Code § 2-534 (a)(2), which pertains to information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. MPD denied other portions of the documents under D.C. Official Code § 2-534(a)(3)(C), which exempts from disclosure investigatory records compiled for law enforcement purposes, the release of which would constitute an unwarranted invasion of personal privacy. In addition, MPD advised that it searched for photographs related to the matter but did not locate any.

Subsequently, you appealed to this office, contesting the adequacy of MPD’s search. In specific, you challenge MPD’s “failure to identify any pieces of evidence or photos/copies of evidence examined by the Questioned Documents office, which were specifically referenced in the released records” and you reference particular photos and items that you are seeking. You later supplemented your appeal to challenge redactions from the middle of pages 14-16 of Batch 3 of the documents MPD produced as well as similar “cut out” withholdings on other pages that you claim you cannot identify due to a lack of proper identification of these redactions.

The MPD provided this office with two responses to your appeal.¹ In its first response, MPD contends that contrary to your position, it conducted an adequate search, including for the photographs identified in the documents you received. In its second response, MPD explains that

¹ A copy of both responses are attached. MPD provided a supplemental response at the request of this office after we found your additional appellate issues in a note on the FOIAxpress system.

the “cut-outs” referenced in your supplemental appeal were preexisting in the nearly 20-year-old documents and were not the result of redactions made by MPD. MPD also clarified the search that it performed, stating that the only locations where responsive records would be likely to be located were the Homicide, Crime Scene Investigations, and Evidence Control divisions, all of which MPD searched.

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). Accordingly, 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).

The first aspect of MPD’s decision that you appeal is whether MPD conducted an adequate search to find the records you requested, particularly with regard to certain photographs. 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).

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). 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).

Here, the MPD’s deputy general counsel attested to this office that MPD located responsive records through a search of the administrative office of MPD’s Homicide Division, which included paper files, electronic mailboxes, archives, and storage areas. MPD conducted similar searches in two other divisions where it determined that responsive records might have been located: Crime Scene Investigations and Evidence Control.² MPD asserts that these are the “only locations in MPD where responsive records are likely to be located.” We accept MPD’s representation and find that the searches it conducted were reasonable pursuant to MPD’s obligations under DC FOIA.

With respect to your second appellate issue, MPD represents that portions of the documents that are faded or “cut out” appear in the original documents in MPD’s possession. We accept this representation based on our *in camera* review of the documents that were produced. Each redaction made by MPD is clearly marked, whereas the “cut out” portions appear to be faded ink or type.

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)

² MPD also notes that the Department of Forensic Science (“DFS”) currently maintains custody of old forensic files. MPD asked DFS to search its files for the photographs and was informed that DFS did not locate any.