

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-64**

May 26, 2016

Mr. Adrian Madsen

RE: FOIA Appeal 2016-64

Dear Mr. Madsen:

This letter responds to the administrative appeal you submitted 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 March 29, 2016, you sent a request to MPD for a copy of any documents related to barring notices. You identified the documents you were seeking by listing nine subcategories of information relating to barring notices, and you requested that MPD provide you with responsive documents regardless of their form.

On April 20, 2016, you submitted an appeal to the Mayor due to MPD’s failure to respond to your request. Upon receipt of the appeal, MPD informed this Office that it was the first time MPD had seen the request, and that it would respond to you. On April 28, 2016, MPD produced to you one responsive document and stated that no further documents existed. On May 4, 2016, this Office dismissed your appeal without prejudice.

On May 9, 2016, you filed the instant appeal, challenging the adequacy of MPD’s search. This Office received an initial response to your appeal on May 16, 2016, and an amended response accompanied by a declaration on today’s date.¹

In its May 9, 2016, response, MPD explained that MPD does not “issue” barring notices; MPD officers assist in the serving of barring notices by witnessing the service effected by the property owner and by maintaining the peace. MPD does not create or serve barring notices except in special circumstances enumerated in the document MPD disclosed to you. When an MPD officer obtains a barring notice, the officer provides it to the attorney prosecuting the associated legal matter. MPD further explained that it has no mechanism to determine whether an unlawful entry file contains a barring notice unless a physical search is conducted of the files. MPD maintains 13,724 unlawful entry files for the time period you have specified.

¹ Copies of MPD’s responses are attached for your reference.

Today, MPD advised this Office in an amended response that it contacted personnel in MPD's Records Branch to further inquire about the location of barring notices. Sergeant Blonese Thomas, a supervisor in the Records Branch of MPD's Corporate Support Bureau, submitted a declaration to this Office along with MPD's amended response. The declaration asserts, in relevant part, that:

[T]he Records Branch does not file copies of barring notices . . . such notices would have to be obtained by the courts . . . I surveyed staff members, some of whom have been assigned to the Records Branch for up to twenty years. All staff members that I surveyed stated that barring notices have never been retained by the Records Branch. Additionally, a barring notice is not a department generated form and as such would not be maintained in the Records Branch.

Declaration at paragraph 4.²

According to MPD's amended response, MPD apprised you of its position that it does not possess barring notices. MPD further indicated that you have requested that MPD conduct an email search for responsive documents, which MPD has agreed to do.

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).

Since MPD asserts that it has not withheld any responsive records from you, the primary issue in this appeal is your belief that more records exist and your contention that MPD conducted an inadequate 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. U.S. Dep't of Justice*, 578 F.2d 261 (9th Cir. 1978).

² A copy of the declaration is attached for your reference.

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). The first step includes determining 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.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

Here, MPD has made a reasonable determination that barring notices would be located in the Records Branch if MPD maintained them. MPD confirmed this determination with six different divisions and seven police districts. By declaration from the supervisor of the Records Branch, MPD has further attested that no staff member has observed a barring notice maintained in a file at the Records Branch in approximately 20 years. As for email messages that are responsive to your request, MPD has acknowledged that it has not conducted a search but advised you and this Office that it will do so.

Conclusion

Although you believe MPD has failed to disclose additional records that may exist, under applicable FOIA law, the test is not whether any additional documents might conceivably exist but whether MPD’s search for responsive documents was adequate. *Weisberg*, 705 F.2d at 1351.

Based on MPD's above-described efforts to determine whether it maintains barring notices, in conjunction with the declaration of the Records Branch supervisor that staff has not seen any in at least 20 years, we conclude that MPD has conducted an adequate search for the paper records you are seeking. With respect to the email messages you have requested, we direct MPD to, within 10 business days of this decision, conduct an electronic search and provide you with responsive documents, subject to applicable redactions.

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

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