

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-06**

November 29, 2016

Mr. Jason Leopold

RE: FOIA Appeal 2017-06

Dear Mr. Leopold:

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 responded to a request for records you made under the DC FOIA.

Background

On August 11, 2016, you submitted a request under the DC FOIA to MPD seeking documents “discussing Julian Assange, Wikileaks, and/or the offered reward.” On October 14, 2016, MPD responded by denying your request, asserting that releasing records would interfere with a law-enforcement proceeding, pursuant to D.C. Code § 2-534(a)(3)(A)(i) (“Exemption 3”).

On appeal, you challenge MPD’s assertion of Exemption 3 and argue that MPD’s denial amounts to a “categorical denial.” Further, you challenge the adequacy of MPD’s search.

MPD provided this Office with a response to your appeal on November 18, 2016.¹ In its response, MPD no longer asserts that it is withholding records pursuant to Exemption 3. Instead, MPD states that it has searched for responsive records but has not found any. MPD provided us with a description of the searches the agency conducted to locate records responsive to your request. MPD further proffered that relevant staff were “not aware of any responsive documents ever having been received or created.”

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.

¹ A copy of MPD’s response is attached for your reference.

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).

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). This 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).

Originally, in denying your request MPD claimed that the release of the requested records “would among other things, interfere with enforcement proceedings.” In response to your appeal, MPD now claims that no records exist. In making this assertion, MPD explains that it contacted MPD’s “homicide unit and public information office” and that both offices indicated that no responsive records could be located. MPD did not indicate why these offices would be the only locations likely to have records. MPD did not indicate if emails were searched or what search terms were used. Further, MPD did not articulate what circumstances led to MPD’s original claim that records that do not exist would “interfere with enforcement proceedings.”

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 the letter MPD provided this Office in response to your appeal, we find that the search it conducted was not adequate. Inconsistencies in MPD's position in the existence of records and the minimal description provided of the search makes this matter appropriate for remand. Given the nature of your request, at a minimum, a search of MPD emails for the terms "Wikileaks," "Assange," and "\$20,000" would be appropriate.²

Conclusion

Based on the foregoing, we remand the MPD's decision and hereby dismiss your appeal. Within 5 business days, MPD shall commence a second search. If responsive records are located, MPD may redact or withhold such records as appropriate under DC FOIA. If no responsive records are located, MPD shall issue you a letter of denial with a more specific description of the search it conducted. This constitutes the final decision of this office. You may file a separate appeal to challenge MPD's subsequent substantive responsive.

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.

Respectfully,

Mayor's Office of Legal Counsel

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

² We suggest these search terms because it appears that MPD may have narrowed the scope of your request to being solely about a "reward" – whereas this Office interprets your request to be for any document maintained by MPD that discusses either "Julian Assange, Wikileaks, and/or the offered reward."