

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-10**

December 20, 2016

VIA ELECTRONIC MAIL

Mr. Ben Emmel

RE: FOIA Appeal 2017-10

Dear Mr. Emmel:

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 challenge the Metropolitan Police Department's ("MPD") response to your request under the DC FOIA.

Background

You submitted a request to the MPD for all record relating to a police presence at a certain address on November 21, 2016. The MPD responded to you on November 29, 2016, denying your request on the basis that your request was for "records containing information of presence of the police at [an address] and not to your exact address." In follow up correspondence, MPD recommended that you submit a request to the Office of Unified Communications.

You subsequently filed an appeal of MPD's response, which was received by this Office on December 2, 2016. This Office notified MPD that same day of your appeal. On appeal, you challenge the adequacy of MPD's search on the basis that you received a final response 17 hours after MPD acknowledged your request, therefore MPD could not have conducted a reasonable search in that time.

MPD responded to your appeal by conducting a second search, which led to identification of one responsive record – an event report.<sup>1</sup> MPD has asserted, however, that the event report is exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3(A)(i)") because disclosure of an investigatory record compiled for law enforcement purposes would interfere with enforcement proceedings. MPD proffers that even if an enforcement proceeding were not pending, the event report would be protected under D.C. Official Code § 2-534(a)(3)(C) because its disclosure would constitute an unwarranted invasion of privacy. Moreover, MPD asserts that reasonable redaction of the event report is not possible because "there is no reasonable way for it to be redacted without rendering the record meaningless to the requestor."

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<sup>1</sup> See MPD's response to your appeal, a copy of which is attached.

## Discussion

It is the public policy of the District of Columbia government 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 to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

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), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Com’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

As previously discussed, Exemption 3(A)(i) protects from disclosure investigatory records that are compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. The purpose of the exemption is to prevent enforcement from being “jeopardized by the premature release of the evidence.” *See Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted). Conversely, when an agency fails to establish that the documents sought relate to an ongoing investigation or would jeopardize a future law enforcement proceeding, the investigatory records exemption does not protect the agency’s decision. *Id.* A type of harm to enforcement protected by Exemption 3(A)(i) includes the disclosure of information that would allow witnesses to modify, tailor, or construct their testimony in light of information learned from investigatory records. *Accuracy in Media v. United States Secret Serv.*, 1998 U.S. Dist. LEXIS 5798, \*13 (D.D.C. Apr. 16, 1998)

Here, the threshold requirement for invoking Exemption 3(A)(i), that the records qualify as investigatory records, has been met. Our analysis turns on whether disclosure of the record would interfere with pending enforcement proceedings. In response to your appeal, the MPD asserts that disclosure of the record would “identify the victim and witnesses and would reveal the direction and progress of the investigation . . . [because] the record relates to a specific identified location and date.” Exemption 3(A)(i) is used to prevent the detrimental impact of modification and fabrication of testimony on enforcement. *See Accuracy in Media*, 1998 U.S. Dist. LEXIS 5798 at \*13. As a result, MPD has properly withheld the event report in question pursuant to Exemption 3(A)(i).

## Adequacy of Search

The crux of your appeal is that MPD did not conduct an adequate search for the records you requested, which you have surmised based on the expediency between MPD’s acknowledgement of your request and its denial of the existence of records. While this Office recognizes your concerns about MPD’s initial search, on appeal MPD has stated that it conducted a second search, which is the search that this Office will evaluate.

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 make a reasonable determination as to the locations 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). This first step may include a determination of 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.*

MPD's second search produced a single responsive document. MPD proffers that the initial search did not produce this record because at the time of the request, the responsive record was still being processed. MPD further represents that responsive records generated from a call to service would have been uploaded into the record system MPD searched. Therefore, MPD has identified the relevant record repositories likely to contain responsive documents and has searched them. As a result, we conclude that MPD has conducted an adequate search.

### 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.

Respectfully,

Mayor's Office of Legal Counsel

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