

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel



July 21, 2017

Mr. David Haynes

RE: FOIA Appeal 2017-101

Dear Mr. Haynes:

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 February 22, 2017, you submitted a request under the DC FOIA to MPD seeking “copies of all forms PD10-A, PD10-B and PD196A Payer’s Receipt marked for ‘Traffic Accident Report,’ including all supporting documentation . . .”

On May 16, 2017, MPD responded by granting your request in part and denying it in part. Pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”), MPD denied your request in part by redacting “the payer’s name, name of driver, name of collection agent, requester’s name, and the name of MPD personnel who processed the request.”

On appeal, you challenge the redactions made by MPD, stating “[t]he documents that I received in response to the FOIA request were incomplete and overly redacted.” Specifically, you challenge the redaction of the names of those who requested reports – stating that “[a] request for a public document does not create an expectation of privacy.” Additionally, you assert that MPD’s response is incomplete, because they only produced 231 accident reports for the year-long period. You posit that the production is incomplete, and that the incompleteness is evident because you feel it unlikely that 3 of the 7 precincts received a total of only 4 requests over a year.

MPD provided this Office with a response to your appeal on July 20, 2017.¹ In its response, MPD reasserts that the redaction of personal identifiers of persons in the report, including the names of the requesters of the reports, was appropriate under Exemption 2. Further, MPD has

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

stated that it is “presently conducting an additional search for responsive documents.” MPD did not provide a description of the search conducted thus far.

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).

Adequacy of the Search

MPD provided you with a document responsive to your request in its May 16, 2017 letter. On appeal, you have asserted that the responsive document was facially incomplete, because several of the precincts had extremely low representation. 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).

In response to your appeal, MPD has not described the search it conducted or asserted that it was adequate. Instead, MPD has indicated that it is conducting a new search for responsive records. MPD did not indicate where the records would most likely be located or which repositories were searched as part of the initial production. This Office agrees that the uneven distribution of reports across precincts suggests that the original search may have been inadequate.

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. On appeal, MPD has chosen to voluntarily conduct an additional search. This representation, in conjunction with the minimal description MPD provided of its original search, renders this matter appropriate for remand.

Redactions Under Exemption 2

In the documents provided to you, MPD made redactions of "the payer's name, name of driver, name of collection agent, requester's name, and the name of MPD personnel who processed the request." These redactions were presumably made pursuant to Exemption 2 and in accordance with the mandate under DC FOIA that any reasonably segregable portion of a public record be disclosed. *See* D.C. Official Code § 2-534(b). On appeal, you challenge one specific category of names that was redacted: the names of the requesters of documents. In support of this, without legal citation, you assert that "[a] request for a public document does not create an expectation of privacy." Your appeal does not assert any public interest in the release of this class of names, but instead hinges on the absence of a privacy interest. As for MPD, it has not explained what privacy interests are associated with the names of individuals it previously redacted.

Since MPD is re-evaluating the redactions it previously made, we decline to rule on those redactions at this juncture, with the exception of the redactions of corporate entities. It is clear that corporate entities that paid for reports should not be redacted pursuant to Exemption 2, because corporations cannot hold a privacy interest under FOIA. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011). Upon completing its current review, MPD shall issue you a letter articulating the privacy interests it believes are protected by any redactions made to the second production (e.g., the privacy interest associated with the name of an individual requesting an accident report.).

Conclusion

Based on the foregoing, we affirm in part and remand in part the MPD's decision. Within 10 business days, MPD shall complete its second search and provide you with a new decision letter describing the search and the results thereof. If responsive records are located, MPD may redact or withhold such records consistent with this decision and as appropriate under DC FOIA. If no further responsive records are located, MPD shall issue you a letter of denial that includes a specific description of the search it conducted.

This constitutes the final decision of this office. Your appeal is hereby dismissed; however, you are free to file a separate appeal challenging any aspect of MPD's forthcoming 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)