

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



**Mayor's Office of Legal Counsel**



July 25, 2017

VIA ELECTRONIC MAIL

Nicholas R. Barnaby

RE: FOIA Appeal 2017-103

Dear Mr. Barnaby:

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 for records under the DC FOIA.

Background

On May 12, 2017, you submitted a request, on behalf of your client, under the DC FOIA to MPD seeking "Any and all records or information concerning any reward(s) made by or claimed from MPD or the D.C. government that relate to MPD's investigation into the July 13, 1990 homicide of Ronald Jones, Jr." On May 25, 2017, MPD denied your request, citing to D.C. Official Code §§ 2-534(a)(3)(A).

On appeal you challenge MPD's response. Your appeal asserts that MPD has not adequately articulated how the release of records would interfere with an enforcement proceeding, as is required by the exemption cited in its denial.

MPD provided this Office with a response to your appeal on July 18, 2017.<sup>1</sup> In its response, MPD proffered that it had originally denied the appeal because it believed a "post-conviction appeal was in progress" that could be interfered with if the records were released. Despite its initial denial, on appeal MPD asserts that no responsive documents exist and that MPD is not withholding any records. MPD asserts that the homicide unit conducted a search for responsive documents by checking: all paper files and storage areas assigned to the unit, all administrative electric mailboxes assigned to the unit, and the archives of those mailboxes, along with all electronic files of the unit contained on the MPD network. MPD's response indicates that the search of these repositories conducted on appeal did not yield responsive documents.

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<sup>1</sup> A copy of MPD's response is attached for your reference.

## 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 issues in this appeal are whether more records exist and if MPD conducted an adequate 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).

Your request related to a homicide investigation. MPD indicated that its homicide unit conducted searches of its paper and electronic files, including email. MPD further asserts that the searches did not locate any responsive documents, such that MPD is not withholding any documents from your client. This Office accepts MPD's representations.

We note that it was inappropriate of MPD to initially assert an exemption in its denial letter when it was not withholding any documents. This suggests that MPD never conducted an initial search. However, 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 response to your appeal, we find that MPD has now conducted an adequate search for records relating to an event that transpired almost 30 years ago.

### Conclusion

Based on the foregoing, we affirm the MPD's revised response 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 Harris, Deputy General Counsel, MPD (via email)