

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



Mayor's Office of Legal Counsel

August 29, 2017

VIA ELECTRONIC MAIL

Mr. Kemit Mawakana

RE: FOIA Appeal 2017-137

Dear Mr. Mawakana:

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 University of the District of Columbia ("UDC") improperly denied your request for a fee waiver under the DC FOIA.

Background

The present appeal is related to a prior determination, FOIA Appeal 2017-93, issued by this Office. In FOIA Appeal 2017-93, UDC's decision to deny your FOIA requests due to your ongoing litigation was deemed improper. We remanded the matter to UDC and ordered it to conduct a search for and review of responsive documents and provide you with non-exempt portions of records on a rolling basis. This Office noted that due to the scope of your request, UDC may require advance payment of fees to process your request pursuant to D.C. Official Code § 2-532(b-3), which provides that an agency may require advance payment of a fee when the fee will exceed \$250.

On July 12 2017, UDC informed you that its estimate to produce the documents you requested would cost \$108,790.35 including \$36,320.35 for ESI processing costs, \$320 for initial document collection, and \$72,150 to review approximately 108,225 pages of responsive documents. UDC included an analysis of its estimate and informed you that advanced payment would be required before it began providing you with responsive documents. In response, you sent emails to UDC inquiring if it would grant your previous requests for fee waivers or reductions. UDC responded via email on July 18, 2017, informing you that it would not grant your requests for reduced fees because it determined that the primary purpose of your request was to further your personal litigation interest and the requested records would not benefit the public interest. As a result, UDC maintained that you would have to pay fees for "the reasonable and direct costs of search, duplication, or review" pursuant to D.C. Official Code § 2-532(b-1)(3) and (4).

Now, you challenge UDC's denial of your requests for fee waiver asserting that you qualify for a fee waiver pursuant to D.C. Official Code § 2-532(b) because furnishing the information you requested is in the public interest. Alternatively, you claim that you should be subject to only the

costs of duplication pursuant to D.C. Official Code § 2-532(b-1)(2) for non-commercial educational or scholarly use. You argue that the information is in the public interest because it will inform the public about the existence or absence of racism at UDC. You also claim that your involvement in litigation against UDC does not make your request a commercial interest and that you intend to use the requested information for scholarly research and to publish scholarly writing on racial discrimination. On August 17, 2017, you submitted a supplement to your FOIA appeal, providing additional support for your arguments and a declaration regarding your intended use for the records sought.

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).

The primary issue in this appeal is UDC’s denial of your request for fee waivers. This Office’s jurisdiction is limited to “review[ing] the public record to determine whether [a record] may be withheld from public inspection.” D.C. Official Code § 2-537(a). As a result, ordinarily we do not review disputes over FOIA fees, unless a fee itself amounts to the constructive denial of public inspection. Due to the large amount of the fee and the requirement for prepayment, we find that constructive denial is at issue here. This determination will consider whether UDC should grant your requests for fee waivers and reductions, and also whether UDC’s fee estimates are appropriate.

Under D.C. Official Code § 2-532(b), “documents may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.”¹ The requester bears the burden to show that the information primarily benefits the general public. *See, e.g., Monaghan v. FBI*, 506 F. App’x 596, 597 (9th Cir. Jan 28, 2013). The public benefit must be stated with reasonable specificity. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (stating that a fee waiver request must be “based

¹ This differs from the fee waiver standard under federal FOIA, which states that “[d]ocuments shall be furnished without any charge or at a charge reduced... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(ii). The use of the word “may” in DC FOIA indicates that fee waivers are discretionary as opposed to the use of the word “shall” in the federal statute.

on more than conclusory allegations). A FOIA request to further litigation interests can be construed as not primarily benefiting the general public. *See Rozet v. HUD*, 59 F. Supp. 2d 55, 57 (D.D.C. 1999) (finding that the timing and content of requests in connection with other litigation demonstrated a primarily commercial interest despite plaintiff's assertion otherwise). *But see, McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (finding records sought related to an ongoing tort claim was not primarily a commercial interest).

Here, you allege that the records you seek will demonstrate the existence or absence of racial discrimination at UDC. You cite the “race riots in Charlottesville, Virginia, deadly police brutality based on race, and other race-related issues” to support your request for a fee waiver. These examples generalized, conclusory, and not specifically related to the records sought from UDC. Additionally, your ongoing personal litigation against UDC clouds whether the information sought is primarily for the public interest or your personal interest. As a result, UDC’s decision to deny your fee waiver based on D.C. Official Code § 2-532(b) was not inappropriate.

Under D.C. Official Code § 2-532(b-1)(2), fees are limited to reasonable duplication costs “when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution for scholarly or scientific research.” Based on the language of this section, to qualify for this fee category the request must serve a scholarly research goal of an institution, not an individual goal. Your declaration states that you were a professor at Georgetown University Law Center and UDC David A. Clarke School of Law, and that you were scheduled to start teaching at Notre Dame de Namur University in August of 2017. Your statement indicates that your request was for personal scholarly research rather than an institutional goal. As a result, your request does not qualify for a fee reduction pursuant to D.C. Official Code § 2-532(b-1)(2).

Consequently, UDC may charge you for the reasonable and direct costs of search, duplication, or review pursuant to D.C. Official Code § 2-532(b-1)(3) and (4). UDC’s estimates for personnel and review costs are supported by the fee schedule provided in 1 DCMR § 408. Nevertheless, it is not clear to us that the \$36,320.35 that UDC estimates for ESI processing costs is a necessary or direct cost of search, duplication, or review. You are not required to pay for UDC to upgrade its technological capacity to facilitate processing your request. As a result, it is not appropriate for UDC to charge you a fee for ESI processing costs.

We note that some subparts of your requests more closely resemble interrogatories or requests for UDC to create new records than requests for public records. DC FOIA does not require FOIA officers to act as personal researchers on behalf of requesters. *See, e.g., Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) (“FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters...”). UDC has no obligations under FOIA to create a new record or to answer interrogatories. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency “has no duty either to answer questions unrelated to document requests or to create documents.”); *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). As a result, if the records you requested do not already exist, UDC is not obligated to create them.

Conclusion

Based on the foregoing, we affirm in part and remand in part UDC's decision. UDC may require you to make advanced payment for reasonable and direct costs of search, duplication, and review; however, based on the information before us at this juncture, UDC cannot require you to pay ESI processing costs.

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: Alonzo Chisolm, Assistant General Counsel, UDC (via email)