

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel



September 15, 2017

VIA ELECTRONIC MAIL

Ms. Loretta Townsend

RE: FOIA Appeal 2017-146

Dear Ms. Townsend:

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”) inadequately responded to a request you submitted to MPD under the DC FOIA on behalf of your client, Monique Brown Spann.

Background

The request at issue that was submitted to MPD sought “[a]ny and all notes and conclusions and the complete file or record made by anyone associated with the Metropolitan Police [Department]” regarding 8 specific police reports, which were identified by report numbers.

MPD responded to the request on August 9, 2017, indicating that it conducted a search and no records were located other than the police reports associated with the designated report numbers, which MPD previously provided to you and your client.

On appeal you challenge MPD’s denial, asserting that you believe MPD conducted a superficial search of its records. This Office notified MPD of your appeal, and MPD responded on September 12, 2017.¹ MPD stated in its response that after receiving your request it conducted a search of electronic and paper files in MPD’s criminal investigations division and released everything to you except for documents pertaining to an open criminal investigation, as such documents are protected from disclosure under D.C. Official Code § 2-534(a)(3)A(i).²

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

² It is unclear whether you were advised that MPD withheld these documents from its initial production. We received a copy of MPD’s email response to you dated August 9, 2017, which does not reference the withheld records, but this email is titled “Final Response [to your request].” It is possible that MPD sent you an earlier email informing you of the criminal investigation records being withheld.

Apparently, MPD initially withheld a statement from Ms. Spann that was contained in the open investigation file; however, MPD indicated in its response that it will release this statement to you.

After MPD received your appeal, it conducted a second search for documents. This search was conducted by staff of the criminal investigations division and the Sixth District detectives unit and consisted of paper and electronic files. MPD represented that no additional documents were located from the second search that were not previously released to you.

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).

The primary issue in this appeal is your belief that MPD’s initial search was cursory and that more responsive records exist than have been released to you. Therefore, we consider whether 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).

In response to your appeal, MPD identified the relevant locations where records responsive to your request would be found if they existed: the paper and electronic files of the criminal investigations division and the Sixth District detectives unit. MPD further indicated that the first search conducted was of paper and electronic files located in the criminal investigation division. The second search MPD conducted was of the same division, as well as the Sixth District detectives unit, where paper and electronic files were also searched for responsive records. The second search yielded no additional documents. Although you contend that MPD's search was "superficial" and you imply that more responsive records should exist, 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 description of the two searches it conducted, we find that these searches were adequate.

Conclusion

Based on the foregoing, we affirm MPD's decision insofar as the searches it conducted were adequate. Your appeal does not reference the criminal investigation documents that MPD previously withheld under D.C. Official Code §2-534(a)(3)(A)(i).³ As a result, we are not certain whether you are not challenging this withholding or whether you were not previously aware of it. If MPD did not previously advise you that it was withholding certain investigative documents, you are free to challenge this withholding by separate appeal.

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)

³ This statute exempts from disclosure investigatory records compiled for law-enforcement purposes that would interfere with enforcement proceedings.