

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-36**

April 5, 2017

VIA ELECTRONIC MAIL

Mr. Jarrod Sharp

RE: FOIA Appeal 2017-36

Dear Mr. Sharp:

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 withheld records you requested under the DC FOIA.

Background

On March 20, 2017, you submitted a FOIA request for “a detailed report of all police reports, requested via the FOIA since 1 Jan 2016, that refer, relate, and/or make reference to the identity of the relevant requestor.” Your request further asks that “[f]or each identified instance, please document whether or not identification was requested, and if so, what sort of identification was provided, and, if not, why not. Also, in each case, please detail whether the report was provided to the requestor.”

On March 21, 2017, MPD denied your request, stating that “we do not have a report which is responsive to your request and our databases are unable generate such reports.”

On March 22, 2017, you appealed MPD’s denial, stating, “I hereby appeal the unlawful denial of this FOIA request for the following reasons including but not limited to: lack of adequate search and a lack on [sic] reliance on legal authority. The MPD surely maintains a list of FOIA requests and denials.”

This Office notified MPD of you appeal. MPD responded by reaffirming its position that no responsive records exist.¹ MPD’s response was based on MPD’s FOIA Officer’s “knowledge of the records the FOIA office maintains regarding appeals and of the capabilities of the department’s FOIA request tracking system.”

¹ A copy of MPD’s response is attached.

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

The primary issue raised by your appeal is whether MPD conducted an adequate search for the records at issue. 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.* 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).

On appeal you state that “The MPD surely maintains a list of FOIA requests and denials.” We first note that the FOIA request on appeal was not for “a list of FOIA requests and denials” but for “a detailed report of all police reports, requested via the FOIA ... that refer, relate, and/or make reference to the identity of the relevant requestor.” Second, speculation that a document exists is not enough for this Office to conclude that MPD’s search was inadequate.

Here the MPD FOIA officer, based on his personal knowledge, stated that no reports of the type requested exist. Because no such report is maintained, MPD did not conduct a search. This was proper because MPD reasonably determined that no relevant record repository existed to search. MPD further represents that their database lacks the capability to produce such a report. We accept MPD’s determinations, and conclude that MPD’s search was adequate.

Creating New Records

Your request more closely resembles an interrogatory or a request for MPD to create a new record. MPD 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.”); *see also* FOIA Appeal 2014-41. The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). “FOIA creates only a right of access to records, not a right to personal services.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). As a result, MPD is not obligated to create a specific and detailed report for you.

Conclusion

Based on the foregoing, we affirm MPD’s decision. 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 DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

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