

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-37**

April 6, 2017

VIA ELECTRONIC MAIL

Mr. Jarrod Sharp

RE: FOIA Appeal 2017-37

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 22, 2017, you submitted a FOIA request for "a list of all full or partial FOIA denials issued by the MPD that were overturned on appeal by the Mayor's Office and/or a court of law." For each denial, you requested a "copy of the Mayor's Office and/or the court's decision and legal rationale."

On March 23, 2017, MPD denied your request, stating that it did not possess a "list or report which is responsive to your request." Additionally, MPD's denial informed you of two sources to obtain administrative appeal decisions, a website and the District of Columbia Register.

On March 23, 2017, you appealed MPD's denial, stating, "I hereby appeal this unlawful FOIA denial for the reasons including, but not limited to, the following: lack of adequate search; lack of legal authority for denial; and arbitrary and capricious application of FOIA requirements. Surely, the MPD maintains a list of recent FOIA decisions that were overturned on appeal."

This Office notified MPD of your appeal. MPD's FOIA officer responded with a statement explaining its determination that no responsive records exist.<sup>1</sup> The FOIA officer's response states "[b]ased on my personal knowledge of the records which are maintained regarding appeals, I know that no list has been created which is responsive to the FOIA request of Mr. Sharp."

Discussion

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<sup>1</sup> A copy of the FOIA officer's statement is attached.

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.* However, a search for records is unnecessary when it was supported by an agency attestation that a person familiar with the records maintained by the agency determines that no responsive records are maintained. *See Espino v. DOJ*, 869 F. Supp. 2d 25, 28 (D.D.C. 2012) (upholding a decision not to search when agency declarations stated that agency did not maintain requested records); *Thomas v. Comptroller of the Currency*, 684 F. Supp. 2d 29, 33

(D.D.C. 2010) (affirming a decision not to search when an agency determined that given its system of records, “there was no reasonable expectation of finding responsive documents”).

On appeal you state “[s]urely, the MPD maintains a list of recent FOIA decisions that were overturned on appeal.” You offer no evidence or rational basis to support your speculation that MPD retains responsive documents. In contrast, the MPD FOIA officer asserted in response to your appeal that based on his personal knowledge no records of the type requested exist. Because no such records are maintained, MPD did not conduct a search. This was proper because MPD reasonably determined that no relevant record repository existed to search. We accept MPD’s determinations, and conclude that MPD’s response to your request was adequate.

### *Creating New Records*

An adequate search 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...”); *Lamb v. IRS*, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

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; FOIA Appeal 2017-36. 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 compilation of FOIA determinations for you. MPD has already informed you of two sources where you can obtain decisions for FOIA appeals, and we note that the Office of the Secretary for the District of Columbia posts annual reports on FOIA appeals available at <https://os.dc.gov/page/annual-reports>. None of these resources are created or maintained by MPD; therefore, MPD’s response to your request was adequate.

### 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)

