

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-40**

April 10, 2017

VIA ELECTRONIC MAIL

Mr. Jarrod Sharp

RE: FOIA Appeal 2017-40

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 21, 2017, you submitted a FOIA request for “records that refer and/or relate to the MPD’s use of Stingray equipment, and/or other cell site simulators, since 1 January 2010.”

On March 24, 2017, MPD denied your request, stating exemptions pursuant to D.C. Official Code §§ 2-534(a)(1), (2), (3)(C), and (3)(E) prevented disclosure of the records.

On March 27, 2017, you appealed MPD’s denial, stating, “I hereby appeal this unlawful FOIA. The request was closed without any notice. I appeal for the reasons including but not limited to: (1) lack of legal basis for denial; (2) lack of required notice; and (3) lack of adequate search.”

This Office notified MPD of your appeal. MPD’s response reaffirmed its decision to deny your FOIA request and included a statement from a FOIA officer explaining the decision not to search for certain responsive records that would be exempt from disclosure in their entirety.¹

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.

¹ A copy of MPD’s response and the FOIA officer’s statement are attached.

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

One of the primary issues in 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.*

A similar request to MPD, for records related to Stingray devices, was addressed by this Office in FOIA Appeal 2015-37. In response to the request in FOIA Appeal 2015-37, MPD withheld some records in their entirety and produced several other records with redactions pursuant to exemptions under D.C. Official Code §§ 2-534(a)(1), (a)(2), (a)(3)(E), and (6). In contrast, MPD’s response here was to withhold all records in their entirety. Further, MPD now claims that a search for responsive records is not required because any responsive records would be exempt from disclosure in their entirety. Based on MPD’s prior disclosures for a similar request, this Office cannot agree with MPD’s assertion that no responsive record could be disclosed. As a result, we find that MPD did not conduct an adequate search.

Reasonable Redaction

D.C. Official Code § 2-534(b) requires that an agency produce “[a]ny reasonably segregable portion of a public record . . . after deletion of those portions” that are exempt from disclosure. The phrase “reasonably segregable” is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, one interpretation is that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009).

Here, MPD has not conducted a search for responsive records; therefore, no review for segregability has been performed. In FOIA Appeal 2015-37 after reviewing a selection of responsive records, this Office agreed with MPD’s decision that certain training materials and manuals were properly withheld in their entirety under Exemptions 3(E) and 6 as reasonable redaction was not feasible. However, several responsive records were disclosed with redactions in response to the request at issue in FOIA Appeal 2015-37. As a result, MPD’s application of exemptions here was overbroad and MPD should review responsive records to determine which portions can be disclosed.

Conclusion

Based on the foregoing, we remand MPD’s decision. MPD shall conduct a reasonable search for responsive records and provide non-exempt responsive records, subject to redaction, to you on a rolling basis.

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)