

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-52**

April 26, 2017

VIA ELECTRONIC MAIL

Mr. Jarrod S. Sharp, Esq.

RE: FOIA Appeal 2017-52

Dear Mr. Sharp:

This letter responds to the above-captioned administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In this appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

On April 4, 2017, you submitted a FOIA request for “any and all records that refer, relate, and/or discuss MPD’s use of conductive electronic weapons (CEW) (e.g., TASERS).” On April 11, 2017, MPD denied your request, stating in relevant part, “The Metropolitan Police Department does not use electronic weapon technology. Accordingly, we are unable to provide you with any responsive records.”

On April 11, 2017, you appealed MPD’s denial, stating, “I hereby appeal the MPD’s unlawful denial of the abovementioned FOIA request for the reasons including, but not limited to, the following: (1) lack of adequate search; (2) lack of legal authority for denial; and (3) misstatements of fact to wit, please find an article below that confirms, contrary to the MPD’s denial, the MPD uses electronic weapons (e.g., Tasers).” Additionally, you provided this Office with a hyperlink to a news story dated October 28, 2015, which states in part that “D.C. police don't have Tasers. . . .”

This Office notified MPD of your appeal. MPD responded on April 19, 2017, explaining its determination that no responsive records exist.¹ MPD’s response states that “there are no responsive documents as the department is not presently using TASERS. The FOIA Officer contacted an official in the training division who confirmed that TASERS have not been issued to officers. The news report that Mr. Sharp references discusses the decision to have supervisors equipped with the devices. However, no devices have been issued to date.”

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.* 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, in support of your contention that “MPD uses electronic weapons” you provide a hyperlink to a local news story from 2015 which states in part that “D.C. police don't have Tasers. . . .” . Besides this link, you offer no evidence or rational basis to support your speculation that “MPD uses electronic weapons.” In contrast, the MPD has asserted in response to your appeal that based on conversations with its training division, MPD does not use TASERS and that none have been issued to date. As a result of MPD not using TASERS, MPD does not maintain any records discussing MPD’s use of TASERS, such that no responsive records 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. Absent any substantiation on your part that records do exist, we accept MPD’s determinations and conclude that 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)