

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-93**

July 3, 2017

VIA ELECTRONIC MAIL

Kemit Mawakana

RE: FOIA Appeal 2017-93

Dear Mr. Mawakana:

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 University of the District of Columbia (“UDC”) improperly withheld records you requested under the DC FOIA.

Background

On April 17, 2017, you submitted a request to UDC for nine categories of records. UDC responded to your request on May 26, 2017, claiming that because your FOIA request relates to ongoing litigation to which you are a party, UDC did not have to respond because the discovery period had closed. Additionally, UDC asserted in its denial that the request was “too broad and burdensome.”

On June 15, 2017, you appealed UDC’s response. In your appeal you assert that UDC’s response is defective under DC FOIA because the denial “does not assert or rely upon any statutory exemption under DC FOIA.” Your appeal points out that neither of the stated reasons of the denial is sufficient to deny your request under DC FOIA.

UDC provided this Office with its response to your appeal on June 30, 2017.<sup>1</sup> UDC’s response reiterates its belief that UDC does not have to comply with DC FOIA because of your status as a party in litigation. In support of this position, UDC offers no binding case law but instead relies on DC FOIA Appeal 2009-17, issued by the Office of the General Counsel to the Mayor of a previous administration. On appeal, UDC cites to no exemptions under DC FOIA. Unrelated to the merits of the appeal, UDC proffers that a good faith estimate of producing the documents “would greatly exceed \$20,000.” UDC does not provide a calculation of this cost estimate.

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<sup>1</sup> A copy of the UDC’s response is attached.

## Discussion

It is the public policy of the District of Columbia government 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 . . .” *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

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), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Com’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The crux of your appeal is that UDC believes your status as a member in litigation arrests your rights under DC FOIA. UDC is incorrect. A requester’s identity and involvement in litigation relating to the request are well established as irrelevant in the FOIA context. *E.g.*, *North v. Walsh*, 881 F.2d 1088, 1099 (D.C. Cir. 1989) (“FOIA rights are unaffected by the requester’s involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery . . . .”); *see*, *Jackson v. First Fed. Sav.*, 709 F. Supp. 887, 889 (E.D. Ark. 1989) (declaring that “there is no rule that the parties to a lawsuit may only gather evidence through the formal discovery devices” and “it is ordinarily unnecessary for the party seeking the material to take steps to compel what will be given freely”); *see also In re F&H Barge Corp.*, 46 F. Supp. 2d 453, 454-55 (E.D. Va. 1998) (noting that “courts have allowed private litigants to obtain documents in discovery via the FOIA”); FOIA Update, Vol. III, No. 1, at 10 (acknowledging that “[u]nder present law there is no statutory prohibition to the use of FOIA as a discovery tool”). The right to access government records is available to all persons and is not contingent on whether an individual has sued the government. D.C. Official Code § 2-531 (“all persons are entitled to full and complete information regarding the affairs of government”).

Government agencies that wish to withhold records must rely on a statutory exemption. D.C. Official Code § 2-533 (“Denial by a public body of a request for any public record shall contain at least the following: (1) The specific reasons for the denial, including citations to the particular exemption(s) under § 2-534 relied on as authority for the denial . . .”). UDC has not asserted a statutory exemption here.

Instead, UDC cites solely to DC FOIA Appeal 2009-17 to support its position. Normally, we consider previous FOIA Appeal decisions to be persuasive, but 2009-17 is a poorly reasoned decision without basis in law. This 2009 decision relies mostly on *dicta* from an unreported District Court decision, *U.S. v. Agunbiade*, No. 90-CR-610(S)-02 (JRB), 1995 U.S. Dist. Lexis 8043, \*20 (E.D.N.Y. 1995). The merits of *Agunbiade* were decided on the failure of the plaintiff to exhaust his administrative remedies; the portion that 2009-17 quotes is an explanation by the court of one of the reasons it would not ignore a clear procedural bar. *Agunbiade* does not articulate a stand-alone exemption and was improperly relied on in FOIA Appeal 2009-17.

UDC has failed here to state a legally cognizable reason for denying your FOIA request. UDC has not asserted any exemption to justify partial withholding, yet has also asserted that there would be a cost associated with “redaction.” From this, this Office assumes that portions of the withheld documents may be subject to legally cognizable FOIA exemptions that have not yet been asserted.

Lastly, UDC makes arguments relating to the scope of your request and its burdensome nature. These arguments do not constitute an exemption or justification to withhold records. *Fraternal Order of Police v. District of Columbia*, 139 A.3d 853, 863 (D.C. 2016) (“there is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request.”). However, pursuant to DC FOIA, UDC may avail itself of fees to recoup costs. *See* D.C Official Code § 2-532(b-3) (“No agency or public body may require advance payment of any fee unless . . . the agency or public body has determined that the fee will exceed \$250.”); 1 DCMR § 408.

### Conclusion

Based on the foregoing, we remand this matter to UDC. Within 15 business days of the date of this decision, UDC shall: (1) search for responsive documents; (2) review responsive documents for redactions pursuant to D.C. Official Code § 2-534(b); and (3) begin providing you with responsive documents on a rolling basis.<sup>2</sup> You may challenge UDC’s subsequent response by separate appeal.

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 the DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Alonzo Chisolm, Assistant General Counsel, UDC (via email)

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<sup>2</sup> Please note that because of the size and scope of this request, you may be required to pre-pay for these services. *See* D.C Official Code § 2-532(b-3).