

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-98**

July 18, 2017

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2017-98

Dear Mr. Mulhauser:

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 challenge the response you received from the Office of the City Administrator ("OCA") to a request you submitted under the DC FOIA.

Background

On May 5, 2017, you submitted a FOIA request to OCA for records relating to "a study of DC MPD body worn cameras." Specifically, your request contained four parts:

- (1) the study design or plan, (2) data collection instruments in use in the study, (3) any record identifying [sic] the principal investigator and performing organization that is doing the study, and (4) any interim or progress reports -- all related to the MPD study of the results of equipping patrol officers with body worn cameras.

Additionally, your request had a fifth, unnumbered request: "If work is being done under contract (University of Arizona, outside reviewers, etc.) I also request copies of the relevant records including scope of work, deliverables, schedule and any correspondence."

On June 12, 2017, OCA responded to your request, providing you with a single document titled "Pre-analysis Plan – MPD BWC RCT – v1". OCA indicated in its response that this document was responsive to three of the four parts of your request. OCA's initial response did not acknowledge the request for interim or progress reports or for work being done under contract.

You appealed OCA's response on four grounds: (1) the document that was provided to you appears to be incomplete, as it references an "Appendix B" that doesn't follow; (2) the released record does not identify the principal investigator; (3) you believe that an interim and progress report must exist because "it is unlikely a government agency overseeing such a project has no record of any kind concerning progress. . ."; and (4) OCA did not respond to your unnumbered fifth request for documents concerning a contract.

This Office notified OCA of your appeal. OCA subsequently provided us with an explanation and declaration of the underlying response you received.<sup>1</sup> OCA's response addresses the four parts raised in your appeal. OCA avers that: (1) Appendix B "was included in error, based on a prior outline of the document"; (2) "The principal investigator is the individual identified as the 'contact' on page 1 of the pre-analysis plan . . . the Director of The Lab @ DC"; (3) no progress reports exist, and OCA did not read your original request to be inclusive of "email or other correspondence" as stated in your appeal, and as such, OCA requests that you file a new request for such records; and (4) the work is not being done under contract, therefore OCA does not possess records responsive to that aspect of your request.

### 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*

We have interpreted your appeal as challenging the adequacy of OCA's search for the records you requested. DC FOIA requires that a search be 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

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<sup>1</sup> A copy of OCA's response is attached to this decision.

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.*

Here, OCA provided a declaration from the Director of The Lab @ DC that responds to all four parts of your appeal. The Director states that he “would be aware of the existence of documents responsive to Mr. Mulhauser’s FOIA request and appeal.”

First, you challenged the adequacy of the search because the single document that was provided to you appeared to be incomplete. The response appears incomplete because the document contains reference to an “Appendix B” that is not attached. OCA’s declaration clarifies that “that reference is in error and no Appendix B exists.” This Office accepts OCA’s representation, and concludes that this part of the search was adequate.

Second, you claim that no principal investigator was identified. The declarant identifies himself as “the principal investigator of the body-worn camera study . . .” This Office accepts this representation, and considers this portion of the appeal to be resolved.

Third, you challenge OCA’s position that interim progress reports do not exist. The declaration states that “[t]here are currently no interim or progress reports for the body-worn camera study.” This Office accepts this representation, because the Director is the “principle investigator for the body-worn camera study and in that capacity would be aware of the existence of documents responsive to [your] request. . .” Further, the Director’s statements are “based on personal knowledge, as well as on information acquired by [him] in the course of performing [his] duties.” As a result, this Office concludes this part of the search was adequate.

Fourth, you challenge OCA’s lack of response to the final part of your request, for records relating to work being performed under a contract. The declaration states that “[w]ork on the body-worn camera study is not being performed by contract.” As a result, no responsive records would exist. This Office accepts this representation, and concludes this part of the search was adequate.

Having reviewed OCA’s response to your appeal, we find that OCA made a reasonable determination as to where the documents you are seeking would be located if they existed: in the possession of the Director of The Lab @ DC. We find that OCA conducted an adequate search for the documents, and we accept OCA’s representation that no further responsive documents were retrieved.

*Scope of Original Request*

On appeal, in relation to “interim or progress reports” you purport that your request “may involve email or other correspondence with the distant experts, notes of telephone conversations, draft reports, or emails to others on progress reported by phone calls.” The OCA’s response indicates that it did not interpret your initial request to go beyond “interim or progress reports.” That is, OCA narrowly interprets your request as being for reports and not as being for correspondence related to the study. As a result, OCA requests that you file a separate request for such records. This Office finds that OCA’s interpretation was reasonable, and that your request was not written as broadly as you characterize it on appeal. This Office’s jurisdiction is limited to reviewing the withholding of records, pursuant to D.C. Official Code § 2-537, and it does not appear that OCA is withholding records. As a result, we lack jurisdiction at this juncture to order OCA to produce the “correspondence” documents relating to “interim or progress reports” since you have not yet requested and been denied such records.

Conclusion

Based on the foregoing, we affirm OCA’s response to your request and hereby dismiss your 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 DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Nathan Mulat, OCA (via email)