

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



November 2, 2015

***VIA ELECTRONIC MAIL***

Mr. Delroy A. Burton, Chairman  
DC Police Union  
1524 Pennsylvania Avenue, SE  
Washington, DC 20003  
[dburton@dcpoliceunion.com](mailto:dburton@dcpoliceunion.com)

Dear Chairman Burton:

The Office of Open Government (OOG) is in receipt of your October 13, 2015, request for a Freedom of Information Act (FOIA) investigation in connection with the Executive Office of the Mayor's (EOM) response to the September 14, 2015, FOIA request by the Fraternal Order of Police (FOP) for all records<sup>1</sup> pertaining to the authority of the Metropolitan Police Department (MPD) to adjudicate appeals of Notices of Infraction issued to MPD vehicles.

The OOG, pursuant to the authority set forth in § 503(a)(4) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593 *et seq.* (2015)), may issue advisory opinions on implementation of Subchapter II, D.C. Official Code § 2-531 *et seq.* (2015) Freedom of Information Act. The OOG does not have the authority to conduct investigations into agency FOIA determinations; nor does the OOG have the authority to compel agencies to provide requested records under FOIA. Accordingly, the findings below are submitted to you and the Executive Office of the Mayor as an advisory opinion.

**Background**

On September 23, 2015, Jim Slattery, EOM FOIA Officer, responded to the FOIA request with the following:

“In response to this request, first, for statutes and rulemakings you can query: <http://www.lexisnexus.com/hottopics/dccode/>; Second, for Mayor's

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<sup>1</sup> Specifically, the FOP seeks: “Any Memorandum of Understanding, statute, regulation, notice and comment rulemaking, memorandum, e-mail, meeting notes, Mayor's Order, and/or any other authority of any kind that relates in any way to the purported authority of the Metropolitan Police Department (rather than the Department of Motor Vehicles) to adjudicate appeals of Notices of Infraction issued to D.C. Metropolitan Police Department vehicles, including any and all drafts of such documents.”

Orders, regulations and notices in the DC Record you can query here: <http://www.dcregs.dc.gov/Search/FullTextSearch.aspx>; Third, meeting notes and drafts of the documents that you seek are not subject to FOIA as information contained within are considered deliberative. Lastly, as to your request for e-mails, I must ask that you broaden your search to a specific time frame and listing of those persons' e-mail accounts you would like queried, along with specific search terms. Likewise, searches for memorandum and memorandums of understanding must be defined by specific time frames and search terms. I must also ask for specificity concerning the term "any other authority of any kind" mentioned in your request."

On October 15, 2015, I spoke with Melissa Tucker, the Associate Director of the Mayor's Office of Legal Counsel (MOLC), regarding the FOP's request for an investigation into this matter. Ms. Tucker informed me that it was Mr. Slattery's intention to seek additional information to clarify the scope of the request, and that the September 23, 2015, letter is not considered a denial to obtain copies of the requested records.

## **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." DC Official Code § 2-531. The District FOIA creates the right "to inspect...to copy any public record..." *Id.* at § 2- 532(a). The right to inspect is limited by exemptions expressly provided under § 2- 534. Such exemptions may be used as a basis for denial, but will be narrowly construed in favor of disclosure. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

The matter raises three issues for review: (1) the adequacy of the search conducted by the EOM in response to the request for records; (2) whether the September 23, 2015, letter from Mr. Slattery constitutes an effective denial of the FOIA request; and (3) whether the tolling of the request is stayed pending the EOM seeking clarification from the FOP regarding search perimeters of the requested records.

## **Adequacy of Search**

DC FOIA requires a public body to "make reasonable efforts to search for records..." D.C. Official Code § 2- 532(a-2); and to attest that a search for documents was reasonably calculated to discover responsive documents. *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Agencies are required to conduct a thorough, good faith search for records.. *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978)

To establish an adequate search for records, an agency need not search every record system. It must, however, "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 Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An adequate search is one that is "reasonably calculated to uncover all relevant documents," *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)

The EOM in its response directed the FOP to two Websites to locate the requested statutes, rulemakings, Mayor's Orders, regulations and notices.<sup>2</sup> While Courts have long held that agencies are not required under FOIA to produce records that are publicly accessible (*Antonelli v. Fed. Bureau of Prisons*, 591 F.Supp. 2d 15, 25 (D.D.C. 2008)), it is the determination of the OOG that the EOM failed to meet its burden of supplying records under FOIA. The response of the EOM to simply point the FOP to general Websites, rather than provide the necessary information or instructions to access the requested records, does nothing more than frustrate the intended purpose of FOIA and encumbers the FOP in exercising its right to inspect public records.<sup>3</sup> Therefore, the EOM is advised to provide specific links to the records sought by the FOP.

Further, the EOM must establish that it made reasonable efforts to search for the requested records (DC Official Code § 2-532(a)); and should there be a denial of any requested record(s), the EOM must provide specific reasons for the denial, including citations to the particular exemptions relied upon to deny access to the records. *Id.* at § 2-533(a)(1).

**Whether the EOM's Response Pertaining to Meeting Notes and Document Drafts Constitutes an Effective Denial of the FOP's FOIA Request.**

D.C. Official Code § 2-534(a)(4) exempts from disclosure "inter-agency or intra-agency memorandums or letters...which would not be available by law to a party other than a public body in litigation with the public body." The deliberative process privilege shields from release agency documents that are both predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is considered predecisional if it was created prior to an agency adopting policy, and deliberative if it "reflects the give-and-take of the consultative process." *Id.* The EOM in its September 23, 2015, response summarily dismisses the FOP's request to access meeting notes and drafts of documents as deliberative. It can only be assumed that the EOM reached this conclusion without taking the proper steps to (1) search and review the requested documents; and (2) make a determination as to whether each record is predecisional, deliberative, or both.<sup>4</sup> Both are mandatory steps for a proper determination regarding the applicability of the deliberative process exemption. While a final decision is not necessary to establish the privilege, (*see Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975)), an agency must establish "what deliberative process is involved and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). The EOM is therefore advised to conduct a proper search and determine whether agency records must be released or withheld under D.C. Official Code § 2-534.

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<sup>2</sup> The EOM directs the FOP to LexisNexis (<http://www.lexisnexis.com/hottopics/dccode/>) to locate statutes and rulemakings; and to the District of Columbia Government Municipal Regulations and D.C. Register Website (<http://www.dcregs.dc.gov/Search/FullTextSearch.aspx>) to locate Mayor's Orders, regulations and rulemaking notices.

<sup>3</sup> This determination is not foreign to the EOM, as it has ruled in a similar manner on appeal. *See Freedom of Information Act Appeal 2014-07*.

<sup>4</sup> As the Office of Open Government does not have the authority to compel the EOM to release records under FOIA, it did not seek to review *in camera* those documents the EOM asserts are exempt as deliberative, and is relying solely upon the communications of the FOP and EOM is issuing this advisory opinion.

### **Whether the Tolling of the Request is Properly Stayed for the EOM to Seek Clarification from the FOP**

Lastly, the EOM requests that the FOP broaden its search to include a specific time frame and listing of those persons' e-mail accounts that should be queried, along with specific time frames and search terms for memorandum and memorandums of understanding. Additionally, the EOM requests clarification of the meaning of "any other authority of any kind," as stated in the FOP FOIA request.

Under District FOIA, all requestors are required to state with specificity the records sought. Subsection 1-402.4 of the District of Columbia Municipal Regulations provides: "A request shall reasonably describe the desired record(s)." A requestor is therefore required to submit requests with sufficient particularity to ensure that searches are not unreasonably burdensome, so that the agency may determine what records are requested and to conduct a reasonable search for those records. Section 1-402.5 provides that "[w]here information supplied by the requestor is not sufficient to permit identification and location of the record by an agency...the requestor shall be contacted and asked to supplement the request for the necessary information."

Given the scope of the FOP request, the EOM acted properly when it requested date ranges for the search, and the names of District Government employees whose emails must be searched for the requested records. The FOP has met its burden of providing the topic area for the search. The FOP is advised to supply the EOM with the date ranges and government employee names whose email address should be queried. Additionally, the FOP is advised to provide clarification to the EOM regarding the meaning of "any other authority of any kind." Until the FOP supplies the necessary information to conduct the search, the tolling of the FOIA request is properly stayed.

### **Conclusion**

The EOM is advised to provide specific links to the records sought by the FOP; the EOM is advised to conduct a reasonable search of all records, including meeting notes and drafts of documents upon receipt of specific date ranges and employee names from the FOP.

Sincerely,

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TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

Cc: Melissa Tucker, Mayor's Office of Legal Counsel  
Jim Slattery, EOM