April 6, 2016

Traci L. Hughes, Esq.
Director, Office of Open Government
Board of Ethics and Government Accountability
441 4th Street NW, Suite 540S
Washington, D.C. 20001

Dear Ms. Hughes:

This letter is in response to your November 2, 2015, advisory opinion ("Advisory Opinion") addressing the request of the Fraternal Order of Police ("FOP") that an investigation be conducted into the Executive Office of the Mayor's ("EOM's") September 23, 2015, reply to a Freedom of Information Act ("FOIA") request that the FOP submitted to the EOM.

The Advisory Opinion addresses various categories of records that the FOP sought in its FOIA request.[1] The purpose of this letter is to respond to the Advisory Opinion's conclusion that the EOM failed to conduct an adequate search for statutes, regulations, notice and comment rulemaking, and Mayor's Orders ("legal authorities") that the FOP requested. I disagree with this conclusion because it ignores the threshold issue: whether the FOP's request for legal authorities was proper under the FOIA.

The FOP's request for authorities that "relat[e] in any way to the purported authority of the Metropolitan Police Department . . . to adjudicate appeals of Notices of Infraction issued to Metropolitan Police Department vehicles . . ." is a legal question conveyed in the form of a FOIA request. The FOIA, however, does not require an agency to conduct research by "answer[ing] questions disguised as a FOIA request." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985)

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[1] In specific, the FOP requested: "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."

("FOIA creates only a right of access to records, not a right to personal services.")[2] An agency has no duty either to answer questions unrelated to document requests or to create documents. *See Forsham v. Harris*, 445 U.S. 169, 186 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975)); *accord Yeager v. DEA*, 678 F.2d 315, 321, (D.C. Cir. 1982) ("It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.").

Courts including the United States District Court for the District of Columbia have addressed the specific issue here and held that agencies are not obligated to provide statutes, regulations, and similar documents in response to a FOIA request. *See Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003) (finding an agency is not required to identify and list regulations meeting the description of a FOIA request); *West v. Jackson*, 448 F. Supp. 2d 207, 212 (D.D.C. 2006) (stating an agency does not have to conduct legal research to provide statutes or regulations in response to a FOIA request); *Tolotti v. IRS*, 2000 U.S. Dist. LEXIS 12083, *4 (D. Nev. 2000) (stating an agency has no obligation to research regulations, rulings, and statutes under FOIA or provide such information in response to a FOIA request).

The Advisory Opinion does not cite case law in support of its conclusion that the EOM should provide specific links to the legal authorities sought by the FOP. Rather, the Advisory Opinion cites to FOIA Appeal 2014-07, issued by the Mayor, and misconstrues the holding in this decision. FOIA Appeal 2014-07 examined a request for an identifiable, specifically described record, whereas the FOP's request is an open-ended query for legal authorities. FOIA Appeal 2014-41 is more factually on point and states that agencies are not required to provide statutes, regulations, and similar documents in response to a FOIA request.[3] *See also Bloeser v. United States DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("'FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,' *Assassination Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), 'it is the requester's responsibility to frame requests with sufficient particularity to . . . enable the searching agency to determine precisely what records are being requested.' *Id.*, citing *Yeager*, 678 F.2d at 315.'").

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[2] *See also Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269 (D.D.C. 2012); *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009); *Frank v. U.S. Dep't of Justice*, 941 F. Supp. 4, 5 (D.D.C. 1996) (holding that agencies are "not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's question").

[3] *See* FOIA Appeal 2014-41 citing several cases referenced in this letter *Hudgins*, 620 F. Supp. at 21, *Brown*, 675 F. Supp. 2d at 129-130, *Landmark Legal Found.*, 272 F. Supp. 2d at 64, *West*, 448 F. Supp. 2d at 212, *Tolotti*, 2000 U.S. Dist. LEXIS 12083 at *4; as well as *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985), *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978).

In light of the well-established case law cited above, I respectfully disagree with the Advisory Opinion's conclusion pertaining to FOP's request for legal authorities. The FOIA does not require an agency to answer questions or conduct legal research to provide statutes and regulations. Accordingly, EOM asserts that its response to the FOP's request for legal authorities was proper under the law.

Sincerely,

Betsy Cavendish,
General Counsel to the Mayor

cc:     Jim Slattery, Director, Mayor's Correspondence Unit (via email)
         Delroy Burton, Chairman, DC Police Union (via email)