BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT

April 12, 2017

VIA ELECTRONIC MAIL
Mr. Mark Segraves
mark.segraves@nbcuni.com

VIA ELECTRONIC MAIL
Lucida Babers, Director
D.C. Department of Motor Vehicles
95 M Street SW, Washington, DC 20024
babers.lucinda@dc.gov

RE: OOG-0001_3.31.17_FOIA AO

Dear Mr. Segraves:

The Office Open Government (OOG) is in receipt of your March 31, 2017 request for a Freedom of Information Act (FOIA) advisory opinion to address an allegation that the District of Columbia Department of Motor Vehicles (DMV) mandated the District Government FOIA Public Access Portal (FOIA Portal) as the only means for the submission of your FOIA request to that agency.

Additionally, you have concerns about recently receiving two electronic communications from the DMV in the form of zip mail containing the responses to questions you presented to the DMV. It is undisputed that the DMV's two electronic communications were not in response to a FOIA request. The two electronic communications from the DMV containing their responses to you are zip forms and encrypted.[1] Also, each contain expiration dates after which you would no longer be able to access the information the encrypted messages contain. Each message also instructs the recipient that "[I]f clicking Open Message does not work, copy and paste the link below into your internet browser address bar."

In response to your inquiry as to why the DMV was providing answers to you with zip mail, DMV Director Lucinda Babers stated "it was the standard setting for email based on OCTO's encryption requirements." However, you found the Director's response to be in direct contradiction with information you received from OCTO's Communication Director. Because it appears that the DMV may use encrypted emails in all responses to the public, you have raised

[1]Email encryption involves encrypting, or disguising, the content of email messages in order to protect potentially sensitive information from being read by anyone other than intended recipient. Email encryption often includes authentication.

concerns that DMV may provide responses to your March 28, 2017, FOIA request or a requester's future FOIA request with encrypted email. You asked the OOG whether doing so is a requirement of FOIA or violates the statute.

The foregoing non-binding opinion is issued by the OOG pursuant to section 503(c) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Official Code § 2-593(c)), authorizing the OOG to issue advisory opinions on the implementation of Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.), the Freedom of Information Act of 1976.

The two issues this opinion resolves are whether: (1) an agency may require that the public submit a FOIA request through District's FOIA Portal; and, (2) FOIA requires a public body to provide responsive records to the requester using an encrypted email. For reasons which follow, the OOG opines that: (1) under current District FOIA regulations an agency may not restrict the method a requester uses to submit a FOIA request to the FOIA Portal; and, (2) FOIA does not require the delivery of responsive records to the requester in an encrypted email, which the statute and courts hold is a violation of FOIA.

BACKGROUND

On March 16, 2017, Mr. Mark Segraves, a journalist with NBC 4 received email responses to a series of questions that were posed to the DMV, from Director Lucinda Babers. Director Baber's electronic responses were sent from the email address dc.gov.notification@zixmessaecenter.com, with instructions to "Reply-TO SecureEmailReply@zixmessagecenter.com." The body of the email response reads:

> New ZixCorp secure email message from the Government of the District of Columbia.
> Open Message
> To view the secure message, click Open Message.
> The secure message expires on Apr 16, 2017@06:21 PM (GMT)>
> If clicking Open Message does not work, copy and paste the link below into your Internet browser address bar.
> https://web1.zixmail.net/s/se?b=dcgov&
> Want to send and receive your secure messages transparently? Click here to learn more.

Relevant to this opinion is the Director's response to Mr. Segraves' first question, "[W]hy are you replying via zip mail?" To which the Director's response was, "[T]hat's the standard setting for email based on OCTO's encryption requirements."

On March 17, 2017, Vanessa E. Newton, DMV's Associate Director of Administrative Services, electronically communicated a response to an inquiry by Mr. Segraves. The email containing the

response was also an encrypted zip mail with the identical content in the email body as the March 16, 2017 electronic communication.

On March 28, 2017, Mr. Segraves submitted a FOIA request via email to DMV's General Counsel and to foia.dmv@dc.gov. The FOIA request stated:

> I am seeking any and all emails, memos, letters or other correspondence between DMV employees and other DC agencies/employees regarding a vendor{sic}; RR Donnelly.
> Additionally I am seeking emails, memos and correspondence between DMV employees/officials and any other DC Government agencies /employees regarding the recall and distribution of hand written ticket books for MPD Officers and others authorized to issue tickets.
> I am also seeking any and all correspondence, emails and memos between DMV employees and the company RR Donnelly.
> I am seeking the above material for the time period of November 1, 2016 to March 28, 2017.
> I am seeking this as a member of the press for distribution to the public. I would ask for a waiver of any and all fees.
> Please respond and send all information in an electronic format.

That same day Mr. Segraves received an email response to the FOIA request from "DMV, FOIA (DMV)" < foia.dmv@dc.gov>. The subject line of the email reads "Out of Office: FOIA Request." The body of the email contains the following language:

> ATTENTION: Effective **August 6, 2014,** all Freedom of Information Act ("FOIA") requests sent to this email address will not be accepted.
> If you wish to submit a FOIA request to the Department of Motor Vehicles ("DMV"), please utilize the following link below to access the D.C. Government's Freedom of Information Act Public Access Portal.
> https://foia-dc.gov/palMain.aspx
> Thank You.

On March 28, 2017, Mr. Segraves forwarded to Director Babers, Erika Satterlee of the Executive Office of the Mayor, and to Ms. Newton the electronic auto-reply he received from the DMV. In the forwarded response, Mr. Segraves notified them of the following: (1) his receipt of the auto-reply email; and (2) that requiring FOIA requests to be submitted through the FOIA portal is illegal. Also, Mr. Seagrave ask that they address the issue as soon as possible; and to accept the forwarded email as an official FOIA request.

On March 29, 2017, in an electronic communication, Ms. Satterlee responded to Mr. Segraves "that she would certainly look into it this morning." Ms. Satterlee also confirmed with Mr.

Segraves that he did not wish to submit the FOIA request to the EOM. She also stated that DMV would be the best agency to locate the responsive documents. Mr. Segraves' response was that he did not wish to FOIA the EOM, but thought Ms. Satterlee "could explain to the DMV how they were in violation of the DC Code." Later that same day, Ms. Satterlee requested from Mr. Segraves the auto-reply email that had been received from the DMV email account.

By electronic correspondence on March 29, 2017, Mr. Segraves forwarded Director Babers' March 16, 2016, email containing the reason for the DMV's use of encrypted email to Mr. Michael Rupert, OCTO's Communications Director for clarification of OCTO's requirement that the DMV use encrypted email. That same day, Mr. Rupert responded electronically that: "[W]e don't require all DMV emails. Only emails that contain sensitive data or PII[2] should be encrypted. Users sometimes leave it on for all without thinking about it."

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. FOIA creates the right "to inspect…to copy any public record..." Id. at § 2-532(a). However, an individual's right to inspect or copy a public record is not absolute. FOIA restricts through exemptions found in D.C. Official Code §2-534 certain matters from disclosure. The District FOIA is patterned after its federal counterpart. Where similar provisions exist, we may look to the federal FOIA for guidance in interpreting local FOIA. *Dunhill v. D.C. Department of Corrections*, supra 416 A.2d at 247 n.6.

> **District FOIA regulations authorize several methods for the submission of a FOIA request to an agency. Therefore, an agency may not mandate that a requester use a specific method to submit a request.**

The District of Columbia Municipal Regulations (1 DCMR § 400 *et seq*.) contains the rules to implement FOIA provisions. Per its terms, all District agencies subject to FOIA must strictly adhere to its provisions. 1 DCMR § 400.1provides:

> This chapter contains the rules and procedures to be followed by all agencies, offices, and departments (hereinafter "agency") of the District of Columbia Government which are subject to the administrative control of the Mayor in implementing the Freedom of Information Act, D.C. Law 1-96, 23 DCR 3744 (1977) (hereinafter "the Act") and all persons (hereinafter "requesters") requesting records pursuant to the Act.

[2] Personal Identifiable Information

The DMV is an agency of the District of Columbia subject to the administrative control of the Mayor and therefore must follow 1 DCMR § 400 in complying with FOIA requests.

Dispositive to this issue of whether an agency may require the public to submit a FOIA request through the FOIA Portal is 1 DCMR § 402, entitled "Request for Records." The provisions in this section authorize several methods a requester may use to submit a FOIA request to an agency. Subsection 402.3 provides in relevant part that requests "may be mailed, faxed or e-mailed."[3]

The auto-reply Mr. Segraves received from foia.dmv@dc.gov fails to state these statutory alternate methods of submitting a FOIA request, i.e., orally, by mail, fax, or email, and to provide the requisite information so a requester may do so. The auto-reply from foia.dmv@dc.gov directed Mr. Segraves to the FOIA Portal with language that expressly limits the requester's options for submitting the request. This language is unambiguous and states, "[I]f you wish to submit a FOIA request to the Department of Motor Vehicles ("DMV"), please utilize the following link below to access the D.C. Government's Freedom of Information Act Public Access Portal.[4]"

The OOG finds that the DMV limited Mr. Segraves to using the FOIA Portal to submit a FOIA request. The DMV's actions are violations of the following: (1) 1 DCMR § 400 for its failure to follow all rules and procedures in meeting a request; and, (2) 1 DCMR§ 402.1 for requiring, to the exclusion of all legally authorized methods, submission of a FOIA request through the FOIA Portal.

> **FOIA does not require that a public body responds to a requester in an encrypted email. Doing so limits the availability of the public to the records, and violates FOIA.**

Mr. Segraves' March 28, 2017, FOIA request 2017 FOIA-02777 is currently pending with the DMV for processing. Mr. Segraves asked that the responsive documents be provided to him in electronic format. As has been noted, the DMV used encrypted emails to provide responses to Mr. Segraves' questions on March 16, 2017 and March 17, 2017. These encrypted email responses came from two different persons within the DMV – Director Babers and Ms. Newton. When asked by Mr. Segraves why the use of encrypted emails, Director Babers' response was that it is the standard imposed by OCTO. However, an electronic communication to Mr.

[3] Subsection 402.1 and 402.3 provide that a request may be submitted orally. However, the requester may be asked to reduce an oral request to writing.
[4] DMV's website at https://dmv.dc.gov/page/open-government-and-freedom-information-act-foia, list in addition to the District's FOIA Portal, mail, email or fax as methods to submit a request to DMV.

Segraves from OCTO's Communication Director regarding the DMV's use of encrypted email is in conflict with Director Babers' statement.[5]

Based on Director Baber's statement, it appears that the use of encrypted emails may be the practice within the DMV. If this is true, there is a real possibility that where the DMV grants a FOIA request, the DMV may provide to the recipient the responsive documents in an encrypted email. For reasons which follow, the delivery of records to a requester in an encrypted email would be in violation of FOIA.

First, there is no statutory authority under District FOIA or the FOIA regulations for an agency to use an encrypted email to provide records to a requester. When this is done the agency action is *ultra vires.* Secondly, since the record is no longer available to be accessed by the requester after a stated period, the agency is "limiting the availability of records to the public" in violation of D.C. Official Code § 2-534(c).

D.C. Official Code § 2-534 contains sixteen categories of records that are exempt from release to the public under FOIA. D.C. Official Code § 2-534(c) makes abundantly clear that these exemptions are the sole reason for withholding a record. It states:

> (c) *This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.* [Emphasis added.] This section is not authority to withhold information from the Council of the District of Columbia. This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.

The encrypted emails Mr. Segraves received from the DMV's Director and Ms. Newton each contained expiration dates of April 16, 2017, and April 28, 2017, respectively. After the respective dates, when the requester would no longer have access to the information. The sending by the DMV of an encrypted email with an expiration date, limits the availability of the record to the requester in violation of D.C. Official Code § 2-534(c).

Furthermore, once the expiration date in the encrypted document has passed, the requester has no ability to disseminate the record to additional persons, thus limiting how the record could be used by the requester. Courts have held such limitations violate FOIA. "An agency does not comply with the FOIA when it produces records subject to restrictions on how those records may be

[5] Michael Rupert, OCTO's Director of Communication indicated to Mr. Segraves in a March 28, 2017 electronic correspondence that: "[W]e don't require all DMV emails. Only emails that contain sensitive data or Pll should be encrypted. Users sometimes leave it on for all without thinking about it."

used." [6] Once records are released to the public in response to a FOIA request, "[T]he information belongs to citizens to do with as they choose." *Nat'l Archives & Records Administration v. Favish*, 541 U.S. 157, 172 (2003). In the instant case, the resulting restriction could prevent the requester from accessing or disseminating a record after a stated date.

A further limitation on the public access to an encrypted FOIA response from the DMV is found in a message in the body or the encrypted email messages. Each encrypted message instructs the recipient that "[I]f clicking Open Message does not work, copy and paste the link below into your internet browser address bar." Therefore, the possibility exists that the "Open Message" prompt will not provide the requestor access to the record, leaving the recipient to attempt to open the encrypted email to obtain the record using alternate instructions. Finally, courts have held that a document subject to disclosure "belongs to all." *Ibid*. An encrypted document would not fit this description because such documents are generally recipient-specific and are password protected.[7]

Recommendations for Compliance with FOIA

The OOG does not find the DMV's violations of the FOIA to be willful or intentional. However, this does not lessen the severity of these violations or the need for the DMV to take immediate corrective action which the DMV has apparently begun with respect to the foia.dmv@dc.gov email address. When Mr. Segraves sent his March 28, 2017, FOIA request to foia.dmv@dc.gov, he received an auto-reply message from foia.dmv@dc.gov, that as of August 6, 2014, FOIA requests sent to the address would no longer be accepted and to submit his request through the FOIA Portal. This is no longer the case.[8] Currently, the auto- reply states that the email address is invalid. It no longer directs the requester to submit a FOIA request through the FOIA Portal.

With respect to using encrypted email to provide responsive records to FOIA requesters, the OOG has no definitive proof that DMV has done so in the past or intends to do so in the future. Notwithstanding this uncertainty, the OOG must advise the DMV not to use encrypted email for the delivery of responsive records to FOIA requesters for reasons already stated in this opinion. The OOG also recommends that the DMV follow OCTO's guidance with regard to the transmission of non-PII information using encrypted email.

[6] See *Yonemoto v. VA*., 686 F.3d 681, 690.
[7] On March 31, 2017, Mr. Segraves forwarded to OOG Director Traci Hughes the March 16, 2017 and March 17, 2017, the encrypted electronic messages he received from the DMV. Director Hughes was not able to open these messages because they were recipient-specific and password protected.
[8] On March 31, 2017, OOG Attorney Adviser Johnnie Barton sent an electronic correspondence to foia.dmv@dc.gov. The response from that email address was "Delivery has failed to these recipients or groups: foia.dmv@dc.gov.

Conclusion

District regulations clearly delineate the methods by which a requester may submit a FOIA request. They are orally, by mail, email and fax. Therefore, an agency may not mandate which method a requester uses to submit a FOIA request, or require a requester use the FOIA Portal. FOIA does not require the delivery of responsive records to the requester in an encrypted email. The statute and legal precedent are clear that if an agency limits or restricts access to records it is a violation of FOIA. The DMV's website at https://dmv.dc.gov/page/open-government-and-freedom-information-act-foia currently lists the appropriate contact information for the submission of FOIA requests using these methods including use of the D.C. Government FOIA Portal. Therefore, the DMV currently appears to be in compliance with 1 DCMR § 400.

Sincerely,

TRACI L. HUGHES, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability