

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



MEMORANDUM

**TO: DEB MATTIES, GENERAL COUNSEL
SMRUTI RADKAR, COUNSEL
OFFICE OF THE CHIEF TECHNOLOGY OFFICER**

FROM: JOHNNIE BARTON, CHIEF COUNSEL *JB*
OFFICE OF OPEN GOVERNMENT

RE: PROCESS FOR HANDLING FOIA REQUESTS FOR TELEPHONE LOGS

DATE: JUNE 11, 2021

Summary

This Memorandum responds to your request for advice from the Office of Open Government (“OOG”) about how Office of the Chief Technology Officer (“OCTO”) should handle District of Columbia Freedom of Information Act (“D.C. FOIA”) requests for telephone logs of numbers used and controlled by another District of Columbia government agency. Because OCTO maintains those telephone logs, D.C. FOIA would require OCTO to respond. However, the OOG looks for guidance on this issue to Mayor’s Order 2008-88, which mandates that FOIA requests for emails be handled by agencies assigned the email address, rather than OCTO, which maintains email records merely as a custodian. The OOG also finds guidance in the D.C. FOIA section 202(a-3), which governs requests for contracts held by a custodian. As discussed below, the OOG believes requests for telephone logs must be treated similarly to those for emails and contracts: requests for telephone logs should be handled by the agency with programmatic responsibility for the record.

Background

In general, D.C. FOIA and its implementing regulations require that requests “be directed to the particular agency” that maintains the records. 1 DCMR § 402.1.

By Mayor’s Order 2008-88, FOIA requests for emails are excepted from this requirement. OCTO does not receive and does not respond to an outside-of-government FOIA request for emails. Requests for emails are directed to the agencies assigned the email addresses, despite the fact that OCTO maintains email records. The Email Search Request (“ESR”) portal was developed to allow OCTO to efficiently implement the Mayor’s Order. In response to an ESR from an agency, OCTO forwards the collected email for substantive review to the general counsel(s) or FOIA officer(s) of the subject agency.

Similarly, section 202(a-3) of D.C. FOIA governs the records of private contractors that perform government functions. That subsection states:

A public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function, and *the public body with programmatic responsibility* for the contractor *shall be responsible* for making such records available to the same extent *as if the record were maintained by the public body*. (Emphasis added,)

D.C. Official Code § 2-532(a-3). Through this provision, the D.C. Council has recognized that the entity with the “programmatic responsibility” ought to answer a request for records, even when that entity must obtain the records from a custodian.

Similarly, as a records custodian, OCTO has no substantive or programmatic responsibility in telephone logs. As with emails, OCTO assigns the telephone numbers to agencies and maintains the telephone logs, but OCTO has no ability to determine responsiveness and apply privileges for telephone log requests. The agency to which telephone numbers are assigned is in the best position to conduct the substantive review of the search records and determine whether to redact or withhold the records.

Analysis

The OOG believes requestors should submit FOIA requests for telephone logs to the agency assigned the telephone number, and not to the custodian, in this case OCTO. Similar to the procedures for emails and contracts, OCTO’s role as custodian should be simply to collect potentially responsive telephone log data upon a request from an agency and forward it to the agency. Thereafter, the agency would carry out the formal response to the requestor, including producing the responsive records, if any.

This streamlined process furthers D.C. FOIA’s objectives of “minimization of costs and time delays.” D.C. Official Code § 2-531. The OOG believes that District practices should require an initial request for telephone logs to be submitted to the agency that is *assigned* the telephone number, since that agency will be responsible for the substantive decision of whether to redact or withhold the telephone logs, and is in the best position to correspond with the requester about the request.