

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



February 6, 2019

**VIA ELECTRONIC MAIL**

Ms. [REDACTED] Udodi  
[REDACTED]  
[REDACTED]  
[REDACTED]@yahoo.com

**VIA ELECTRONIC MAIL**

Inspector Vendette Parker  
Metropolitan Police Department  
300 Indiana Avenue, NW  
Room 4153  
Washington, DC 20001  
[Vendette.Parker@dc.gov](mailto:Vendette.Parker@dc.gov)

**RE: OOG-0003\_10.31.18\_FOIA AO**

Dear Ms. Udodi:

This correspondence responds to your October 31, 2018, request for a Freedom of Information Act (FOIA) advisory opinion from the Office of Open Government (OOG) on the Metropolitan Police Department's (MPD) failure to provide you with a timely determination concerning your August 28, 2018, FOIA request for body-worn camera footage.

This advisory opinion is issued by OOG pursuant to section 205c(d) of the Board of Ethics and Government Accountability Establishment and Comprehensive Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.02c(d)) (Government Ethics Act of 2011). The Government Ethics Act of 2011 empowers 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.

This advisory opinion resolves the issue of what notifications, if any, does FOIA require an agency, specifically MPD, to provide a requester when: (1) it invokes an extension to dispatch a determination to a FOIA request for body-worn camera recordings and (2) when no determination is dispatched by the agency to the requester within the applicable period. For the reasons that follow, I find that MPD did not properly notify the Requester when it invoked an extension to respond to the request for body-worn camera footage. I also find that MPD did not properly notify the Requester in accordance with the notifications requirements of 1 DCMR § 405.5 upon expiration of the time limit for the agency to make a determination of the FOIA request at issue.

## I. BACKGROUND

Based upon a review of the materials submitted by the Requestor and MPD, the background in this matter appears to be as follows. On August 28, 2018, Ms. Udodi (the “Requester”) submitted a FOIA request to the MPD to obtain the body-worn camera footage of the MPD officer responding to the automobile accident involving the motor vehicle she was driving, and the motor vehicle driven by a DHS Security Police Officer. In response, MPD sent the Requester a “FOIA Request Acknowledgement by DC Government” later that same day. The FOIA Request Acknowledgement stated in relevant part, “Request Number 2018-BWC-00210 has been assigned to the request you submitted.”

On September 26, 2018, twenty days after the request, MPD’s FOIA representative, Tara Branch, sent the following email, with the subject “Extension,” to the Requester regarding the applicable time frame in which MPD had to respond to the request:

Pursuant to D.C. Official Code § 2-532(c), we have fifteen (15) business days, subject to the possibility of a ten (10) working-day extension to respond to the request as of the date of receipt. Because your request falls under one and/or both of the categories listed below, we are exercising the additional ten (10) day extension pursuant to D.C. Official Code § 2-532(d)(2) for the following reason(s): (1) Search for, collect, and appropriately examine a voluminous amount or records and/or; (2) To consult with other components within and/or outside the agency.

Be advised, if your request is for Body Worn Camera (BWC) footage, D.C. Code § 2-532(c) allows 25 business days<sup>1</sup> subject to the possibility of 15 working-day extension, to respond to the request as of the date of receipt.

On October 29, 2018, the Requester again attempted to contact Ms. Branch regarding her FOIA request and related technical issues, but the Requester did not hear back from MPD’s FOIA representative.<sup>2</sup>

On October 31, 2018, the Requester then contacted the OOG in an email to request assistance with the FOIA request to MPD and to ask for clarification about the applicable time period for MPD to respond to the request. After receiving the Requester’s request for assistance, OOG staff then reached out to MPD and the Requester to gather additional information regarding the FOIA request to resolve the matter. On November 2, 2018, OOG staff contacted MPD FOIA representative Ms. Branch via email to determine the status of the FOIA request. That same day, Ms. Branch responded to the status update request with the following:

At this time, there is a delay due to an increased amount of requests. We are working to get the request completed as soon as possible. Please note that all BWC requests are sent to an outside vendor for processing.

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<sup>1</sup>The relevant text of D.C. Official Code § 2-532(c)(2)(A) reads, “within 25 days (except Saturdays, Sundays, and legal public holidays of the receipt of such request.”

<sup>2</sup> The Requester also had issues with logging into MPD’s system to get information about her request.

In response to Ms. Branch's status update, OOG staff advised that forty (40) days had elapsed since the Requester's FOIA request, reminded her of a FOIA officer's statutory obligation when an agency fails to provide a FOIA requester with a determination within the applicable time frame, and asked if she planned to advise the Requester of the requirements of 1 DCMR § 405.5, which imposes explicit notification requirements on an agency that does not make a determination on a dispatch of a FOIA request within the applicable time period.

That same day, the Requester also again emailed Ms. Branch to inquire about the time frame for completion of the request. Ms. Branch's response to the Requester was, "[S]orry, I don't have a time frame as to when your request will be completed." Somewhat perplexed by the MPD's response, the Requester then emailed Ms. Branch, MPD Inspector Vendette Parker, and OOG staff for clarification: "Just for clarity the time frame listed in FOIA's website is not what FOIA employees are required to follow?"

Both Inspector Parker and OOG staff responded to the Requester that same day. Inspector Parker's response stated that:

MPD is required to follow all of the FOIA laws referenced. We strive to meet these requirements with every request that we receive. Unfortunately, there are some times, due to special circumstances, when we are unable to.

There is a provision for these unusual circumstances in the law. We use a vendor to apply redactions to our body worn camera video. Due to the volume of requests, there is currently a backlog. However, the vendor is working as quickly as possible to process each request.

We understand this may be frustrating and do apologize for any delay. We will get your response to you as soon as we can. If you have any additional questions or concerns, please feel free to give me a call.

OOG's response to the Requester was as follows:

Yes, agencies including MPD must adhere to statutory time frames to provide the public with records. Because the time for MPD to respond is past, you may deem the lack of timely response as a denial of your request for the body camera footage and appeal either to the Mayor or the D.C. Superior Court. However, the Mayor or Superior Court may or may not and agree that the record is releasable. If they agree they may order that MPD release the record to you, which they apparently intend to do once it is available. If MPD provides the record while an appeal is pending the issue becomes moot.

On November 8, 2018, the Requester emailed Inspector Parker to inquire as to why a DHS investigator was given a copy of the body-worn camera footage so quickly, while the Requester was still waiting to receive a copy from MPD. That same day, Inspector Parker responded to the Requester to explain:

If the person you are referring to is a law enforcement officer, he is able to have access to BWC video if it is needed in the course of his law enforcement responsibilities, without the need to file a FOIA request. In order for video to be released as part of a FOIA, the video must be processed in accordance with FOIA laws and exemptions. Currently, the video you have requested is being processed to redact and protect certain privacy privileges.

Please feel free to call me if you have additional questions or concerns.

It does not appear that the MPD has made a determination on dispatching the Requester's FOIA request for the body-worn camera recording at issue. The Requester emailed OOG again on December 28, 2018 to indicate that the request had not yet been completed. On February 5, 2019, the Requester informed the OOG that MPD did not respond to her February 4, 2019 inquiry requesting a status update on the request and that MPD has not provided the Requester with the body -worn camera footage.

## **II. DISCUSSION**

### **A. Applicable Standards**

Under the District's FOIA laws, 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). Any person has the right of access to public records and may inspect and obtain copies of public records (D.C. Official Code § 2-532(a)), unless the requested records are subject to withholding as expressly provided under D.C. Official Code § 2-534.

The D.C. Official Code § 2-532(d) and the FOIA regulations at 1 DCMR § 405.5 govern the notice the agency must provide to the requester in such instances. The regulations implementing FOIA found in 1 DCMR § 400.1 make clear that all parties to a FOIA request must strictly adhere to its provisions: 1 DCMR § 400.1 states:

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.

D.C. Official Code § 2-532 and the FOIA regulations at 1 DCMR § 405.5 govern the notice that MPD must provide to the requester in such instances. Generally, when responding to a

FOIA request, a public body shall “within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.” (D.C. Official Code § 2-532(c)(1). As in this matter, if the public record requested is for a body-worn camera recording recorded by MPD, then MPD “shall within 25 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested recording accessible or notify the person making such request of its determination not to make the requested recording or any part thereof accessible and the reasons therefor.” (D.C. Official Code § 2-532(c)(2)(A).

In “unusual circumstances” the time period to respond to a FOIA request for body-worn camera footage “may be extended by written notice to the person making such request setting forth the reasons for extension and expected date for determination.” Under D.C. Official Code § 2-532(d)(1),<sup>3</sup> such extension to provide the body-worn camera recordings requested shall not exceed 15 days (except Saturdays, Sundays, and legal public holidays). D.C. Official Code § 2-532(d)(2)(C) defines the usual circumstances for extending the period for issuing a determination for a request for body worn camera recordings as “the inability to procure a vendor that is able to perform the redactions within the 25-day time period provided under subsection (c)(2) of this section.” Thus, if unusual circumstances exist that warrant extension of the time period to respond, MPD would have up to forty (40) days to respond to a FOIA request for body-worn camera recordings.

Further, if MPD fails to comply with a FOIA request for body-worn camera recordings within forty (40) days, that failure “shall be deemed a denial of the request, and the person making such request shall be deemed to have exhausted his administrative remedies with respect to such request.” *See* D.C. Official Code § 2-532(e). The D.C. Municipal Regulations also require that MPD provide specific notice to a FOIA requester upon expiration of the applicable time period to respond. 1 DCMR § 405.5 states that:

When no determination can be dispatched within the applicable time limit, the agency shall nevertheless continue to process the request. On expiration of the time limit, the agency shall inform the requester of the following:

- (a) The reason for the delay;
- (b) The date on which a determination may be expected; and
- (c) The right to treat the delay as a denial and of the appeal rights provided by the Act and this chapter.

The agency may ask the requester to forego appeal until a determination is made.

The following analysis and discussion details MPD’s application of the rules stated above to this matter.

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<sup>3</sup> Although not at issue here, public bodies may extend the time period to respond to other FOIA requests for no more than 10 days under D.C. Official Code § 2-532(d)(1).

## B. Analysis

The issues presented in this matter involve a determination of the type of notification that MPD is required to provide when it seeks an extension to respond to a FOIA request for body-worn camera footage, and what type of notice must be provided if it does not respond to a FOIA request for body-worn camera footage within the applicable time. After reviewing MPD's response to the Requester and the governing standards, I find that MPD did not properly notify the Requester that it needed to extend the time period to respond to the request for body-worn camera footage. I also find that once MPD failed to make a determination to dispatch the footage to the Requester within the applicable time period, it failed to properly notify the Requester under the notice requirements of 1 DCMR § 405.5.

### 1. *MPD's Notification to the Requester Invoking an Extension to Issue a Determination Does Not Comport with FOIA's Requirements.*

The subject line of the MPD's September 26, 2018, email to the Requester reads "Extension." MPD's email to the Requester falls short of FOIA's requirements. First, MPD's extension notification highlights the time frame for providing a determination of the release of public records other than body-worn camera footage. Although MPD does cite the appropriate statutory time frame and extension period for dispatching a determination for body-worn camera footage in the final paragraph of the extension notice, this notice is still insufficient.

According to D.C. Official Code § 2-532(d)(1), a notification that an agency is invoking the applicable extension to respond to a request must be in writing. The notice must also include the reason for the extension and the expected date for the determination to be made. *Id.* Further, 1 DCMR § 405.3 requires that the MPD's extension notice set forth the unusual circumstance for the delay in responding to a request. In this matter, MPD's notice of extension to the Requester failed to state the unusual circumstances for invoking the extension and failed to state the expected date for MPD's FOIA determination. Based on the Requester's correspondence with and communication to OOG, it is evident that MPD's extension correspondence confused the Requester as to the applicable time periods for MPD to make the FOIA determination. In the correspondence seeking OOG's assistance, the Requester believed the initial response period to be fifteen days and the extension period to be ten days, based on the information the Requester received from MPD.

Because MPD's notice of extension did not inform the Requester of the reasons that constitute an "usual circumstance" requiring an extension and did not provide the Requester with an expected date for a determination to be made, MPD's September 26, 2018 notice of extension to the Requester was improper.

### 2. *MPD Did Not Properly Notify the Requester When the Applicable Time Limit to Make a Determination Expired.*

In this matter, the applicable time limit as extended for the MPD to issue a determination to the Requester was forty days, excluding weekends and legal public holidays. Since initial request was made on August 28, 2018, MPD was required to respond by October 25, 2018. The MPD did not issue a determination to the Requester within the statutory extended time period. Upon expiration of the applicable time limit to issue a determination, 1 DCMR § 405.5(a) mandates that an agency notify a requester of the reason for a delay. In response to a request for a status update, MPD did provide the Requester with the reason for the delay in processing the

FOIA request for body-worn camera footage. An excerpt from Ms. Branch's November 2, 2018 email to the Requester gives the following reason for the delay in dispatching the determination:

[A]t this time, there is a delay due to an increased amount of requests. We are working to get the request completed as soon as possible. Please note that all BWC requests are sent to an outside vendor for processing.

Hence, the agency's stated reason for the delay satisfies the requirements of 1 DCMR § 405.5(a). However, as discussed below, the regulations also require that the agency provide the requester with the date on which the determination may be expected, the right to treat the delay as a denial, and of the appeal rights provided by the FOIA and the FOIA regulations.

The MPD's November 2, 2018 emails to the Requester explaining the delay fail to provide to the Requester with a date on which the Requester may expect to receive the determination. Ms. Branch informed the Requester that MPD was "working to get the request completed as soon as possible."<sup>4</sup> A subsequent response from Ms. Branch to the Requester stated: "[S]orry, I don't have a time frame as to when your request will be completed." In addition to Ms. Branch's vague response on the expected completion date, Inspector Parker's response to the Requester also gives an uncertain time frame for responding to the request. The response states:

MPD is required to follow all FOIA laws referenced. We strive to meet these requirements with every request we receive. Unfortunately, there are times, due to special circumstance, when we are unable to.

There is a provision for these usual circumstances in the law. We use a vendor to apply redactions to our body worn camera video. Due to the volume of requests, there is currently a backlog. However, the vendor is working as quickly as possible to proceed with each request.

We understand this may be frustrating and do apologize for the delay. *We will get your response to you as soon as we can.*

If you have any additional questions or concerns, please feel free to give me a call. (Emphasis added).

While perhaps well meaning, the MPD's responses to the Requester, as stated above violate the requirements of 1 DCMR § 405.5(b).

In light of the MPD's inadequate responses to the Requester on November 2, 2018, OOG staff provided the Requester with notification of the right to appeal pursuant to 1 DCMR § 405(c). The OOG correspondence provided the following information:

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<sup>4</sup> OOG Attorney Johnnie Barton was the addressee of this November 2, 2018 electronic communication. The Requester and Inspector Parker were sent a courtesy copy.

Yes, agencies including MPD must adhere to statutory time frames to provide the public with records. Because the time for MPD to respond is past, you may deem the lack of timely response as a denial of your request for the body camera footage an appeal either to the Mayor or the D.C. Superior Court. However, the Mayor or Superior Court may or may not and agree that the record is releasable. If they agree they may order that MPD release the record to you, which they apparently intend to do once it is available. If MPD provides the record while an appeal is pending the issue becomes moot.

D.C. Official Code § 2-532(e) provides that any failure on the part of an agency to issue a timely determination shall be deemed a denial of the request with the right to petition the Mayor to review the deemed denial of the request. Further, D.C. Official Code § 2-537(a)(1) provides the Requester with the right to proceed to the Superior Court to seek redress. Also, 1 DCMR § 405.5(c) requires that the agency notify the requester of the right to treat the delay as a denial and of the appeal rights provided under FOIA.

In this matter, MPD did not inform the Requester of the right to treat the delay as a denial of the Requester's FOIA request to MPD. The correspondence to the Requester from MPD also failed to provide notice the appeal rights under FOIA. Even though OOG provided the Requester with notice of the appeal rights under FOIA, this does not absolve MPD of its obligation to provide proper notice of the Requester's appeal rights and the Requester's ability to treat the delay as a denial under 1 DCMR § 405.5.<sup>5</sup> Therefore, OOG must find that MPD's insufficiently notified the Requester of the right to treat the delay as a denial and of the Requester's appeal rights in violation of 1 DCMR § 405.5(c).

### **III. RECOMMENDATIONS FOR COMPLIANCE WITH FOIA**

OOG makes the following recommendations: (1) to prevent confusion, the MPD should utilize separate correspondences to invoke extensions for body-worn camera footage and public records subject to the 10-day extension period; (2) contact the vendor redacting body-worn camera footage and inquire as to the date when the redactions to the body camera footage may be expected and supply that date to the Requester; (3) immediately notify this Requester that she may treat the delay as a denial and of her appeal rights; (4) with all future MPD FOIA request, strictly adhere to requirements of D.C. Official Code § 2-532(d)(1), D.C. Official Code § 2-537(a)(1), and 1 DCMR § 405.5; and (5) provide the Requester of body-worn camera footage an estimate in advance of the cost of redacting the recording for release.<sup>6</sup>

In addition, OOG recommends that MPD's General Counsel's office create a form letter or template for the MPD FOIA Officer and MPD staff to use when corresponding with FOIA requesters seeking body-worn camera (BWC) footage regarding an extension of time for MPD to respond to the request. To comply with the requirements of FOIA, this form letter or template should include the correct timeframe for responding to FOIA requests for BWC footage and

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<sup>5</sup> This electronic communication was mistakenly sent solely to the Requester and Ms. Branch.

<sup>6</sup> OOG notes that MPD failed to discuss any estimate of the cost of making the redactions to the Requester. 1 DCMR 408.2 provides: "[W]hen a response to a request requires services or materials for which no fee has been established, the direct cost of the services or material to the government may be charged, but only if the requester has been notified of the cost before it is incurred."



clearly state the statutory justification for any extension of this timeframe. Furthermore, the form letter or template should include the following language concerning appeals:


Under D.C. Official Code § 2-537 and 1 DCMR 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain “Freedom of Information Act Appeal” or “FOIA Appeal” in the subject line of the letter as well as on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to: The Mayor’s Office of Legal Counsel, FOIA Appeal, 1350 Pennsylvania Avenue, NW, Suite 407, Washington, DC 20004. Electronic versions of the same information can instead be e-mailed to foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to the FOIA Officer of the involved agency or the head of that agency if there is no designated FOIA Officer there. Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

#### **IV. CONCLUSION**

D.C. Official Code § 2-532(d)(1) requires that MPD provide “written notice to the person making such request setting forth the reasons for the extension and expected date for the determination.” The regulations implementing FOIA, found in 1 DCMR § 400.1, make it clear that all parties to a FOIA request must follow these provisions in the processing FOIA requests. When the agency does not make a determination within the applicable time-frames, 1 DCMR § 405.5 provides that the agency must notify the requester of the following: (1) the reason for the delay; (2) the date on which a determination may be expected; and (3) the right to treat the delay as a denial and of the appeal rights provided by FOIA. While MPD provided the Requester with the reason for the delay in this matter, it failed to provide the date on which the determination may be expected. MPD also failed to notify the Requester of the appeal rights, which FOIA law requires agencies to provide notice of appeal rights. For inexplicable reasons, the MPD omitted to provide these statutory and regulatory notifications to the Requester despite a reminder from OOG.

Since MPD’s notification was improper, OOG advises MPD to immediately provide the Requester with a determination concerning the FOIA request for BWC footage that complies with FOIA law or to immediately provide correspondence concerning the extension that comports with FOIA law based on the recommendations above.

Sincerely,

A handwritten signature in blue ink that reads "Niquelle M. Allen". The signature is written in a cursive style with a horizontal line underneath it.

NIQUELLE M. ALLEN, ESQ.  
Director, Office of Open Government  
Board of Ethics and Government Accountability

cc: Terrence Ryan, Esq.  
General Counsel, Metropolitan Police Department