Recent Records-Access Cases
August 6, 2024
(supplemental materials incl. citations)

Office of Open Government

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PART I: Procedure

TWO TRACKS

Administrative Appeals to the Mayor's Office of Legal Counsel (the MOLC)...

(procedural rules at 1 DCMR § 412)

...AND / OR...

...Judicial Appeals to Superior Court

(Case Management Plan (summary of procedure) at
< dccourts.gov/sites/default/files/divisionspdfs/
CivilDivisionCaseManagementPlan-
CivilActionsBranchFinalJune2016.pdf >

PART II: Finding the Law

Administrative (MOLC, etc.) Opinions (research sources)

Lexis (since 1998):
Example — searching for opinions on exemptions:
("freedom of information act appeal" or "foia appeal") and exempt* and ("2 534" or 204)

Westlaw:
("freedom #of information act appeal" or "foia appeal") and exempt! and ("2 534" or 204)

FREE public sources (though less robust search engines):
dcregs.dc.gov (10/2009–present) and dcregisterarchives.dc.gov (4/2003–9/2009)

Older opinions:
"Brute force" method: Go to MLK (Central) Library's Washingtoniana Collection (4th Fl.) or similar collection, consult the indexes at the start of each year of the *Register* for Freedom of Information Act Appeals, FOIA, District of Columbia F----…, or similar terms

Searching All States' / Territories' Records-Access Opinions (accounts for variation in Short Titles)

foi or foia or "f o i" or "freedom of information" or "public records" or "public record" or sunshine or "open records" or "right to know" or "public information" or "records access" or "record access" or "government access" or "data practices"

PART III: Specific Appellate Opinions

Legal Boilerplate Okay; But Not Question Marks??

Compare

Chi. Justice Project v. District,
Case No. 2022 CA 001175 B (D.C. Super. Ct. Sept. 21, 2022) (long, legalistic request),

With

In re Rose,
Case No. 2019-211 (M.O.L.C. Nov. 5, 2019), 70 *D.C. Reg.* 006045 (Apr. 21, 2023) (simple request but asked in question syntax).

To: Metropolitan Police Department

Re: Gang Data Affiliation FOIA request

Inspector Vendette Parker
Metropolitan Police Department
300 Indiana Avenue, NW
Room 4153
Washington, D.C. 20001

Dear Sir or Madam,

Pursuant DC Code Title 2, Chapter 5, Subchapter II, Freedom of Information ("FOIA"), I, Tracy Siska, along with the Chicago Justice Project (the "Project"), respectfully requests copies of the below-listed public records from the District of Columbia Metropolitan Police Department ("MPD").

DEFINITIONS

A. Records or Documents

"Record" and/or "Records" means any documents or electronically stored information of any kind—including writings, drawings, graphs, charts, photographs, video recordings, sound recordings, images, databases, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

B. Database

"Database" means any collection of data or information that are specially organized for rapid search and retrieval by any electronic device. Databases are structured to facilitate the storage, retrieval, modification, and deletion of data in conjunction with various data-processing operations.

C. Data Dictionary

"Data Dictionary" means a collection of names, definitions, and attributes about data elements that are being used or captured in a database, information system, or part of a research project. A Data Dictionary also provides metadata about data elements.

D. Gang Affiliation

"Gang Affiliation" means the identifying of an individual with an organization, group, or association of people under a common name or symbol.

E. Access (Accessible or any other form we use)

"Access" means the ability to view, obtain, examine, edit, submit, share, or retrieve data.

F. Private Entity

"Private Entity" means any entity that is not a unit of government, including but not limited to a corporation, partnership, company, nonprofit organization, other legal entity, or a natural person.

INSTRUCTIONS

A. The requests below seek only non-privileged data. Please provide all non-privileged tables and fields related to the below requests. The "at a minimum" lists below are intended as a starting point for specificity, but are not exhaustive.

B. All data provided related to individuals should have identifying data such as name, phone number, and/or social security number removed from the data. Home address data should be altered to include only the hundred blocks. As an example, "2004 W. Roscoe St." would be transformed to "2000 W. Roscoe St."

C. In any requests regarding data or information shared among MPD and other entities, all responses should be limited to data and information accessible to MPD. The below requests do not seek or require information outside that controlled by or shared with MPD.

D. Where available or obtainable, please provide the requested data, in order of preference, in comma delimited format, comma separated format, or other format common for databases. If necessary, a portable hard drive or other means of transmittal can be provided for the data. In order to ensure a compatible format and minimize exportation burden, I am willing to meet and confer before the data are transmitted.

E. If the MPD decides to withhold any document or information pertinent to the requests made herein, please identify the document or information in as much detail as possible, and describe and detail in specific language why each document or piece of information is being withheld.

F. If any information requested herein is withheld on the basis of a claim of privilege or other protection, then that claim shall be made expressly in a writing that describes the nature of the document(s), information, communications, or things not produced or disclosed, in a manner that will enable an assessment of the applicability of the claimed privilege or protection. With regard to each claim of privilege or protection, the following information should be provided in the response or the objection:

1) The type of Document, *e.g.*, letter or memorandum;

2) General subject matter of the Document;

3) The date of the Document;

4) Such other information as is sufficient to identify the Document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the Document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

5) The nature of the claimed privilege or protection and why it is applicable; and

6) If applicable, the litigation or trial of which the document was created in anticipation.

G. If any Document identified herein has been lost, discarded, or destroyed, such Document(s) should be identified as completely as possible, including as to each such Document: its date, general nature (*e.g.*, letter, memorandum, email, telegram, telex, photograph, computer printout, etc.), subject matter, each author and/or originator, each person indicated as an addressee or copy recipient, and its former custodian(s). In addition, as to each such Document, the following information should be supplied:

1) Date of disposal, loss, or destruction;

2) Manner of disposal, loss, or destruction;

3) Reason for disposal or destruction, or any explanation of loss;

4) Persons authorizing the disposal or destruction;

5) Persons having knowledge of the disposal, destruction, or loss; and

6) Persons who destroyed, lost, or disposed of the Document or thing.

CJP's Request # C2 (Finally!)

2. Please provide Records sufficient to show each public or private entity—whether on the federal, state, or local level—that can view or otherwise has access to the data within each Database detailed in Request A 1.

C2: "Please provide Records sufficient to show each public or private entity—whether on the federal, state, or local level—that can view or otherwise has access to the data within each Database detailed in Request A 1."

In re Rose
Request & MOLC's Analysis

"[Y]ou state that the Metropolitan Police Department . . . denied your request for the following records:

" *The head of the unit of Rio de Janeiro, Brazil police investigating communist activity in that country is said to have had contact with the police in Washington, DC sometime between 1933 and 1939. The person in question was...Captain* [(*NAME*)].

" *Do you have any records of communication with this Brazilian officer?*"

Rose's request, MOLC's analysis (cont'd)

". . . MPD [respond]s that it sent a letter to you acknowledging your request and informing you of [its] fee schedule, and you responded as follows:

"*While I am willing to pay, I do not need more than a simple 'yes or no plus the date' . . . if Brazilian police captain* [(*NAME*)] *was asked to have some kind of contact with the police in Washington, DC in 1936–1937. A 'by whom' he was asked would likewise be nice if it is available. I DO NOT need copies of any documents.*

"Based upon these statements, MPD denied your request on the grounds that [D.C.] FOIA does not require agencies to perform research, analyze data, answer written questions, or create records in order to respond to a request.

"We agree with MPD that it is not obligated create [*sic*] records for you. . . . Moreover, [D.C.] FOIA does not require MPD to perform legal research for you."

The Leading MOLC Opinions Mentioning "Glomar"

- MOLC Opinion No. 2019-18 (*Hannagan*)
- MOLC Opinion No 2019-84 (*Zangari*)

Public Interests vs. Privacy Interests

MOLC Opinion No. 2019-238 (*Zavala*):

Affirmed exercise of Exemption 2 because adequate public interest not demonstrated w/ respect to third-party Uber receipts

MOLC Opinion No. 2019-236 (*Esfino*):

Affirmed exercise of Exemption 2 because adequate public interest not demonstrated w/ respect to V.I.S. (victim-impact statement)

MOLC Opinion No. 2019-179 (*Pearson*)*:*

"[T]here is a public interest associated with the resume and application [of] a successful candidate for a government position that outweighs the applicable privacy interest."

Requestor Of Records, that Included PII (SSN, etc.), Was Himself Subject of the Records:

MOLC Opinion No. 2019-188 (*Winters*)

More Court Cases (D.C.)

--*Kane v. District*, 180 A.3d 1073 (D.C. 2018)

--(ANC can't be sued in its own right—generally, plaintiff must sue District at-large)

--*Gooch v. D.C. Metro. Police Dep't*

1:22-cv-02804-UNA (D.D.C. Oct. 25, 2022) (wrong court(?))

2023 CA 002404 B (D.C. Super. Ct.)

More Court Cases (Extra-Juris., incl. D.D.C.)

U.S. Right To Know v. Univ. of Vt., 255 A.3d 719 (Vt. 2021)
(Vt. & D.C. differ in definition of public record/document)

Summers v. Fox, 169 N.E.3d 625 (Ohio 2020)
(3d-party delivery of requested info. didn't moot action)

McCarley v. Dep't of Rehab. & Corr., 199 N.E.3d 910 (Ohio Ct. App 2022)
(state statute provided for damages for violation, but plaintiff would have needed to send request by trackable method)

Eddington v. D.O.D., 35 F.4th 833 (D.D.C. 2022) (U.S. law)
(no "mailbox rule" for e-mailed FOIA requests)

Lamb v. Sec'y of State, 628 S.W.3d 339 (Tex. Ct. App. 2021)
(presidential electors not a "governmental body" for purposes of state's public-information statute)

More Court Cases (Extra-Juris., incl. D.D.C.)

State v. Webb **, 786 So.2d 602 (Fla. Dist. Ct. App. 2001)**

(misdemeanor for school-board member's violation of public-records statute)

--Background:

rcfp.org/school-board-member-jailed-failing-release-records (May 31, 1999)

More Court Cases (Extra-Juris., incl. D.D.C.)

Procedural Issues

""Reading Room" Records"

Campaign for Accountability v. DOJ, No. 16-1068, 2024 WL 1701640 (D.D.C. Apr. 19, 2024)

More Court Cases (Extra-Juris., incl. D.D.C.)

Procedural Issues

"Reasonable Description"

Sherven v. CIA, No. 23-466, 2023 WL 8649897 (W.D. Wis. Dec. 14, 2023)

"Definition of a "Record" / Reasonable Segregation"

Ulis v. FBI, No. 23-636, 2023 WL 8620632 (D.D.C. Dec. 13, 2023)

Inst. for Energy Research v. FERC, No. 22-3414, 2024 WL 1091791 (D.D.C. Mar. 13, 2024)

More Court Cases (Extra-Juris., incl. D.D.C.)

Procedural Issues

"Agency Control"

Behar v. DHS, 39 F.4th 81 (2d Cir. 2022), cert. denied, No. 22-578 (U.S. May 1, 2023)

"Record Creation"

Am. Civil Liberties Union Immigrants' Rights Project v. ICE, 58 F.4th 643 (2nd Cir. 2023)

Rutila v. Dep't of Transp. , 72 F.4th 692 (5th Cir. 2023)

More Court Cases (Extra-Juris., incl. D.D.C.)

Exemption 1

"Foreseeable Harm"

James Madison Project v. ODNI, No. 22-0647, 2024 WL 1299336 (D.D.C. Mar. 26, 2024)

More Court Cases (Extra-Juris., incl. D.D.C.)

Exemption 4

"Commercial"

Citizens for Responsibility & Ethics in Wash. v. DOJ, No. 19-3626, 2024 WL 1406550 (D.D.C. Mar. 31, 2024)

"Confidential Foreseeable Harm/Trade Secret"

AMA Sys., LLC v. Food & Drug Admin. , No. 23-0489, 2024 WL 712465 (D. Md. Feb. 21, 2024)

More Court Cases (Extra-Juris., incl. D.D.C.)

EXEMPTION #5

"Consultant Corollary / Threshold"

Am. Oversight v. HHS, et al.,

No. 22-5281, 2024 WL 2225336 (D.D.C. May 17, 2024))

More Court Cases (Extra-Juris., incl. D.D.C.)

EXEMPTION #5

"Deliberative Process / Foreseeable Harm"

Colo. Wild Pub. Lands v. U.S. Forest Serv.,
No. 21-2802, 2023 WL 5846678 (D.D.C. Sept. 11, 2023)

Vanda Pharmaceuticals, Inc. v. FDA,
No. 22-0938, 2023 WL 2645714 (D.D.C. Mar. 27, 2023)

Adequacy of Search (D.C. Ct. of App. & M.O.L.C.)

Doe v. M.P.D., 948 A.2d 1210 (D.C. 2008)

F.O.P. v. District, 79 A.3d 347 (D.C. 2013)
- the "Peaceoholics" case

F.O.P. v. District, 139 A.3d 853 (D.C. 2016)
- the "no void-for-volume" case

Leith v. M.P.D., Case No. 2019-133 (*dictum*), (M.O.L.C. May 20, 2019), 66 DCR 14745 (Nov. 1, 2019)

Caselaw Standard for Responsive Adequacy

(1)(a) show that search was "*reasonably calculated* to uncover *all* relevant documents" (and follow any leads along the way that *likely* will yield (not just *might* yield) more responsive records),

and **(b)** evaluate your search in hindsight, as you go along, and don't just stick to the initial, provisional plan you might have had at the top;

and **(2)** be prepared to "*adequately explain*" (such as in an affidavit) "both *how* the search was conducted and *why* it was conducted in that manner" (practice tip: it'll be easier to support that with a contemporaneous record kept in a routine/consistent, organized way)

For Assistance with OMA or FOIA Questions, Please Reach Us at (202) 481-3411 or opengovoffice@dc.gov

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