


**From:** Tracy Siska [tsiska@chicagojustice.org](mailto:tsiska@chicagojustice.org)   
**Subject:** Freedom of Information Act Appeal  
**Date:** February 4, 2022 at 2:16 PM  
**To:** [foia.appeals@dc.gov](mailto:foia.appeals@dc.gov)



February 2, 2022

The Mayor's Office of Legal Counsel  
FOIA Appeals  
John A. Wilson Building  
1350 Pennsylvania Avenue, N.W., Suite 407  
Washington, D.C. 20004  
[foia.appeals@dc.gov](mailto:foia.appeals@dc.gov)

VIA D.C. FOIA PORTAL, ELECTRONIC MAIL, AND USPS

RE: FOIA Appeal of Partial Denial of Request No. 2021-FOIA-08263 on the grounds that MPD erroneously withheld public records in violation of D.C. Code § 2-532

To Whom It May Concern:

Please accept this letter as an administrative appeal of D.C. FOIA Request No. 2021-FOIA-08263. The request concerned the use by the Metropolitan Police Department ("MPD") of gang databases, which has recently been the subject of significant news coverage. The Mayor's Office should grant this appeal because MPD's refusal to disclose – or even to search for – records that exist (or should exist) in response to our request demonstrates that MPD did not conduct an adequate search as required by D.C. Official Code § 2-532 (the "D.C. FOIA").

#### **I. Summary of FOIA Correspondence with MPD**

On September 22, 2021, I and the Chicago Justice Project submitted a Freedom of Information Act ("FOIA") request via the D.C. FOIA Portal (<https://foia-dc.gov/App/Index.aspx>) and via email to the MPD. See Exhibit 1. The FOIA request sought various documents in connection with the databases that MPD has access to that contain gang affiliation data. On September 22, 2021, MPD briefly acknowledged our FOIA request via email and provided the tracking number 2021-FOIA-08263. See Exhibit 2. This email noted, "Pursuant to D.C. Official Code § 2-532(c), there is a 15 business day statutory allotted time, subject to the possibility of a ten (10) business day extension from the date of receipt to respond to a FOIA request." *Id.* (emphasis in original).

Despite having acknowledged the response timeframe required by law, MPD violated D.C. Official Code § 2-532 by failing to either respond within that 15-day timeframe or provide written notice of its reasons for an extension. It was not until 43 business days after the original request, on November 23, 2021, when MPD finally responded to the FOIA request by denying the request in its entirety. See Exhibit 3. Specifically, MPD vaguely claimed that "it would take MPD employees more than 8 hours to search for and to produce the information" sought. *Id.* On November 24, 2021, MPD designated this FOIA request as "closed." See Exhibit 4.

Despite this seemingly final response, MPD contradicted its prior correspondence by sending a "follow-up response" to our FOIA request on November 30, 2021. See Exhibit 5. In this second response, MPD partially granted and partially denied the FOIA request. See *id.* Without explaining why the MPD suddenly changed its prior position, MPD provided information in partial response to Requests A(1), C(1), C(2), C(3), D(1), E(1), G(1), K(1), K(2), and J(1). See *id.* MPD produced only a single, redacted document.

For a subset of the remaining requests, MPD responded, "Not applicable" or "Records do not exist."<sup>[1]</sup> See *id.* Meanwhile, MPD denied Request C(6), which requested the number of searches conducted in the MPD gang database. MPD claimed, "There is no existing mechanism to query the total number of searches of the system. It can only be accomplished by auditing each user's activity which would take over 10-15 hours as there are over 400 registered users." *Id.*

Similarly, MPD denied Request H(1), which sought, among other things, information concerning the race, gender, and geographic area of individuals with gang affiliation data in MPD's database. MPD claimed, "Some of the information responsive to this request is not maintained in a format that can be exported. In order to produce records responsive to this request the record for each individual contain [sic] in MPD's Gang Database (3,687) would have to be opened and the information manually extracted. It would take well over 100 hours of labor to produce these records. Additionally, data

such as age at time of entry in the Gang Database is not captured and would have to be calculated manually.”

MPD argued that granting these requests would take more than the “reasonable efforts” required by D.C. Code § 2-532(a-2). MPD also claimed, generally, that portions of our FOIA request “essentially ask[] for substantial research to be performed and/or for the creation of new records.”

## **II. MPD’s Denials Demonstrate That MPD Failed to Conduct an Adequate Search**

This appeal concerns three types of MPD’s denials. First, MPD denied specific requests (under Requests C and H) by preemptively claiming that the burden to search and produce these records would be too great. Second, MPD denied numerous other requests by claiming either that these were “not applicable” or that the requested records did not exist, despite contrary evidence in the public record. Third, MPD incorrectly asserted a substantial research and creation of new records exemption. All three denials demonstrate that MPD failed to make reasonable efforts to search for and produce the requested records. As the Mayor’s Office of Legal Counsel has previously found, D.C. FOIA requires the government’s search to be “reasonably calculated to produce the relevant documents.”<sup>[2]</sup> Here, MPD has not demonstrated that it has conducted an adequate or reasonably calculated search for the reasons set out below. Accordingly, this appeal should be granted and MPD should be required to produce all responsive records.

### **a. MPD May Not Preemptively Claim That An Undue Burden Exists**

MPD failed to conduct an adequate search when it claimed that documents responsive to Requests C(6) and H(1) would take more than “10-15 hours” and “100 hours,” respectively, to search for and produce. An excuse of this kind has been flatly rejected by the D.C. Court of Appeals. In *Fraternal Order of Police v. District of Columbia*, the Government argued that “the effort required to respond [to the FOIA request at issue]—including the necessary search and review process—imposed too great a burden on the District.” 139 A.3d 853, 862 (D.C. 2016). The Court disagreed. Relying on both the statutory language and legislative history of the D.C. FOIA, the Court held that “there is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request.” *Id.* at 863. MPD, therefore, may not preemptively decide that searching for and producing the requested information is overly burdensome, and use that as a basis to deny the request. By doing so, MPD has failed to perform an adequate search as required by D.C. Code § 2-532.

Further, MPD’s explanation for this denial implies that at least some of the information requested in Requests C(6) and H(1) is already captured in MPD’s gang database. For example, MPD explained how the data requested in Request C(6) could be compiled by reviewing “each user’s activity.” MPD likewise explained that the information responsive to Request H(1) was “not maintained in a format that can be exported.” Because these explanations suggest that MPD already has in its possession the information we requested, an adequate search should have resulted in at least some responsive records. Despite this, MPD produced no information responsive to either Request C(6) or Request H(1). This is improper.

### **b. MPD’s Assertions That “Records Do Not Exist” and That Requests Were “Not Applicable” Are Unreasonable**

MPD failed to conduct an adequate search when, instead of searching for and producing responsive records, MPD asserted that the records requested under Requests J(1)(b) and J(1)(c) “did not exist” and that Requests A(2), B(1), B(2), C(4), C(5), C(7), D(2), E(2), E(3), G(2), H(2), K(3), and J(2) were “not applicable.” The public record demonstrates that MPD should, in fact, have records responsive to these requests. For example, Request J(1)(c) requests the number of individuals currently associated with each gang. MPD should easily be able to produce this information, as an article published by *The Intercept* on June 18, 2021 states that MPD maintains a spreadsheet with the names of supposed gang members and crews.<sup>[3]</sup> MPD could have simply produced that spreadsheet. MPD’s inaccurate response, therefore, that “records do not exist” reveals that MPD failed to use reasonable efforts to search for and produce such records.

Furthermore, MPD’s claim that certain requests are “not applicable” is specious. In this context, we are unable to determine what MPD intends to convey by declaring a request “not applicable.” It is unclear what exemption, if any, MPD is asserting here. In addition, public news sources again confirm that MPD possesses information responsive to at least some of the requests that MPD deemed “not applicable.” For example, Request C(2) asks for records that “show each public or private entity...that can view or otherwise has access to the data within each Database.” The above-mentioned *Intercept* article expressly states that “MPD shares information from the database [] with outside agencies and larger regional gang databases.”<sup>[4]</sup> The article further asserts that data from MPD’s gang database is “accessible to more than 9,400 law enforcement agencies.” MPD’s response, therefore, that such a FOIA request was “not applicable” indicates that, at the very least, MPD failed to conduct a reasonable search for the requested information, which MPD has in its possession.

### **c. The FOIA Request Does Not Require “Substantial Research” Or the “Creation of New Records”**

MPD broadly and incorrectly claimed an exemption to FOIA when it stated that “portions of the FOIA request essentially asks [*sic*] for substantial research to be performed and/or for the creation of new records.” No such exemption exists in D.C. Code § 2-534. Further, the U.S. District Court for the District of Columbia has found, with respect to the federal FOIA, that “sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record.” *National Security Counselors v. Central Intelligence Agency*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012). [5] Sorting a pre-existing database is precisely what we have requested. By denying our FOIA request on the ground that it requires new records or substantial research, MPD has failed, at the least, to conduct an adequate search. [6]

Further, it is unclear from MPD’s response which portions of the FOIA request were denied based on this improper objection. It is reasonable to assume, however, that this objection was part of the basis for MPD’s failure to conduct an adequate search of every above-mentioned request (*i.e.*, Requests A(2), B(1), B(2), C(4), C(5), C(6), C(7), D(2), E(2), E(3), G(2), H(1), H(2), K(3), J(1)(b), J(1)(c), and J(2)).

## I. MPD Failed to Seek Out Information Needed to Fulfill the FOIA Request

In addition to improperly denying our FOIA request, MPD violated D.C. Code § 2-531 and 1 DCMR § 402 by failing to seek clarification from the requester in processing the request. The D.C. FOIA provides:

The public policy of the District of Columbia is 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. To that end, provisions of this subchapter shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information.

D.C. Code Ann. § 2-531. In the same vein, 1 DCMR § 402 states:

Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. Every reasonable effort shall be made by the agency to assist in the identification and location of requested records.

1 DCMR § 402.5. Both laws illustrate MPD’s duty as a public servant to make reasonable efforts to engage with FOIA requesters to provide the information sought. In violation of that duty, MPD denied our FOIA request in its entirety on November 23, 2021, and then partially on November 30, 2021. See Exhibits 3 and 5. To the extent that MPD needed clarification about any portion of the FOIA request, MPD failed to contact us with any questions about the specific requests.

This lack of engagement, however, is not only against D.C. regulations, but also D.C. case law. As the D.C. Court of Appeals held in *Fraternal Order of Police*, “when the officer is unsure what the requester wants or where it might be found, the regulations impose an affirmative obligation on the FOIA officer to engage with the requester and seek out the information needed to fulfill the request.” 139 A.3d at 861. Because MPD failed to engage with the requester to develop any means to obtain the requested information, MPD has not demonstrated that it has made reasonable efforts to conduct an adequate search.

## D. Conclusion

For the foregoing reasons, the Chicago Justice Project and I petition the Mayor to review the withheld records to determine whether they should be produced for public inspection as provided by D.C. Code § 2-537(a).

Thank you for your attention to this appeal. A copy of these appeal materials will be forwarded to MPD’s FOIA Officer, Robert Eckert. Should you have any questions or need any additional information, please feel free to contact me at [tsiska@chicagojustice.org](mailto:tsiska@chicagojustice.org) or (312) 971-6745.

Sincerely,

Tracy Siska  
Chicago Justice Project  
105 W. Madison Street, Suite 1500  
Chicago, IL 60602

[tsiska@chicagojustice.org](mailto:tsiska@chicagojustice.org)  
(312) 971-6745

Enclosures

cc: Robert Eckert  
FOIA Specialist  
Freedom of Information Act Office  
Metropolitan Police Department  
District of Columbia  
[Robert.eckert@dc.gov](mailto:Robert.eckert@dc.gov)

---

[1] “Not applicable” was MPD’s response to 13 specific requests included in Requests A, B, C, D, E, G, H, K, and J. See Exhibit 5. “Records do not exist” was MPD’s response to two specific requests included in Request J. *Id.*

[2] 2018-74 FOIA Appeal Decision, MAYOR’S OFFICE OF LEGAL COUNSEL, p. 2, [https://dc.gov/sites/default/files/dc/sites/DC/publication/attachments/2018-074\\_FOIA\\_Appeal\\_Decision.pdf](https://dc.gov/sites/default/files/dc/sites/DC/publication/attachments/2018-074_FOIA_Appeal_Decision.pdf) (Feb. 20, 2018).

[3] See Chris Gelardi, *Hacked Emails Give Unfiltered View into the D.C. Police Gang Database*, THE INTERCEPT (June 18, 2021), <https://theintercept.com/2021/06/18/dc-police-gang-database-hacked-emails/>.

[4] *Id.*

[5] The Mayor’s Office of Legal Counsel has previously acknowledged that such decisions regarding the federal FOIA are instructive. See 2018-74 FOIA Appeal Decision, *supra* note 3, at 2 (“The DC FOIA was modeled on the corresponding federal Freedom of Information Act... Accordingly, decisions construing the

federal statute are instructive and may be examined to construe the local law.”) (internal citations and quotations omitted).

[6] In support of its denial, MPD cited D.C. Code § 2-532(a)(2) as the basis for its claim that it can deny a request that would require more than eight hours to collect the requested documents. The reliance on this provision of the D.C. Code is misplaced and MPD’s interpretation is inconsistent with the case law of the D.C. Court of Appeals and the U.S. District Court for the District of Columbia discussed herein. The eight-hour time limit described in D.C. Code § 2-532(f)(1) relates to the reprogramming or reformatting of records. MPD conflated the time for reprogramming or reformatting with the time for conducting a search. Further, MPD has not indicated which databases need to be reprogrammed or which documents, if any, would need to be reformatted. It is also unclear why any documents might need to be reformatted rather than a simple export from the database. Nevertheless, even if the eight-hour limit applied to the time spent conducting a search, MPD’s FOIA response did not indicate that MPD even attempted to search/produce any records within that timeframe.



CJP\_Freedom\_o  
f\_Infor...22.pdf



MPD FOIA  
Appeal...its.pdf

-----  
Tracy Siska | Executive Director  
Chicago Justice Project | 105 W. Madison St., Suite 1500 | Chicago, IL 60604 | Ph. (312) 971-6745 |

[tsiska@chicagojustice.org](mailto:tsiska@chicagojustice.org) | [www.chicagojustice.org](http://www.chicagojustice.org) |  
Twitter: CJPJustProj

