

March 28, 2018

The Honorable Muriel Bowser
District of Columbia Office of the Mayor
1350 Pennsylvania Avenue NW
Washington, DC 20004

Re: *NEAR Act Stop & Frisk Data Collection*

Dear Mayor Bowser:

Two years ago this week, the District of Columbia enacted the Neighborhood Engagement Achieves Results (NEAR) Act of 2016. One of its key provisions required the collection of detailed and comprehensive data about stops and frisks carried out on the streets of the District by the Metropolitan Police Department (MPD). The collection of this data is crucial to ensuring that the police do not unfairly and unconstitutionally profile certain populations when conducting these stops. Although the Office of the Mayor and the MPD have sometimes claimed that the NEAR Act has been “fully implemented,” it is now clear that it has not been, and it is unclear whether they have actually taken *any* concrete steps toward changing systems or protocols to ensure that police do in fact collect this information.

We write to inform you that today the undersigned organizations — the American Civil Liberties Union of the District of Columbia (ACLU-DC), Black Lives Matter D.C., and the Stop Police Terror Project D.C. — have filed a request under the D.C. Freedom of Information Act (FOIA), D.C. Code § 2-531 *et seq.*, seeking records and/or data regarding stops and/or frisks collected pursuant to the NEAR Act, and also seeking any plans and timetables that are in place to achieve implementation.

The ACLU-DC previously requested NEAR Act data in 2017. MPD’s response, in April 2017, indicated that the NEAR Act had not yet been implemented. More than a year has passed since our earlier request.

If we do not receive a satisfactory response to our present FOIA request within the time provided by law, we will conclude that legal action is required to compel compliance with the Act’s requirements.



District
of Columbia

915 15th St. NW, 2nd Floor
Washington, D.C. 20005
(202) 457-0800
acludc.org

I. The NEAR Act and Its Requirements.

The Council of the District of Columbia unanimously passed the NEAR Act on March 1, 2016. The Act became law on March 26, 2016. On June 30, 2016, the bill went into effect following the federally-mandated congressional review period.

Title II(G) of the NEAR Act, which was fully funded as of October 2016, amended the D.C. Code to require that MPD officers record the following information about all stops made in the District of Columbia (hereinafter “NEAR Act Stop & Frisk Data”):

- A. The date, location, and time of the stop;
- B. The approximate duration of the stop;
- C. The traffic violation or violations alleged to have been committed that led to the stop;
- D. Whether a search was conducted as a result of the stop;
- E. If a search was conducted:
 - i. The reason for the search;
 - ii. Whether the search was consensual or nonconsensual;
 - iii. Whether a person was searched, and whether a person's property was searched; and
 - iv. Whether any contraband or other property was seized in the course of the search;
- F. Whether a warning, safety equipment repair order, or citation was issued as a result of a stop and the basis for issuing such warning, order, or citation;
- G. Whether an arrest was made as a result of either the stop or the search;
- H. If an arrest was made, the crime charged;
- I. The gender of the person stopped;
- J. The race or ethnicity of the person stopped; and
- K. The date of birth of the person stopped.

D.C. Code § 5-113.01(a)(4B). Specifically, the statute requires that “[t]he Mayor of the District of Columbia . . . cause the Metropolitan Police force to keep” these records. § 5-113.01(a).

In its Committee Report on the proposed legislation, the Council quoted the Obama Administration’s Task Force on 21st Century Policing, which emphasized that “Data collection, supervision, and accountability are . . . part of a comprehensive systemic approach to keeping everyone safe and protecting the rights of all involved during police encounters.” *See* Council of the District of Columbia Committee on the Judiciary, Report on Bill 21-0360, the “Neighborhood Engagement Achieves Results Amendment Act of 2016,” at 23, *available at* <http://lims.dccouncil.us/Download/34496/B21-0360-CommitteeReport1.pdf>. The

Committee Report further noted the importance of the data collection requirement by pointing out that the Task Force had “strongly encouraged local governments to allocate infrastructure and IT staff expertise to support law enforcement reporting on activities implementing their recommendations.” *Id.* The Committee Report’s “Section-By-Section Analysis” makes clear that the purpose of Title II(G) is “to require the Metropolitan Police Department to collect *additional* data on stops and use of force incidents” beyond what MPD had collected previously. *Id.* at 60 (emphasis added).

II. The District’s Failure To Provide The Data and Its Contradictory Statements Regarding Implementation.

On February 10, 2017, ACLU-DC filed a FOIA request for all data collected pursuant to the NEAR Act’s Stop & Frisk Data provision since the implementation of the Act. MPD responded on April 5, 2017, stating that “[a]lthough the NEAR Act became law[,] it ha[d] not been implemented as of the date of the search, and existing records do not contain the NEAR data which is the subject of your request.”

In his February 27, 2017 letter to D.C. Councilmember Charles Allen in advance of the D.C. Council Judiciary Committee’s Fiscal Year 2016 Performance Oversight hearings, then-Acting Chief of Police Peter Newsham responded to the Committee’s question regarding MPD’s “progress and plans for implementation” of the NEAR Act Stop & Frisk Data provision by stating that complying with “the stop and frisk data [collection requirement] is more challenging” than other changes mandated by the NEAR Act. Peter Newsham, Letter to Councilmember Charles Allen (Feb. 27, 2017), at 56, *available at* http://dccouncil.us/files/user_uploads/budget_responses/JPS_Performance_Oversight_Responses_2017_MPD_Part1.pdf. Chief Newsham described how “Cobalt,” the system MPD has used since Fall 2015 to “document incidents, offenses, field contacts, missing persons, and arrests” needed “additional work” with respect to certain other “mission critical issues” and “other important programming areas” that MPD had previously planned to “roll out” in “later phases,” but which ostensibly took priority over the NEAR Act Stop & Frisk Data requirement. *Id.* at 56-57. Chief Newsham stated that the department was “working to come into compliance, but must evaluate where these changes fit with mission critical objectives.” *Id.* at 57.

In a publication released on January 30, 2018, your office stated that your administration has “fully implemented” the NEAR Act. Gov’t of the District of Columbia, *A Fair Shot: A Toolkit for African American Prosperity*, at 7, *available at* https://moaaa.dc.gov/sites/default/files/dc/sites/dmgeo/publication/attachments/PathwaytoProsperity4_1.30.18_finalweb.pdf. But in mid-February 2018, your office began circulating a table describing the progress made on each aspect of the NEAR Act, which states that with respect to the NEAR Act Stop & Frisk Data, “[i]mplementation has begun, but will require alternative ways to analyze data.” Gov’t of the District of

Columbia, *NEAR Act — Safer Stronger DC*, available at <https://saferstronger.dc.gov/page/near-act-safer-stronger-dc>.

On February 20, 2018, MPD publicly released data for all “incident reports classified as ‘stop and frisk’ from 2010 to 2016.” Metro. Police Dep’t, *Stop and Frisk Data and Explanatory Notes*, available at <https://mpdc.dc.gov/node/1310236>. However, this data set is unrelated to the NEAR Act requirements: it was collected before the Act was passed, let alone implemented, and it is missing critical data points including: duration of the stop; specific violation that led to the stop; whether a search occurred and if so, the reason for and result of that search; whether it was consensual; whether a warning, order, or citation was issued; and whether and for what charge an arrest was made. See D.C. Code § 5-113.01(a)(4B)(B)-(G). Moreover, the data release shows that MPD has not complied with its own *existing* data collection protocols, which since 2013 have required officers to “maintain records of all stops [and] frisks,” including “all pertinent details of the incident, including all factors relied upon in determining that the stop or frisk was justified.” MPD GO-OPS-304.10 § III.D (Record Keeping), available at <https://go.mpdconline.com/GO/GO OPS 304 10.pdf>. MPD admits that the data does not distinguish between “forcible” and “non-forcible” stops, see Metro. Police Dep’t, *Stop and Frisk & Field Contact Data: Explanatory Notes* (Feb. 20, 2018), available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/S%26F_Field%20Contact_Explanatory%20Notes_02202018.docx.pdf, which MPD’s internal protocols require that officers “clearly indicate.” MPD GO-OPS-304.10 § III.D.5.b. Further, the data reflects only 23,326 stops over a period of seven years, or an average of 3,332 stops per year or only nine stops per day, city-wide — a completely implausible number.

On February 22, 2018, Deputy Mayor Kevin Donahue testified before the D.C. Council Judiciary Committee. See Council of the District of Columbia, *Committee on the Judiciary and Public Safety, Performance Oversight Hearing* (Feb. 22, 2018), available at http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=4370. When answering a question about why MPD was not complying with the NEAR Act Stop & Frisk Data requirement, Donahue admitted that there were certain required elements of data that the MPD “do[es]n’t collect . . . at all,” and that doing so would require “a fundamental change to . . . an I.T. System” and/or a new “police protocol.” *Id.* at 03:11. Donahue focused on the data that was being collected through the pre-NEAR Act procedures, “some” of which the MPD “collect[s] exactly as listed” and “some” of which MPD “collect[s] but not consistently or ha[s] to clean” for “consistency,” including through DMV records connected to traffic stops. *Id.* at 03:11-03:21. Donahue said the government “ha[s] turned [its] attention” to “articulating clearly and honestly here’s what [it is] not collecting” and what “I.T. investment or change in procedure” would be required to collect all that is required under the NEAR Act. *Id.*

On February 26, 2018, Chief Newsham submitted his pre-oversight hearing responses to the D.C. Council Judiciary Committee, responding again to the same question the committee had asked a year earlier regarding the implementation status of the NEAR Act Stop & Frisk Data. He stated that “MPD or the Department of Motor Vehicles (DMV) collects almost half of the data” required under the statute. He also touted MPD’s release of the 2010-2016 pre-NEAR Act data, and claimed that MPD “will be examining if there are creative ways to use existing data to address the same issues, such as with potentially capturing other data through DMV records.” Peter Newsham, Letter to Councilmember Charles Allen (Feb. 26, 2018), at 53, *available at* http://dccouncil.us/files/user_uploads/budget_responses/SUBMITTED_MPD_Response_2018_Perf_Hearing_Questions_02_26_18-signed.pdf.

On March 26, 2018, WUSA9 Reporter Eric Flack published MPD Communications Director Dustin Sternbeck’s responses to questions posed regarding the implementation of the NEAR Act Stop & Frisk Data collection requirement. *See* Eric Flack, DC Police Not Following Law Requiring Stop and Frisk Data Collection 2 Years After It Was Passed, WUSA9 (Mar. 26, 2018), <http://www.wusa9.com/mobile/article/news/investigations/dc-police-not-following-law-requiring-stop-and-frisk-data-collection-2-years-after-it-was-passed/532319128>. In those responses, Sternbeck stated that “MPD officers have the ability to collect most of the data required in the legislation,” but “the data is not collected in a manner that can easily be sorted or consistently reviewed” since much of it is “only documented in the narrative text portion” of the relevant forms used by MPD. *Id.* Sternbeck provides no indication which of the relevant categories of information are available using the “narrative text portion” of existing forms nor that this information is collected on a consistent and systematic basis. Like the pre-NEAR Act data set MPD has already released, reliance on incomplete data cobbled together from whichever “narrative text portions” of the relevant forms happen to mention the relevant information is not a substitute for full compliance with the NEAR Act Stop & Frisk Data collection requirement. Although Sternbeck refers to MPD’s “continu[ed] . . . efforts . . . to identify a process from which [MPD] can extract usable information from the raw data and / or narrative information,” he admits that “[a]n end date for this work has not yet been confirmed.” *Id.* Sternbeck’s responses also reveal that MPD’s delay cannot be chalked up to an exhaustion of available funds for implementation; on the contrary, he stated that MPD has “not expended” any of the \$150,000 in funding allocated by the D.C. Council for implementation of the NEAR Act Stop & Frisk Data requirement. *Id.*

In sum, despite your January 2018 statement that the NEAR Act has been “fully implemented,” top officials from your Administration have indicated that in fact this important provision remains far from implemented. Indeed, as far as we can tell, MPD is not actually collecting any more stop and frisk data than it was collecting before the NEAR Act was passed.

Meanwhile, the need for Stop & Frisk Data required by the NEAR Act has remained acute. Although African Americans make up forty-seven percent of D.C.'s population, they remain the subjects of the vast majority of all stops, frisks, and uses of force in the District. On January 23, 2018, the D.C. Office of Police Complaints released a report on all uses of force in the District of Columbia for the preceding fiscal year (another NEAR Act requirement). The report found that of the 2,224 total reported uses of force in Fiscal Year 2017 (October 1, 2016 through September 30, 2017), *eighty-nine percent* involved a black subject. See Gov't of the District of Columbia Police Complaints Board, Office of Police Complaints, *Report on Use of Force by the Washington, D.C. Metropolitan Police Department Fiscal Year 2017*, available at <https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/UOF%2017%20Final.pdf>. A recent report from WUSA9 analyzed the pre-NEAR Act data released last month by MPD and found that approximately *eighty percent* of the stops involved a black subject. See Eric Flack, *DC Police: Stopping, frisking innocent people necessary to fight crime*, WUSA9 (Feb. 28, 2018), <http://www.wusa9.com/article/news/local/dc-police-stopping-frisking-innocent-people-necessary-to-fight-crime/65-518657856>. These findings are consistent with what the affected communities report to the undersigned organizations. As D.C. Circuit Judge Janice Rogers Brown noted in *United States v. Gross*, 784 F.3d 784 (D.C. Cir. 2015), D.C. police have a practice of subjecting individuals “who fit a certain statistical profile” to “intrusive searches unless they can prove their innocence” “[d]espite lacking any semblance of particularized suspicion when the initial contact is made.” *Id.* at 789 (Brown, J., concurring). However, without the data collection required by the NEAR Act, such practices, which may very well be unlawful and contrary to public policy, remain impossible to document comprehensively so as to facilitate meaningful reform. Gaining a complete understanding of the contours of the problem is the first step toward fixing it. If the D.C. police are not collecting the data the NEAR Act requires them to collect, accountability and reform will remain elusive, as they have for so many years, and MPD will continue to subject communities of color in the District to disproportionate and unfair treatment.

III. Today's FOIA Request and Next Steps.

Based on the need, as recognized in the NEAR Act, for transparency and accountability in how MPD interacts with the community it serves, ACLU-DC, Black Lives Matter D.C., and the Stop Police Terror Project D.C. have today (by separate request submitted through D.C.'s online FOIA portal) again requested data on all stops and frisks conducted beginning on the NEAR Act implementation date. We assume, based on the MPD testimony summarized above, that the response will again be that such data does not exist. Our FOIA request therefore additionally requests documents reflecting MPD's plan for achieving full implementation of the NEAR Act Stop & Frisk Data requirement. We hope such plans exist, and that they are detailed,

concrete, and contain realistic short-term deadlines. We look forward to MPD's prompt reply to our records request, as required by D.C. Code § 2-532(c).

If the response to our FOIA request, within the time required by law, does not include, at a minimum, satisfactory plans for promptly achieving full implementation of the NEAR Act's data-collection provisions, the undersigned organizations intend to initiate legal action to compel compliance with those statutory requirements.

The District of Columbia courts apply the same standards for unreasonable delay as the federal courts. *See Coakley v. Police & Firemen's Ret. & Relief Bd.*, 370 A.2d 1345, 1348 (D.C. 1977). When evaluating whether the delay in agency action is "so egregious" as to warrant relief, although "[t]here is no *per se* rule as to how long is too long to wait for agency action, . . . a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal quotations and citations omitted). This is particularly true when "human health and welfare are at stake," as opposed to mere "economic regulation." *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). The OPC and news reports discussed above underscore the significant implications of the NEAR Act data, and the policies and practices they will illuminate, for the welfare of District residents, who may be facing daily unlawful police practices and violations of their rights.

Although D.C. officials have attempted to justify their delay by reference to "activities of a higher or competing priority," *id.* at 80, such as updates to the Cobalt system, there is no reason MPD could not pursue their preexisting efforts simultaneously with NEAR Act compliance. *Cf. Washington Teachers' Union, Local No. 6 v. Labor*, 11-OA-36, 2012 WL 939054, at *1 (D.C. Jan. 27, 2012) ("[B]udgetary constraints are not an extraordinary circumstance warranting unreasonable delay."). The decision to deprioritize NEAR Act data-collection in favor of other upgrades to MPD's systems contravenes the legislative mandate of the NEAR Act, which is categorical and not contingent. *See* D.C. Code § 5-113.01(a) ("The Mayor of the District of Columbia *shall cause* the Metropolitan Police force to keep the following records" (emphasis added)). Moreover, the contradictory and apparently misleading statements by members of your Administration regarding NEAR Act implementation raise the possibility of bad faith, which — although not a necessary component of an unreasonable delay claim — also points toward the unreasonableness of a delay. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987); *see also In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("Where the agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities."). Ultimately, "[t]here is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough.'" *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992). If in fact the response to today's FOIA request indicates that your Administration has done little or nothing over the past two years to bring itself into compliance with the NEAR Act, and has

no concrete plans to achieve full compliance in the near future, that point will have been reached.

Thank you for your prompt attention to this matter. We look forward to receiving a satisfactory response to our FOIA request within the time required by law. Otherwise, we intend to initiate legal action to compel the District's unreasonably delayed compliance with the law.

Sincerely,



Monica Hopkins-Maxwell
ACLU of the District of Columbia



Eugene Puryear
Stop Police Terror Project D.C.



April Goggans
Black Lives Matter D.C.

cc: Natalie O. Ludaway, Chief Deputy Attorney General
Office of the Attorney General for the District of Columbia
441 4th Street NW – Suite 1100 South
Washington, DC 20001
natalie.ludaway@dc.gov