

496578

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

March 6, 2007

BY US MAIL AND E-MAIL

[Redacted]
Washington, DC 200

Re: Freedom of Information Act Appeal

Dear [Redacted]

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. §§ 2-531 *et seq.* (the "DC-FOIA"), dated February 16, 2007, initially received in this office on February 16, 2007 (the "Appeal"). We accept your Appeal as of that date. You delivered a copy of the Appeal directly to the respondent agency, the District of Columbia Office Chief Financial Officer ("OCFO") and we requested a response. OCFO responded to the Appeal by memorandum, dated February 20, 2007 ("DOC Response"). You are referred to herein as the "Appellant."

Background

The Appellant's initial DC-FOIA request, dated January 8, 2007 ("FOIA Request"), was made by email and is set forth below. Appellant sought from OCFO the following:

"...copies of *any communication* to or from *any employee of the OCFO that mentions the media coverage* of your office, the Washington Examiner, [Redacted] and/or [Redacted] from June 2006 until the present.

"[Appellant's] request includes, but is not limited to, *memos, Post-It notes, voice mail messages, posted letters, faxes and/or e-mails*. Please include any e-mails that have been moved to the trash folder (or its equivalent)."

"Please send any statistical information on an Excel- or Excel compatible worksheet; please send any computer files (including sound carts [sic]) in a Mac-compatible format..."

Emphasis added.

OCFO initially sought and was granted additional time to complete the search for the records. The extension was confirmed by letter dated January 6, 2007¹. Although OCFO did not transmit an FOIA cover letter, they delivered to Appellant a response which included numerous emails, memoranda, spreadsheets and other documents (the "OCFO Response").

Appellant argues on appeal that the OCFO Response is "unresponsive" in that it did not fully respond to Appellant's request for "any" communication to or from "any" employee of the OCFO. Further, Appellant stresses on appeal that he sought "any" mention of "any" media coverage. He notes that the OCFO Response included only e-mails from one OCFO employee, instead of the 1,000-plus employees that Appellant expected². Appellant also identified correspondence already in his possession that was responsive to the request, which was not delivered by OCFO, thus implying that OCFO did not conduct a full search. Curiously, on appeal Appellant does not emphasize the true scope of his original request. The Appeal does not take exception to OCFO's failure to deliver or make reference to any Post-It notes or voice mail messages sought in the FOIA Request.

In reply to Appellant's Appeal, OCFO acknowledged certain deficiencies with their response, took exception to the breadth of the FOIA Request, and voluntarily agreed to conduct a more extensive search for records. It is OCFO's position that only a small fraction of OCFO's workforce would likely be in possession of the records sought by Appellant. And, given that OCFO has over 1,500 employees, it would be unduly burdensome to conduct a search that includes all of their employees. OCFO agreed to expand the search to include 27 senior officers and department heads, but has declined to expand the search to the parameters sought by Appellant.

Discussion

It is the public policy of the District government 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 2001 Ed. § 2-531. In aid of that public policy, the FOIA creates the right "to inspect ... and ... copy any public record of a public body" *Id.* § 2-532(a). The District FOIA Regulations require that a FOIA request reasonably describe the desired records. Where possible, the requestor shall supply specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information. D.C. Mun. Regs., tit. 1. § 402.4.

The issue presented on appeal is whether the FOIA Request requires OCFO to conduct "an unreasonably burdensome search." An agency is not required to undertake a search that is so broad as to be unduly burdensome. *Brophy v. U. S. Department of Defense*, 2006 WL 571901

¹ It is not known why the request for an extension pre-dates the original written request. It is possible that the original FOIA request was made orally and reduced to writing thereafter.

² Appellant estimates in the appeal that "hundreds of thousands – if not millions" of emails and memos are sent daily by OCFO employees.

(D.D.C 2006), citing *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 2003). See also, *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990).

Whether or not a search is unduly burdensome requires a subjective analysis of the facts and circumstances of a particular case. See, for example, *Goland v. CIA*, 607 F.2d 339 at 353 (finding unreasonably burdensome a request for additional responsive records where “if they exist, could be found only through a page-by-page search through 84,000 cubic feet of documents in the [CIA] Records Center”); *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce*, 907 F.2d 203, 209 (finding unreasonably burdensome a request to locate “every chronological office file and correspondent file, internal and external, for every branch office, staff office [etc.]”); *Public Citizen, Inc. v. U. S. Department of Education*, 292 F. Supp. 2d 1, 6-7 (D.D.C 2003)(finding reasonable a search of 25,000 files for data irregularly kept in the agency’s database when the search was “certain to turn up responsive documents”); *Nation Magazine v. United States Custom Service*, 937 F. Supp. 39, 42 (D.D.C 1996)(finding reasonable a search for a single memorandum among chronological files that were neither indexed nor cross-indexed).

While it is the agency’s burden to provide sufficient explanation why a search would be unduly burdensome,³ we recognize that some requests for information made pursuant to the DC-FOIA may be so overly broad and far-reaching on their face, that they cannot reasonably be deemed to describe any public record. D.C. Official Code 2001 Ed. § 2-532(c). In such cases, a respondent agency may justifiably refuse to comply with the request unless and until the requestor narrows the search request. This strikes a balance between providing the public full and complete information regarding the affairs of government while allowing the government to devote its valuable time and resources toward serving the public. We are faced with such a request here.

The breadth of the FOIA request must not be overlooked when determining its reasonableness. Here, Appellant sought documents maintained in no less than six different media: *memos, Post-It notes, voice mail messages, posted letters, faxes and/or e-mails*; and applicable to no less than one thousand five hundred (1,500) employees. Each medium constitutes a separate request for each employee. Further, each search was to include no less than four (4) possible subject areas. An agency is only expected to conduct a reasonable search for responsive records using methods which can be reasonably expected to produce the information requested. *People for the American Way v. U. S. Department of Justice*, 451 F. Supp. 2d 6, 14 (D.D.C. 2006). The DC-FOIA and the FOIA on which it was modeled were not intended to reduce government agencies to full-time investigators on behalf of requestors. *Servicemembers Legal Defense Network vs. U. S. Department of Defense, et al.*, ___ F. Supp 2d ___, 2007 WL 79442 (D.D.C 2007).

³ *Public Citizen*, 292 F. Supp. 2d. at 6

March 6, 2007

Page 4

We are persuaded by OCFO's representation that only a tiny fraction of their employees would have information responsive to the FOIA request. Therefore, conducting a search pursuant to the parameters of the FOIA request cannot reasonably be expected to produce the information requested. Therefore, OCFO's denial is AFFIRMED.

However, for the limited reasons set forth below, we REMAND this matter to OCFO for further action. Prior to the issuance of this determination, OCFO voluntarily committed to search the records of OCFO's 27 senior officers and department heads in an effort to be responsive to the FOIA Request. While we applaud their commitment, we do not find that OCFO was obligated to conduct this search nor do we hold that an agency is required to narrow the scope of an original FOIA request or infer a different intent from the plain meaning of the request. OCFO shall conduct the search and within a reasonable time frame, not to exceed thirty (30) days, submit to Appellant the results of the search. OCFO may withhold records, or portions of records, under one or more of the statutory exemptions upon a clear marking or identification of the records (or portions) showing the deletions and an identification of the exemption or exemptions relied upon in making those deletions. OCFO may assess fees associated with the retrieval, review, and reproduction of responsive records to the extent provided in the FOIA, and shall notify Appellant in advance of the expected cost.

As the appellant, you are free under the DC-FOIA to commence a civil action against the District of Columbia government at any time in the District of Columbia Superior Court, without awaiting further action by OCFO.

Sincerely,



Andrew T. "Chip" Richardson, III
Deputy General Counsel, EOM

cc (by e-mail):

Charles F. Barbera
Deputy General Counsel
Office of the Chief Financial Officer