

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

May 17, 2007

BY US MAIL AND E-MAIL

[REDACTED]
Washington, DC 200 [REDACTED]

Re: Freedom of Information Act Appeal

Dear [REDACTED]

This letter responds to your client's 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 April 30, 2007, initially received in this office on May 1, 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 Water and Sewer Authority ("WASA") and we requested their response. WASA responded to the Appeal by letter, dated May 10, 2007 ("WASA's Response to Appeal"). You then delivered a letter, dated May 15, 2007, in reply to the WASA Response ("Supplemental Appeal"). You are referred to herein as the "Appellant."

Background

Appellant's DC-FOIA request, dated February 21, 2007 ("FOIA Request"), attached hereto as Exhibit A, contained forty-five (45) separate requests for documents and/or information. WASA's initial response to the FOIA Request was made by letter, dated March 19, 2007, accompanied by two thousand seven hundred eighty-two (2,782) pages of documents ("WASA's initial document production").¹ WASA acknowledged in the March 19 letter that documents were being withheld as exempt, but did not immediately identify those documents. By letter dated March 26, 2007, WASA supplemented its initial document production with additional information and a Vaughn Index titled "JABB, II PRIVILEGED DOCUMENTS FOIA #07-03-02 VAUGHN INDEX," that identified fifteen (15) documents being withheld as exempt from FOIA (the "Vaughn Index"). In each instance, D.C. Official Code § 2-534(a)(4) was cited as the statute supporting WASA's claim of exemption. By letter, dated April 13, 2007, WASA provided another supplemental response, which included twenty-seven (27) additional pages of documents. WASA provided yet another supplemental response by letter, dated April 18, 2007, that included two (2) additional documents (the WASA initial document production and each supplement collectively shall be referred to as WASA's FOIA Response).

¹ WASA did not object in the March 19 letter to the number of requests made by Appellant.

Appellant argues on appeal that WASA's FOIA Response was late, and non-responsive for the following reasons:

- (i) WASA withheld responsive documents without identifying the documents;
- (ii) WASA withheld responsive documents without providing sufficient explanation;
- (iii) WASA's Vaughn Index did not include documents that WASA had failed to disclose; and
- (iv) WASA's Vaughn Index contained documents that should not have been withheld as exempt.

Appellant's main arguments are that: (1) public policy mandates disclosure of the requested documents and (2) WASA's cited FOIA exemption does not apply to the documents being withheld. Appellant requests that the Mayor order WASA to produce all responsive documents, including the documents identified on the Vaughn Index. Alternatively, Appellant requests that the Mayor require WASA to produce the documents identified on the Vaughn Index in redacted form. To the extent that the exemptions are proper, Appellant requests that the Mayor require WASA to provide sufficient detail about the reasons for withholding the documents.

WASA's Response to Appeal criticizes Appellants FOIA Request, and defends WASA's position that the documents withheld are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(4). WASA claims that the FOIA Request is a discovery request in disguise, delivered in connection with certain court actions relating to pre-award and post-award bid protests and a judicial FOIA appeal. WASA defends its decision to withhold documents based on its assertion that the documents are protected from disclosure due to the applicability of the "deliberative process" exemption.

Appellant's Supplemental Appeal takes exception to the label attached by WASA that the FOIA Request is a discovery request in disguise. And, asserts that WASA cannot now "in good faith" raise new reasons for failing to produce relevant documents after the appeal has been filed. Appellant asserts that the request reasonably describes the records sought, and therefore complies with D.C. Official Code § 2-532(c). Appellant also seeks to: (i) explain its disbelief that there are no documents responsive to certain requests and (ii) provide its rationale for seeking documents identified in its requests numbered 15, 19 and 20.

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.

There appear to be two issues presented in this appeal. The first is whether an agency may assert in the agency's response to a FOIA appeal that the underlying FOIA request is unduly burdensome, if the assertion is not first made as part of the initial denial of the FOIA request. The law is clear that 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 (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). The DC FOIA gives an agency the right to respond to an appeal filed by an aggrieved FOIA requestor, but does not place any specific parameters on that response. Therefore, we hold that an agency may make such assertions in its response as it deems necessary to *clarify* the reasons for its initial denial of the FOIA request.

This issue is relevant in the current context because it forces the question of whether we should require WASA to take any further action beyond that which it has already taken to respond to the FOIA Request or, alternatively, limit our review to the validity of the Vaughn Index. If the FOIA Request was unduly burdensome *ab initio*, WASA would not have been obligated to respond from the outset. *People for the American Way Foundation v. U.S. Dept. of Justice*, 451 F. Supp.2d 6, 12 (D.D.C 2006), citing *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978). If they had no obligation to respond to the FOIA Request when it was made, *a fortiori*, they would not now become obligated to respond on appeal. Nonetheless, we would still undertake a review of the validity of the Vaughn Index since WASA voluntarily searched and identified documents it is now withholding under claim of exemption from FOIA. To do otherwise would be contrary to the tenets of DC FOIA, which favor disclosure.

Determining whether or not an FOIA request is unduly burdensome requires a subjective analysis of the facts and circumstances of a particular case. See, for example, *Goland, supra* 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).

It is notable that WASA, at least partially and arguably fully responded to the FOIA Request. An inference could be drawn that the FOIA Request was not unduly burdensome because response was made. However, the evidence contradicts this conclusion. First, Appellant contends that WASA has not yet provided all documents responsive to the FOIA Request despite numerous attempts to do so. Second, there is the FOIA Request itself, which is

overly broad and far-reaching on its face, such that it cannot reasonably be deemed to describe any public record. D.C. Official Code 2001 Ed. § 2-532(c). The breadth of the FOIA request, and the circumstances surrounding it must not be overlooked when determining its reasonableness. Therefore, we are taking the unusual step of circulating this determination to all District of Columbia agencies that receive and process requests under DC FOIA, to alert them to certain abuses such as the unreasonable use of DC FOIA to circumvent normal discovery processes. Here, Appellant set forth forty-five (45) requests, each of which could have stood on its own as an independent FOIA request. Comparably, WASA, received a *total of 40* FOIA requests in Fiscal Year 2006². 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).

While not specifically prohibited under the FOIA, the 45 requests resemble requests for production of documents customarily delivered in the context of discovery proceedings. As WASA noted, this Appellant has been admonished for such efforts in the past. WASA's Response to Appeal at 1. And, Appellant casts a very broad net in its search for documents. The breadth of many of the requests, which include "any and all public records" "relating to" various topics cannot reasonably be deemed to describe *specific* records. And, despite the delivery of over 2,000 pages of documents, Appellant still claims that WASA has provided incomplete "answers to JABB II's questions." Appeal, at 2. This underscores a lack of clarity in the FOIA request and emphasizes the burdensome breadth of the multiple requests. Therefore, we decline to require WASA to provide any further response to the FOIA Request as currently written, other than as may be required with respect to our findings regarding the Vaughn Index.

The remaining issue on appeal is whether WASA properly invoked the "deliberative process" exemption as a basis for withholding documents identified on the Vaughn Index. WASA claims that the documents on the Vaughn Index identified as solicitation evaluations and cost surveys are predecisional and deliberative process documents. WASA correctly asserts that the "deliberative process" exemption is designed in part to protect the agency from being forced to "operate in a fishbowl." WASA's Response to Appeal at 3. However, FOIA exemptions must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the FOIA. *Vaughn v. Rosen*, 484 F. 2d 820, 823 (D.C. Cir. 1973). The burden is on the agency to prove that the information sought fits one of the exemptions to FOIA. *Vaughn*, supra. In fact DCMR 412.5 requires the agency denying a FOIA request to deliver the following:

"Any additional documentation as may be necessary and appropriate to justify the agency's decision, such as a *Vaughn* index of documents withheld, an affidavit or declaration of a knowledgeable official or employee testifying to the decision to

² See District of Columbia Annual Freedom of Information Act Report for Fiscal Year 2006, Uniform Format for the Submission of the Annual Freedom of Information Act Report for D.C. WASA, at page 1.

withhold documents, or such other similar proof as the circumstances may warrant.”

The Vaughn index referenced in DCMR 412.5 evolved from the decision of the United States Court of Appeals for the District of Columbia Circuit in the *Vaughn* case. According to *Vaughn*, an agency is required to provide a “detailed analysis in manageable segments,” by formulating a system of “itemizing and indexing that [correlates] statements made in the [agency’s] refusal justification with the actual portions of the document.” 484 F.2d at 827. We interpret that statement to mean the agency must analyze portions of withheld documents to determine whether any segments may be disclosed. This interpretation is in line with a public policy, reiterated by the court in *Vaughn* that favors disclosure. The Vaughn Index delivered by WASA does not comply with the requirements of *Vaughn*. It only restates the request made by the Appellant, identifies the document being withheld, and recites the exemption. However, we cannot discern from WASA’s Vaughn Index whether portions of the identified documents are exempt while others should be disclosed. Accordingly, we do not have enough information to evaluate whether the exemption was properly applied.

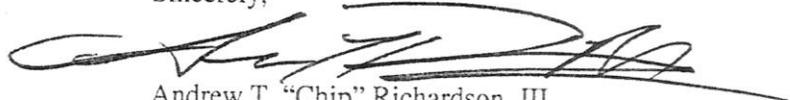
Therefore, we REMAND this matter to WASA to deliver to our office, within fifteen (15) days the following:

1. a Vaughn Index that contains a detailed description of the particular documents withheld along with an analysis of which portions of the documents are exempt and which are disclosable, if any; and
2. a representative document of those withheld for purposes of an *in camera* inspection (not to be provided to Appellant).

No further relief will be provided other than as may be required with respect to the documents identified on the Vaughn Index.

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 WASA.

Sincerely,



Andrew T. “Chip” Richardson, III
Deputy General Counsel, EOM

Enclosure: FOIA Request

cc: Webster Barnes