

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor



June 10, 2009

BY U.S. MAIL

[Redacted]
Rockville, MD 208

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 May 7, 2009 (the "Appeal"). We forwarded the Appeal to the District of Columbia Department of Corrections ("DOC") with a request for a response. DOC responded by letter dated May 29, 2009 ("DOC Response").

In your initial FOIA Request dated April 6, 2009, you sought copies of "all documents and records, including but not limited to all incident reports, maintenance logs and records, and any other documents concerning the malfunction and repair of cell locking mechanisms at the D.C. Central Detention Facility (CDF) on March 20, 2009, and all records and documents that reflect the number of occasions over the past five years, i.e., from January 1, 2004, to the present date, on which CDF personnel were unable to lock cells at the CDF, and the reasons for such malfunctions."

DOC initially responded to your FOIA Request in a letter dated May 4, 2009, requesting an extension to respond to your FOIA Request. However, DOC did not provide a final response before you filed your Appeal with this Office.

On Appeal, Appellant challenges DOC's denial of his FOIA request. In summary, Appellant argues DOC did not respond within the statutory timeframe and therefore his FOIA request was constructively denied.

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 policy, the DC FOIA creates the right “to inspect ... and ... copy any public record of a public body” *Id.* § 2-532(a). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. D.C. Official Code, 2001 Ed. § 2-534.

The DOC Response urges this Office to stay this Appeal because this FOIA Request is related to Appellant’s previous FOIA request dated December 10, 2007, which is the subject of pending litigation in D.C. Superior Court. We have compared Appellant’s December 10, 2007 FOIA Request to Appellant’s current FOIA Request and have determined these requests are materially different. The primary nexus linking both requests is that both requests relate to the same agency, DOC. And both FOIA Requests originate from the same requesters. Outside of these similarities, we see no substantial relationship between the two FOIA Requests and therefore, we decline to stay our decision on this Appeal.

Turning to the merits of this Appeal, DOC urges this Office to deny Appellant’s FOIA Request under D.C. Official Code § 2-534(a)(4) & (10). Exemption 4 of the DC FOIA, commonly referred to as the deliberative process privilege states, in part “inter-agency or intra-agency memorandums or letters . . . which would not be available by law to a party other than a public body in litigation with the public body” may be exempt from disclosure.

To invoke the deliberative process privilege, two requirements must be met. First, the material must be predecisional, and, second, it must be deliberative. *Cobell v. Norton*, 213 F.R.D. 1, 4 (D.C. 2003). To be deliberative, the document must be part of the initial process by which agency decisions and policies are formulated. *People for the American Way Foundation v. National Park Service*, 2007 WL 2416113 (D.C. 2007).

Here, it is clear the deliberative process privilege is inapplicable to the materials sought by Appellant. Many of the materials Appellant seeks only memorialize and document the occurrence of a specific event, a malfunctioning cell lock and the repairing of the same. There is nothing in the record suggesting DOC would have deliberated over this issue. The only decision to be made in this instance was to send someone to fix the cell malfunction. It does not appear from the record before us, for example, that DOC deliberated over procuring new locks or adjusting current policies regarding this matter. Further, we find the deliberative process does not extend to incident reports and maintenance logs under these circumstances.

DOC also relies on DC FOIA exemption 10 which states, in part “any specific response plan. . . and any specific vulnerability assessment, either of which is intended to prevent or to mitigate an act of terrorism,” may be exempt from disclosure.

Again, it is quite clear from reading these statutory provisions, that they are inapplicable to Appellant's FOIA Request. To begin with, Appellant is not requesting a specific response plan. Rather, Appellant is primarily seeking maintenance logs and incident reports. No where does Appellant's FOIA Request seek or imply he is seeking a response plan.

Additionally, the same rationale holds true for the second part of DC FOIA exemption 10. For a record to fall within this exemption, it must specifically relate to terrorism. Terrorism is defined at D.C. Official Code § 22-3152(1) (2008 Supp.) and must constitute a specific offense as defined in subparagraph 8 of the aforementioned Code provision. Looking to these statutory provisions and Appellant's FOIA Request, I cannot conclude that this request meets the second part of exemption 10. It is impossible to allege, without more, that information about the occurrence of malfunctioning cell locks fall within this exemption. I do not find that this FOIA Request imputes information relating to a vulnerability assessment involving terrorism nor does Appellant request such information.

Accordingly, this Appeal is hereby REMANDED to DOC to provide Appellant with all materials responsive to Appellant's FOIA request within ten (10) days of the date of this decision.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Regards,



Runako Allsopp
Deputy General Counsel to the Mayor

cc: Segun Obebe
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