

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-34

June 20, 2011

Abigail and Don Padou

Dear Mr. and Ms. Padou:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) (“DC FOIA”), dated May 17, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the District of Columbia Auditor (the “Auditor”) improperly withheld records in response to your request for information under DC FOIA dated January 13, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the Fiscal Year 2010 final spending reports and the Fiscal Year 2011 budgets for Advisory Neighborhood Commissions 5A, 5B, and 5C.

In response, dated January 21, 2011, the Auditor provided records to Appellant. By email dated February 25, 2011, Appellant sent a clarification to the Auditor stating that Appellant was seeking spending reports for all quarters of Fiscal Year 2010, not simply the final quarter of Fiscal Year 2010. On March 11, 2011, the Auditor provided additional records to Appellant.

By email dated May 6, 2011, Appellant posed two questions to the Auditor, to which questions the Auditor responded by email on the same date. On the same date, Appellant again emailed the Auditor and stated that certain documents were omitted from the response to the FOIA Request. By letter dated May 17, 2011, the Auditor indicated that it was responsible for responding to requests for its records and that the other records requested are maintained by the treasurers for Advisory Neighborhood Commissions 5A, 5B, and 5C.

On Appeal, Appellant challenges the response of the Auditor to the FOIA Request as incomplete. Appellant states that the Auditor has only provided “summary sheets” in response to the FOIA Request, but that D.C. Official Code § 1-309.13(j)(1) requires that the quarterly reports include additional documents. Appellant is seeking these additional documents.

In its response, dated June 14, 2011, the Auditor modified its position. It asserts that it is conducting an audit of Advisory Neighborhood Commissions 5A, 5B, and 5C and the documents collected in connection with this audit are exempt from disclosure under D.C. Official Code § 2-

531(a)(3), which provides an exemption for investigatory records compiled for law enforcement purposes. Although the exemption has subparagraphs which provide further qualifications for the exemption under the paragraph (3), except for certain redactions for an unwarranted invasion of privacy on the documents which it asserts are exempt in whole, the Auditor does not specify the subparagraph upon which it relies or further analyze the justification for the exemption.

Discussion

It is the public policy of the District of Columbia (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 § 2-537(a). In aid of that policy, DC FOIA creates the right "to inspect ... and ... copy any public record of a public body . . ." *Id.* at § 2-532(a). Moreover, in his first full day in office, the District's Mayor Vincent Gray announced his Administration's intent to ensure that DC FOIA be "construed with the view toward 'expansion of public access and the minimization of costs and time delays to persons requesting information.'" Mayor's Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Although it was unclear at the time of the original request, through the cooperative efforts of the Auditor and Appellant, it became clear that the FOIA Request sought the quarterly financial reports required by D.C. Official Code § 1-309.13(j)(1). D.C. Official Code § 1-309.13(j)(1) provides, in part:

The treasurer of a Commission shall prepare a quarterly financial report on a form provided by the Auditor. The financial report shall be presented to the Commission for its consideration at a Commission meeting within 45 days after the end of the quarter. A copy of the approved financial report, signed by the Chairperson, the secretary, and the treasurer, shall be filed, along with a record of the vote adopting the report, with the Auditor within 15 days of approval.

As set forth above, the Auditor provided the main report to Appellant, but did not provide any of the supporting documentation required to be included as part of the quarterly financial report. D.C. Official Code § 1-309.13(j)(1) also provides:

Each quarterly report shall include copies of canceled checks, bank statements, grant request letters and grant disbursements, invoices and receipts, executed contracts, details about all contributions received during the time period covered by the quarterly report, the minutes of all meetings indicating the Commission's approval of disbursements during the time period covered by the quarterly report, and certification of the Commission's approval of the quarterly report signed by the Commission's Secretary.

The Auditor has not provided any of such supporting documents. However, D.C. Official Code § 1-309.13(j)(1) also provides:

The Commission shall make available for on-site review to the Auditor, upon the Auditor's request, originals of documents required to be submitted with quarterly financial reports pursuant to this section. A financial report shall be available for public inspection during the normal office hours of the Commission.

By law, as cited by Appellant, the documents which Appellant has requested are part of the quarterly financial report which Appellant has requested. By that same law, those documents are required to be made available for public inspection and would not, therefore, be exempt from disclosure. To this extent, we agree with Appellant. However, under D.C. Official Code § 2-531, public bodies are required to make public records available to requesters. In this case, the requested records are, to the extent that they exist, in the possession of both the Auditor and the respective Advisory Neighborhood Commissions. The Auditor responded to the FOIA Request, to the extent of the alleged denial, by stating where the records are available for inspection. It has been held that an agency was not obligated under the FOIA to produce such records because the information is publically accessible via its website or the Federal Register. *Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). See also *Crews v. Commissioner*, 85 A.F.T.R.2d 2169, 2000 U.S. Dist. LEXIS 21077 (C.D. Cal. 2000)(production satisfied for documents that are publicly available either in the agency's reading room or on the Internet). Here, the fact that such records are held by another agency is not, in our view, material as the requirement for availability is satisfied. By law, the records are available through the Advisory Neighborhood Commissions and there is no evidence on the administrative record to indicate that this is not the case. The response of the Auditor, as reflected in its letter, dated May 17, 2011, with respect to the remaining records is sufficient.

Although it is not material to this decision, we note that we would not have been able to arrive at the same result based on the response of the Auditor to the Appeal. In the response, the Auditor contends that the records are exempt from disclosure with under D.C. Official Code § 2-534(a)(3) pursuant to an exemption for investigatory records compiled for law enforcement purposes. D.C. Official Code § 2-531(a)(3) provides, in pertinent part, for an exemption from disclosure for:

Investigatory records compiled for law-enforcement purposes, including the records of Council investigations . . . , but only to the extent that the production of such records would:

(A) Interfere with:

(i) Enforcement proceedings;

(ii) Council investigations; or . . .

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures not generally known outside the government; or

(F) Endanger the life or physical safety of law-enforcement personnel; . . .

For the purposes of DC FOIA, law enforcement agencies conduct investigations which focus on acts which could, if proved, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). The exemption “applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.” *Rugiero v. United States DOJ*, 257 F.3d 534, 550 (6th Cir. 2001). Under the *Rural Housing Alliance* case, in determining whether records are being “compiled for law-enforcement purposes,” a distinction is made between general “government surveillance or oversight . . . [and] investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions. [citation omitted].” *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). The Auditor indicates that it is conducting an audit, but there are many different kinds of audits, including operational audits (examines the use of resources to evaluate whether those resources are being used in the most effective and efficient manner); financial audits (examines accounting and reporting of financial transactions, including commitments, authorizations, and receipt and disbursement of funds, and the sufficiency of controls over cash and cash-like assets); compliance audits (examines compliance with laws, regulations, policies, and procedures); information systems audits (examines the internal control environment of automated information processing systems and their use); and investigations (examines evidence of impropriety, including alleged instances of fraud, waste and abuse, and improper governmental activities.) Not all audits will qualify as law enforcement activity. In this instance, the Auditor gives no indication as to the nature of the audits which it is conducting, but the audits seem to be general government oversight and not law enforcement activity.

For purposes of analysis, even if this was a law enforcement activity, we could not find on the record that the exemption was generally available. As stated, except for certain redactions for an unwarranted invasion of privacy on the documents which it asserts are exempt in whole, the Auditor does not specify the subparagraph upon which it relies or further analyze the justification for the exemption. It would appear that the justification for the exemption would be that it would interfere with an enforcement proceeding and exempt under D.C. Official Code § 2-531(a)(3)(A)(i), but the Auditor has not provided any basis for finding that disclosure would, in fact, interfere with such a proceeding, other than asserting that the exemption applies. In Freedom of Information Act cases, “‘conclusory and generalized allegations of exemptions’ are unacceptable, *Found. Church of Scientology of Wash., D.C, Inc. v. Nat'l Sec. Agency*, 197 U.S.

App. D.C. 305, 610 F.2d 824, 830 (D.C. Cir. 1979) (quoting *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820, 826 (1973)).” *In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007). However, it should be noted that the exemption for investigatory records may apply if the appropriate circumstances appear on the administrative record.

Nevertheless, because the records requested are required to be publically available in accordance with law and there is no evidence on the administrative record to indicate that this is not the case, the decision of the Auditor, as reflected in its response, dated May 17, 2011, is upheld.

Conclusion

Therefore, we uphold the decision of the Auditor. The Appeal is hereby DISMISSED.

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.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Lawrence Perry
Karen Todd, Esq.