

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

Freedom of Information Act Appeal: 2011-38

June 28, 2011

Mark Borbeley, Esq.

Dear Mr. Borbeley:

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 June 1, 2011 (the “Appeal”). You, on behalf of certain clients (“Appellant”), assert that the District of Columbia Housing Authority (“DCHA”) improperly withheld records in response to your request for information under DC FOIA dated April 22, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought documents relating to the Highland Dwellings Redevelopment and Modernization Project. There were eight sub-requests in three categories: funding-related; construction-related; and planning-related.

In response, by letter dated May 16, 2011, DCHA produced certain responsive records, with redactions for items that constituted a clearly unwarranted invasion of personal privacy and exempt from disclosure under District of Columbia Official Code § 2-534(a)(2), and stated that it did not have any responsive records for other requests. DCHA also indicated that it anticipated receiving other records pursuant to its search. By email on the same date, it indicated that it would provide a rolling production to accommodate Appellant, who needed documents in connection with ongoing litigation.

On Appeal, Appellant challenges the denial, in part, of the FOIA Request with respect to four of his sub-requests:

1. With respect to the request of Appellant for documents describing funding which DCHA already has available to it, Appellant states that only a “summary budget” has been received and that this response is inadequate.

2. With respect to the request of Appellant for applications for funding and documents showing the current status of funding, Appellant states that no documents regarding applications related to project-based vouchers were produced and that a "Solicitation" which was produced did not have the exhibits attached, which exhibits were a part of the Solicitation.

3. With respect to the request of Appellant for documents showing the scope of renovations if DCHA receives full funding, Appellant states that DCHA shows a Scope of Work, but no detailed supporting schedules.

4. With respect to the request of Appellant for all written communications to and from the Department of Housing and Urban Development regarding the disposition application for the project, DCHA has disclosed no documents although they were promised as soon as they were available.

In its response, by email dated June 20, 2011, DCHA revised its position by stating that there are additional records which it has provided or which it now will provide or make available for inspection. It also states that it "disclosed all responsive records that it had in its possession at the time of the response." With respect to the challenged categories numbered above, DCHA states:

1. It has provided all responsive records within its possession. In addition to the "Summary Budget," it has provided a disposition application with respect to the second sub-request in the FOIA Request, which documents contain additional information responsive to its request.

2. In addition to the records provided in its initial response, dated May 16, 2011, it has provided, or will provide, an application for vouchers and a "Leasing Schedule" which accompanies the voucher.

3. In addition to the records provided in its initial response, dated May 16, 2011, it will make available for inspection interior permits approved by the Department of Consumer and Regulatory Affairs.

4. It will provide emails constituting communications between DCHA and the Department of Housing and Urban Development.

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, the 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 the 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).

DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government’s search for responsive documents was adequate. *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Under the law, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978).

Appellant asserts that DCHA has failed to provide all available records pursuant to the FOIA Request. In its initial response to Appellant, DCHA indicated that it anticipated receiving other records pursuant to its search and that it would provide a rolling production to accommodate Appellant. While DCHA states that it had provided “all responsive records that it had in its possession *at the time of the response* [emphasis added],” based on its revised response as set forth in the Appeal, it is obvious that it provided all of the records in the possession of the FOIA Officer, but not all of the records in the possession of the agency. However, based on the revised response as set forth in the Appeal, we understand DCHA to represent that it has provided or is making available for inspection all of the responsive records within its possession. We have no reason to doubt the veracity of this representation. However, with the disclosures to be made as set forth in the revised response as set forth in the Appeal, we will ask DCHA to confirm this in writing. Although Appellant may believe that additional records exist, mere suspicion is not sufficient to provide a basis for relief. *Marks v. United States (Dep’t of Justice)*, 578 F.2d 261 (9th Cir. 1978). As to the failure alleged by Appellant to provide exhibits to the Solicitation provided by DCHA with respect to the second category of challenged requests, we have reviewed the Solicitation produced by DCHA and found that the exhibits were included.

Based on the foregoing, we are satisfied that DCHA made a good-faith search and has provided, or will provide or make available for inspection, all responsive records. Accordingly, this is dispositive of the matter and all that remains is compliance with its revised response.

Conclusion

Therefore, we uphold the decision, as revised, of DCHA and the Appeal is hereby DISMISSED; provided, that:

1. DCHA shall provide to Appellant its main response to the Appeal and provide, or make available for inspection, the additional records as stated therein.

2. DCHA shall confirm in writing that it has provided or is making available for inspection all of the responsive records within its possession.

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: Qwendolyn Brown, Esq.