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

Freedom of Information Act Appeal: 2011-41

June 30, 2011

Don and Abigail Padou

Dear Mr. and Mrs. 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 June 10, 2011 (the "Appeal"). You ("Appellant") assert that the Department of Consumer and Regulatory Affairs ("DCRA") improperly withheld records in response to your request for information under DC FOIA dated May 16, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought, for the period of January 1, 2011, to the date of the FOIA Request, "all correspondence (including emails) between the Office of the Zoning Administrator and Jack Lester of EYA. The Office of the Zoning Administrator includes, but is not limited to, employee Matthew LeGrant."

In response, by email dated May 17, 2011, DCRA stated that a request under DC FOIA must reasonably describe the records requested and that it would need the names or titles of the agency employees for whom records were sought in order to process the FOIA Request. DCRA indicated that it would process the FOIA Request with respect to Matthew LeGrant. This was followed by an exchange of emails between DCRA and Appellant as to the propriety of the FOIA Request.

On Appeal, Appellant challenges the denial, in part, by DCRA. Appellant asserts that DCRA has failed to conduct a reasonable and adequate search as required by DC FOIA because:

1. The search is limited to one employee, despite the fact that the request applied to all employees of the Office of the Zoning Administrator and that "[t]here is no rule or court holding that states that a requester must name specific employees in order to adequately describe a record."

2. The search is limited to emails, despite the fact the request applied to all correspondence, electronic or paper-based.

In its response, dated June 21, 2011, DCRA reaffirms its position. In support of its contention that the FOIA Request does not reasonably describe the records requested, it cites a case, *Brophy v. U.S. Dep't. of Defense*, 2006 U.S. Dist. Lexis 11620 (D.D.C. 2006), "the relevant text of which is available on the DC FOIA Guidance Memo, and which provides that "'the court found that a request for a search of all staff e-mails was not reasonable and that only e-mails of specifically named individuals need to have been searched.'" In addition, DCRA states that "although the request identifies the records to the extent of 'all employees of the Office of the Zoning Administrator', the identification of the employees [sic] working unit is insufficient to meet this criteria. A working unit in a given agency may contain dozens, and in some cases hundreds of employees over any given period of time." DCRA also states that its search as to Mr. LeGrant included all types of files, not simply email.

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).

Appellant has also raised issues as to the timeliness of the response of DCRA and, in addition. asserts that DCRA has acted in an arbitrary and capricious manner. However, these issues are rendered moot by the filing of the Appeal.

We believe that DCRA has reasonably interpreted the request as to the nature of records requested, that is, its search included all types of files, not simply email. The issue is the scope of that search.

Subsection 1-402.4 of the District of Columbia Municipal Regulations provides: "A request shall reasonably describe the desired record(s)." A requester must frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome and to enable the agency to determine precisely what records are being requested. *Assassination Archives & Research Center, Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989). "The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of

requesters. Therefore, agencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems." *Id*.

As under federal law, an agency is required to disclose records available only upon a request which reasonably describes the records sought. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *Marks v. United States (Dep't of Justice)*, 578 F.2d 261, 263 (9th Cir. 1978). A description is sufficient if it enables a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort. *Id*. As DCRA correctly asserts, an agency is not required to conduct a search which is unreasonably burdensome. *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990). In Freedom of Information Act Appeal 2011-09, a request to search all of the email accounts of the University of the District of Columbia, which would have a search of over 7,000 email accounts, plus archived accounts, was found to be an unreasonably burdensome request. Contrary to the assertion of Appellant, a request to provide names may be required to narrow a search and fashion a request which is not unreasonably burdensome.

However, this is not such a case. According to the FY 2012 Proposed Budget and Financial Plan, prepared by the Mayor and submitted to the Council of the District of Columbia, which we deem to be a matter of public record, the number of budgeted full-time equivalent employees in the Office of the Zoning Administrator for Fiscal Year 2011 is 12. The number for Fiscal Year 2010 was listed as 11.3. While DCRA states that "[a] working unit in a given agency may contain dozens, and in some cases hundreds of employees over any given period of time," the FOIA Request required a search of the record of approximately 12 employees for a 4 ½-month period. This is not unreasonably burdensome. DCRA cites *Brophy v. U.S. Dep't. of Defense*, 2006 U.S. Dist. Lexis 11620 (D.D.C. 2006), and quotes "the DC FOIA Guidance Memo," as describing the case as standing for the proposition that "a request for a search of all staff e-mails was not reasonable and that only e-mails of specifically named individuals need to have been searched." Although DCRA did not provide a citation for the DC FOIA Guidance Memo, we were able to find a copy of the document. It is a memorandum written by the former FOIA Officer for the Office of the Attorney General and provides unofficial advice. We found that DCRA omitted the following sentence following the quoted statement: "The court held that the request was unduly burdensome because it would have required the Department of Defense to search two Human Resources Command Centers containing over 3,700 personnel for any e-mails relating to the requester without limitation." Thus, the guidance given related not to the form of the request, but to the number of persons whose records were to be searched and the concomitant burden. In fact, in the *Brophy* case, the Department of Defense did not contest, and performed, a search for 11 employees within a unit over a one-year period. Here, as stated, the FOIA Request required a search of the record of approximately 12 employees for a 4 ½-month period.

Conclusion

Therefore, the decision of DCRA is REVERSED and REMANDED. DCRA is ordered to conduct the requested search with respect to the records of all employees of the Office of the

Zoning Administrator. With respect to the results of the search, DCRA may assert any exemptions applicable under DC FOIA and Appellant may challenge any exemptions asserted.

This constitutes the final decision of this office. 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: Hamilton Kuralt