

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

Freedom of Information Act Appeal: 2011-46

August 1, 2011

Randy Alan Weiss, Esq.

Dear Mr. Weiss:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated June 21, 2011 (the “Appeal”). You (“Appellant”) assert that the District Department of Transportation (“DDOT”) 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 from the period of October 1, 2010, through May 24, 2011, relating to trees which were ordered or purchased for planting, replacement, or restoration of greenery on public space pursuant to the jurisdiction of DDOT.

In response, by letter dated June 15, 2011, DDOT produced responsive records, with redactions for items that constituted commercial or financial information exempt from disclosure under District of Columbia Official Code § 2-534(a)(1).

On Appeal, Appellant challenges the response by DDOT to the FOIA Request as “incomplete, inadequate and, fundamentally flawed.” In support of its contention, Appellant cites a Washington Post article, dated June 6, 2011, attached and made part of the administrative record, which states that a DDOT unit has removed 80,000 square feet of impervious material and that the District has planted 3,953 trees during the “current growing season.” Appellant contends that the response of DDOT identifies “only a few hundred trees being requisitioned” and does not include any records relating to matters such as planting, invoices, payments, emails, and internal memoranda.¹ Appellant has attached the records provided to him by DDOT.

¹ In the Appeal, Appellant states that 39,953 trees were planted and refers to that number in its argument. Although the actual number is 3,953, we do not deem the discrepancy to be material to the argument.

In its response, by email dated July 20, 2011, DDOT reaffirmed its position. It states that it has provided all of the responsive records associated with the FOIA Request.² In order to clarify its response and the administrative record, DDOT was invited to supplement the response to address the manner in which the search for records was conducted and whether the contracts identified in the purchase orders which were the main records produced by DDOT are maintained by DDOT. In response, by email dated July 27, 2011, DDOT supplemented its response. First, it indicated that its search was conducted by, and records were provided by, its Urban Forestry Administration division as “the request related exclusively to trees.” Second, it indicated that there were numbering errors on the contracts identified in the purchase orders. It stated that there were only two contracts, one of which DDOT did not maintain in its possession and one of which was maintained in the possession of DDOT and not the Urban Forestry Administration. DDOT attached the contract for *in camera* review.

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 § 2-531. 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 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 DDOT has failed to provide all available records pursuant to the FOIA Request. Foremost in support of its assertion is that DDOT has only provided records regarding “only a few hundred trees being planted” when “DDOT approved for planting tens of thousands

² DDOT also notes the error regarding the number of trees which the Washington Post article stated as planted by the District.

of trees.” The administrative record is unclear as to how many trees were planted and how many trees were approved for planting. Each of the purchase orders provided by DDOT and made part of the Appeal as an attachment indicates a quantity approved for planting which exceeds both 3,953 and 39,953. On the other hand, the quantities on the purchase orders do not appear to be consistent with quantities in the contract submitted with the supplemental response of DDOT. The quantity planted as noted in the Washington Post article appears to be more consistent with an internal email relating to the search in response to the FOIA Request (which internal email was not a responsive record for the purposes of the FOIA Request). Based simply on these facts, it is difficult to draw any conclusion as to the withholding of documents by DDOT.

More generally, Appellant contends that DDOT should have created and maintained more records than have been provided as a matter of prudent and sound management practices. Assuming, for the purposes of analysis, that we agree with Appellant, DC FOIA provides no warrant to second-guess the management practices of an agency in the compilation and maintenance of its records. FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Although a requester 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).

Nevertheless, the response of DDOT to the Appeal has raised a question as to the adequacy of the search. As the purchase orders produced referenced a contract, but no contract was produced, we invited an agency supplement to obviate a possible reconsideration and delay to the resolution of the matter. In Freedom of Information Act Appeal 2011-29, in response to an invitation to supplement its response in a similar circumstance, the agency indicated that its response was based on a review of all withheld documents which resulted from a search of electronic databases, but that upon further review of the original request and appeal, there were also paper-based documents that may be responsive to the original request. Accordingly, we were more efficiently able to produce a decision and fashion relief based on fact rather than speculation on an incomplete administrative record. However, in this case, rather than establishing the adequacy of the search or prompting an agency identification as to additional records which need to be reviewed, the supplemental response has raised additional questions.

First, the supplemental response indicates that the search was conducted by the Urban Forestry Administration division alone, but there is no indication as to the manner in which it conducted the search. The lack of production of any emails suggests that a search may have been limited to paper-based files and that there was no search of any electronic databases. Second, the supplemental response has resulted in the identification of a contract that was not produced. The contract is responsive to the FOIA Request and should have been produced, with appropriate redaction for commercial or financial information which is exempt from disclosure under D.C. Official Code § 2-534(a)(1). DDOT explains that the contract was maintained by the agency but not the Urban Forestry Administration division. This buttresses the suggestion that additional records exist which have not been identified and produced within the agency as a whole.

An agency has the burden to establish the adequacy of its search. *See, e.g., Patterson v. IRS*, 56 F.3d 832, 840 (7th Cir. 1995). An administrative appeal under DC FOIA is a summary process

and we have not insisted on the same rigor in establishing the adequacy of a search as would be expected in a judicial proceeding. However, in this case, DDOT has not established a sufficient basis to conclude that the search was, in fact, adequate. Accordingly, we will remand the matter DDOT for disposition as follows:

1. DDOT shall determine whether or not it has searched all relevant electronic databases for the requested records.

A. If DDOT has searched all relevant electronic databases and has found no additional records, it shall so state in writing and indicate the manner in which such search was made.

B. If DDOT has not searched all relevant electronic databases, it shall search all such relevant electronic databases and provide the responsive records, subject to any applicable exemption under DC FIOA, to Appellant. It shall also indicate, in writing, the manner in which such search was made.

2. DDOT shall determine whether or not it has searched all relevant files for the paper-based forms of the requested records.

A. If DDOT has searched all relevant files and has found no additional records, it shall so state in writing and indicate the manner in which such search was made.

B. If DDOT has not searched all relevant electronic databases, it shall search all such relevant files and provide the responsive records, subject to any applicable exemption under DC FIOA, to Appellant. It shall also indicate, in writing, the manner in which such search was made.

3. The contract identified and provided for *in camera* review shall be provided to Appellant, with appropriate redaction for commercial or financial information which is exempt from disclosure under D.C. Official Code § 2-534(a)(1). DDOT shall advise Appellant as to which agency maintains the other contract corresponding to the purchase orders which it has produced.

This order shall be without prejudice to Appellant to assert any challenge to the results of the additional production ordered.

This decision only requires that DDOT either provide the specified confirmation that an adequate and reasonable search was conducted or complete the conduct of an adequate and reasonable search. In the latter event, until such search is conducted, we will not know whether or not there are records which are to be disclosed. We note, for instance, that the purchase orders already provided by DDOT state that billings are to be sent to the Office of the Chief Financial Officer.

We also note that the FOIA Request was made at a time when DDOT had another FOIA officer. Since that time, DDOT has had a temporary FOIA officer and has transitioned to a new FOIA

officer. This transition may have contributed to what seems to be the incomplete response to the FOIA Request.

Conclusion

Therefore, we remand this matter to DDOT for disposition in accordance with this decision, as follows:

1. DDOT shall determine whether or not it has searched all relevant electronic databases for the requested records.

A. If DDOT has searched all relevant electronic databases and has found no additional records, it shall so state in writing and indicate the manner in which such search was made.

B. If DDOT has not searched all relevant electronic databases, it shall search all such relevant electronic databases and provide the responsive records, subject to any applicable exemption under DC FIOA, to Appellant. It shall also indicate, in writing, the manner in which such search was made.

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This order shall be without prejudice to Appellant to assert any challenge to the results of the additional production ordered.

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: Angela Addison Freeman, Esq.