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

Freedom of Information Act Appeal: 2011-58

August 22, 2011

Alexander J. Brittin, Esq.

Dear Mr. Brittin:

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 March 18, 2011 (the "Appeal"). You, on behalf of Data Niche Associates ("Appellant"), assert that the Department of Health Care Finance ("DHCF") improperly withheld records in response to your request for information under DC FOIA dated February 15, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records relating to the D.C. Medicaid pharmacy paid claims data file for all calendar year quarters beginning in 2010. The FOIA Request set forth a requested form for delivery of the data by attaching a "data field layout along with the programming layout from your previous fiscal intermediary." The FOIA Request stated that the "records requested are identical in content to those submitted to Data Niche since 1991 . . . "

In response, DHCF provided records to Appellant, in part, but subsequently denied the FOIA Request, as follows. As a factual predicate, it should be noted that DHCF implemented a new Medicaid Management Information System (the "MMIS"). According to DHCF, the old MMIS permitted an "automatic data feed" for the Medicaid pharmacy paid claims data, but that the MMIS did not permit such automatic data feed. DHCF determined that there would be a significant cost to reprogram the MMIS to provide the automatic data feed. Thus, instead of such automatic data feed, on April 29, 2011, DHF provided Appellant with Medicaid pharmacy paid claims data on a compact disc.[1] After examining the contents of the compact disc, Appellant determined that it would need a "record layout and glossary key" to use the data provided and requested the same from DHCF. DHCF provided the record layout and glossary key to Appellant on June 29, 2011. After further examination of the contents of the compact disc using the record layout and glossary key, Appellant determined that a significant portion of the

[1] DHCF indicates that this was done at the request of Appellant's counsel after learning of the cost of re-establishing the automatic data feed.

data elements, which had been provided in response to prior requests, were missing and that the data provided was not useful without the missing data elements. In response to the further request for the additional data, by email dated July 19, 2011, DHCF stated that it had performed a reasonable search and had provided all responsive records. It stated that it was not required to create records in response to the FOIA Request.

On Appeal, Appellant challenges the response of DHCF as a denial of the FOIA Request. First, Appellant states that as DHCF has previously furnished all of the records sought and the MMIS is managed by the same contractor, Affiliated Computer Services, Inc., "there is no reason to believe that DHCF must 'create records.'" Second, Appellant quotes from an email of a DHCF employee,[2] stating "establishing the interface that produces the quarterly file extract you were previously receiving is not a priority issue for the District at this time since it does not impact provider payment, beneficiary eligibility or system certification." Appellant states that it received data after the system was implemented and that the quoted email suggests that addressing the FOIA Request is not a priority. Third, Appellant contends that the fact that it found that a significant portion of the data elements were missing after provision of the compact disc and the record layout and glossary key suggests that DHCF is capable furnishing the missing data. Fourth, Appellant refers to the federal FOIA as requiring an agency to honor a requester's specific choice of form to provide a record if there is no difficulty in reproducing the form. Appellant argues that there will be no "exceptional difficulty" in producing the data as DHCF and Affiliated Computer Services, Inc. have done so before.

In its response, dated March 31, 2011, DHCF reaffirms its position. In support of its argument, it provides the declaration of the Project Manager for the Health Care Operations Administration of DHCF (whose email Appellant quoted in its argument in the Appeal). He stated that DHCF implemented the new MMIS in December, 2009. When the new MMIS was implemented, not all the "interfaces" were carried forward. The "interface for DNA [Appellant], which provided DNA with an automatic data feed of the Medicaid pharmacy paid claims data" was not carried forward "due to the limited resources available for the implementation of the new MMIS system . ." The Project Manager states that he asked Affiliated Computer Services, Inc. for an estimate of the cost of developing the interface that was in the old MMIS system. The estimate was "$20,000 to develop the interface and a $5,000 quarterly fee to extract the data." This cost estimate was provided to Appellant. He also states:

> Because of the specific format that DNA requested data and concerns about violation of the Health Insurance and Portability Accountability Act of 2006, it required extensive programming and manual manipulation of the data to provide DNA with the Medicaid pharmacy paid claims data. This, in essence, required DHCF to create records to respond to DNA's request.

DHCF maintains that Appellant is requesting DHCF to create records. First, the data which Appellant received previously was provided under an interface in the old MMIS which was not carried forward to the new MMIS and the reprogramming and data manipulation required to

[2] The employee is the Project Manager for the Health Care Operations Administration of DHCF and manages the contract with Affiliated Computer Services, Inc.

provide the same data would constitute the creation of new records. Second, as indicated, the MMIS has undergone significant changes and the provision of the data would require DHCF to incur substantial costs. Third, while DHCF thought that it would be able to fulfill the FOIA Request by "performing a simple data pull," it has turned out that such would not be possible without the extensive reprogramming and data manipulation and its concomitant cost. Fourth, it contends that, under the federal FOIA provisions cited by Appellant, the data is not readily reproducible and would be exceptionally difficult.

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).

DC FOIA only requires production of records in the possession of an agency. As indicated, an agency is not required to create or maintain records.

> It is well established that an agency is not "required to reorganize (its) files in response to (a plaintiff's) request in the form in which it was made," [footnote omitted] and that if an agency has not previously segregated the requested class of records production may be required only "where the agency (can) identify that material with reasonable effort." [footnote omitted].

Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978).

We have summarized the arguments and counter-arguments of the parties above. In addition, we have summarized the factual underpinnings of the matter, including the declaration of the Project Manager of DHCF. After all the sturm und drang, the gravamen of the Appeal is simply stated: Appellant is no longer receiving an individualized feed of data in a special format after the re-design of the information management system of DCHF and, pursuant to DC FOIA, wants DHCF to expend significant time and resources to restore such access. In consideration of the principles set forth above, it is also plain that DHCF is not required to do so. Although an agency will be required to extract records from an electronic database in a requested form or format if it is not difficult to do so,[3] DHCF is not required to engage in extensive reprogramming and data manipulation, with its attendant costs, to provide a requester with information pursuant to a FOIA request. To paraphrase the Project Manager, such extensive reprogramming and data manipulation is, at its essence, the reorganization of files and the creation of records. The fact that the past information management system of DCHF may have afforded Appellant with the individualized data access that it now seeks does not bear on the current configuration of such system. DC FOIA provides no warrant to second-guess the management practices of an agency in the compilation and maintenance of its records.

Conclusion

Therefore, we uphold the decision of DHCF. 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: Irene Hui, Esq.

[3] Appellant cites statutory text of the provisions of federal FOIA regarding the disclosure of information in a requested format. However, such statutory text is not reflected in DC FOIA. Nevertheless, we use these provisions as guidelines and our decision is not inconsistent with such provisions.