

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

Freedom of Information Act Appeal: 2012-08

December 7, 2011

Mr. James P. Garay Heelan

Dear Mr. Heelan:

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 October 24, 2011 (the "Appeal"). You ("Appellant") assert that Advisory Neighborhood Commission 8B ("ANC 8B") improperly withheld records in response to your request for information under DC FOIA dated September 29, 2011 (the "FOIA Request") by failing to respond to the FOIA Request.

Background

Appellant's FOIA Request sought for the period beginning January 1, 2010 minutes of ANC 8B meetings and invoices for monthly telephone use. Appellant filed the Appeal on the ground that he had not received a response.

In response, by email dated November 22, 2011, ANC 8B stated that, on November 2, 2011, by email, it notified Appellant that the requested records would be available on November 10, 2011, but that Appellant has not done so as he now does not wish to pay copying fees for the records after agreeing to do so. ANC 8B states that it is now assessing a processing fee of \$15 in addition to the copying fees of \$.30 per page.

ANC 8B also included in its response three emails pertaining to the FOIA Request. In an email dated October 25, 2011, from Appellant to Gottlieb Simon, Executive Director of the Office of Advisory Neighborhood Commissions, who apparently was acting to mediate this matter, Appellant stated that "I will be happy to pay the direct costs of the ANC 8B's compliance with my request" and requested that the records be mailed or emailed to him as it was inconvenient for him to travel to the ANC 8B office. In an email dated November 2, 2011, ANC 8B notified Appellant that the requested records would be "available for pick up on November 10, 2011" and there would be a "printing charge" of \$.30 per page. In an email dated November 2, 2011, Appellant (1) reiterated his request that the documents be mailed to him as travel to the ANC 8B office is inconvenient; (2) requested that ANC 8B reconsider his request to waive fees as minutes

of the proceedings of public bodies must be made public and posted online under D.C. Official Code § 2-536(a)(7); (3) if any fees are to be assessed, that the copying charges be \$.25 per page, the charge which is prescribed under DCMR § 1-408; and (4) stated that he would pay the fees when the records were received, quoting D.C. Official Code § 2-532(b-3), which states that advance payment shall not be required unless the requester has previously failed to pay fees or the fees will exceed \$250.

ANC 8B also stated its belief that this office does not have jurisdiction to hear appeals regarding Advisory Neighborhood Commissions, but that “we gladly will work you with you so that this matter can come to a mutual agreement.”

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 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).

As set forth above, ANC 8B states its belief that this office does not have jurisdiction to hear the Appeal under District law, but does so in a conclusory manner and cites no authority in support of its belief. We disagree with the contention of ANC 8B. DC FOIA applies to all public bodies of the District government. With the specific exception of the courts under D.C. Official Code § 2-502(5), public bodies include all agencies of the District government. See D.C. Official Code § 2-502(18A). There is no exclusion for Advisory Neighborhood Commissions. This reflects the public policy of DC FOIA 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. Accordingly, the matter will proceed as an administrative proceeding and not “by mutual agreement.”

As of the date that Appellant initiated the Appeal, ANC 8B had not responded to Appellant. However, subsequently, ANC 8B notified Appellant that it would provide the records. Ordinarily, we would consider the Appeal to be moot and dismiss the matter. However, in this case, the response of ANC 8B indicates that there is still a controversy—the records are still not in the possession of Appellant—and it is evident that Appellant will file an additional appeal. Therefore, as a matter of administrative efficiency, we address the issues in this decision.

ANC 8B states that the records were made available to Appellant, but “Mr. Heelan does not want to pay for the documents even though he stated that he would pay for it . . .” The emails which ANC 8B provides show that Appellant has indeed agreed to pay for the copying costs for copies of the records, but do not indicate that he later refused to do so. One of the emails does indicate that Appellant has simply requested that the records be provided to him before he makes payment, as is provided by law. We infer that the problem is that ANC 8B will not provide, by mail or for pick up, the records to Appellant without an advance payment and that Appellant has invoked his right under D.C. Official Code § 2-532(b-3) to receive records without an advance payment.

Appellant has represented that he will pay ANC 8B for its “direct costs” and has made a reasonable request to have the records, which have already been copied, mailed to him. Appellant has correctly pointed out that DC FOIA does not require an advance payment. Accordingly, ANC 8B is ordered to mail the requested records to Appellant.

There is also a question as to the costs which Appellant shall pay. Initially, ANC 8B made copies of the requested records and imposed a copying charge of \$.30 per page. With the submission of its response to the Appeal, ANC 8B has also decided to assess a “processing fee” of \$15. ANC 8B was invited to supplement its response to clarify the manner in which the charges were determined, but it did not do so. We note that the records are of the type which must be made available without request under D.C. Official Code § 2-536. Nevertheless, Appellant has agreed to pay for the “direct costs” of ANC 8B. Such direct costs would not include a processing fee for documents which are already required to be made available. Such direct costs would include the costs of photocopying. ANC 8B has given no indication how it derived the copying charges and whether they, in fact, incurred such costs. By rule, the standard cost for photocopying is \$.25 per page, which would seem to be the limit for a standard commercial charge for such photocopying. Accordingly, the costs of photocopying shall be assessed at \$.25 per page. Finally, the direct costs would include the costs of mailing.

In sum, ANC 8B is ordered to mail the requested records to Appellant. After the mailing, Appellant shall pay to ANC 8B the costs of mailing and the costs of photocopying assessed at \$.25 per page.

Conclusion

Therefore, the decision of ANC 8B is remanded for disposition in accordance with the prior paragraph of this decision.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under DC FOIA to commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Darrell Gaston