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

Freedom of Information Act Appeal: 2012-16

December 27, 2011

James Sullivan, Esq.

Dear Mr. Sullivan:

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 November 14, 2011 (the "Appeal"). You, on behalf of a client ("Appellant"), assert that the Department of Health ("DOH") improperly withheld records in response to your request for information under DC FOIA dated October 4, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records "that relate to or are an Incident Report involving [his client], who is a resident at [facility, location, and room] from August, 2009 to the present."

By email dated October 5, 2011, DOH acknowledged the FOIA Request. By email dated October 26, 2011, DOH invoked an additional 10-day extension. By email, dated October 27, 2011, Appellant objected to the extension. By separate email, Appellant asked whether, if he limited his search "to the past two months or since September 1, 2011," DOH could produce the records immediately. He also asked if DOH could provide a partial response, consisting of the records which had been located, and he would advise whether an additional search was necessary. By emails on the same day, DOH indicated that it would provide a partial response, consisting of the records which had been located, and would complete its response later. By email on the same day, Appellant repeated his inquiry regarding the limitation of his search if records could be provided immediately.

By email dated November 4, 2011, DOH stated that there were no additional records which were responsive to the FOIA Request. By email dated November 14, 2011, Appellant filed the Appeal, with, as required, a copy to DOH. The following day, DOH provided additional records to Appellant.

On Appeal, Appellant challenges the response to the FOIA Request. Appellant asserts that:

1. DOH "did not undertake a search that was reasonably calculated to uncover the relevant documents." Appellant argues that a prior complaint filed by him and an investigative

report referenced in the records, but which were not produced by DOH, indicate that additional records exist.

2. DOH's interpretation of the FOIA Request was "unreasonably narrow."

3. DOH "employed an unreasonable cut-off date with the proper cut-off date being the date of the final response."

4. DOH "employed an exemption for which there is no statutory provision and that is not specifically asserted."

5. DOH "employed a statutory exemption without a specific assertion."

6. DOH failed to disclose portions of records to which a statutory exemption does not apply.

In its response, by email dated December 12, 2011, DOH reaffirmed its position. As to the first assertion of Appellant that DOH did not make a reasonable and adequate search, DOH contends:

1. The missing complaint identified was not included in the records produced as it was thought that because Appellant presumably maintained a copy of his complaint, it was not necessary to produce it. However, DOH states that "pertinent parts of Mr. Sullivan's complaint were included in the documents provided."

2. The investigative report and other records were provided to Appellant on November 15, 2011, subsequent to the filing of the Appeal, mooting the need for a new search.

3. One letter to which Appellant alludes was not produced because Appellant narrowed the scope of the requested search and the letter fell outside the new time range. DOH asserts that on October 28, 2011, Appellant stated that "I am willing to limit my document production request to Incident Reports filed within the past two months or since September 1, 2011 . . ."

As to the second assertion of Appellant that interpretation of the FOIA Request by DOH was "unreasonably narrow," DOH suggests that this assertion arises from the narrowing of the time period for the search and the type of documents, which DOH contends was done at the instruction of Appellant.

As to the third assertion of Appellant that DOH "employed an unreasonable cut-off date with the proper cut-off date being the date of the final response," DOH states that both the 2007 edition of the United States Department of Justice Guide to the Freedom of Information Act and a memorandum written by the former FOIA Officer for the Office of the Attorney General indicate that a FOIA officer is only required to search for documents in existence as of the date of a FOIA request. Moreover, as there are multiple searchers, using a date of search "may result in varying dates that impact what is or is not provided." Because of the need for document review, using the date of response as a cut-off date is impractical.

As to the other assertions of Appellant regarding claims of exemption and failure to redact, DOH points out that it made no claims of exemption or withheld any documents which could have been redacted.

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, 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 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).

The crux of this matter is the adequacy of the search. As DOH correctly sets forth, the assertions of Appellant regarding claims of exemption and failure to redact are not at issue because DOH made no claims of exemption or withheld any documents which could have been redacted. The first three assertions of Appellant all relate to the adequacy of the search.

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). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

As a general matter, the initial design of the search by DOH was appropriate. It identified the DOH employees who would have knowledge of the location of the requested records and those employees, or their delegates, searched agency records, both onsite and offsite.

Appellant suspected that there were additional records which exist because of a prior complaint filed by him and an investigative report referenced in the records, but which were not produced by DOH. DOH explains this, in part, by noting that the investigative report was provided to Appellant subsequent to his filing of the Appeal. Nonetheless, we find that the search by DOH

was deficient because the time period designated for the search was incorrect and the records which were to be searched were incorrectly restricted.

DOH contends that Appellant narrowed the time period designated for the search, with the result that some records which would have otherwise been produced were no longer responsive. However, the administrative record does not reflect that Appellant narrowed such time period, but merely that he proposed it subject to a condition. In the operative email, on October 28, 2011, DOH stated that Appellant narrowed the search by stating: "I am willing to limit my document production request to Incident Reports filed within the past two months or since September 1, 2011 . . ." However, this is only a portion of such sentence. The full sentence is as follows:

> Mr. Husband, without waiving any objection to your original response, I do not see any Title 22 Incident Reports among the documents that you have produced, and as I indicated earlier I am willing to limit my document production request to Incident Reports filed within the past two months or since September 1, 2011, <u>if you can immediately produce those documents</u>. [emphasis added]

The response of DOH does not indicate that such proffer was accepted and the investigative report provided on November 15, 2011, appears to be a Title 22 Incident Report. Thus, we conclude that the scope of the search, by time or nature of the records, was not narrowed.

DOH also contends that the cut-off date for the search should be the date of the FOIA Request, while Appellant contends that it should be the date of the response. We agree with neither party. The cut-off date should be the date of the search.

In support of its position, as set forth above, DOH cites, and quotes, both the 2007 edition of the United States Department of Justice Guide to the Freedom of Information Act and a memorandum written by the former FOIA Officer for the Office of the Attorney General. However, the 2007 edition does not support the proposition cited; in fact, it advises that a date-of-search is the most appropriate cut-off date. Moreover, the United States Department of Justice Guide to the Freedom of Information Act was updated in 2009. The current edition indicates that the date-of-search is the most reasonable and favored cut-off date and, while another cut-off date may be warranted in specific circumstances, the agency may be required to articulate a compelling justification. United States Department of Justice Guide to the Freedom of Information Act, (2009 ed.), at 80-81. As we stated in Freedom of Information Act Appeal 2011-41, the memorandum written by the former FOIA Officer for the Office of the Attorney General provides unofficial advice. We also note that the memorandum was written in 2007 and erroneously characterizes the guidance of the outdated edition of the Department of Justice guide.

In *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983), the Court held that "the agency bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation." *Id*. at 1101. The Court rejected the proposition that use of a time-of-request cut-off date is always reasonable. *Id*.

at 1102. The Court noted that a date-of-search cut-off date where multiple searchers retrieved records as of the date of search and submitted them for evaluation would result in a "much fuller search and disclosure" and would "not appear unduly burdensome, expensive, or productive of 'administrative chaos.'" *Id*. at 1104. See also *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 643 (D.C. Cir. 2002) (following *McGehee* and favoring a date-of-search cut-off in the absence "of a more compelling justification for imposing a date-of-request cut-off on a particular FOIA request." *Id*. at 644.)

DOH has justified its use of a date-of-request cut-off date by pointing to the type of administrative difficulties which the *McGehee* and *Pub. Citizen* courts rejected. Furthermore, in this case, the last incident of concern which Appellant has identified occurred in September, 2011. Given the close proximity in time of the incident to the date of the FOIA Request, the later date-of-search is particularly warranted in order to produce responsive documents.

Finally, as set forth above, DOH stated that the missing complaint identified was not included in the records produced as it was thought that because Appellant presumably maintained a copy of his complaint, it was not necessary to produce it. However, DOH stated that "pertinent parts of Mr. Sullivan's complaint were included in the documents provided." DC FOIA requires that an agency provide all responsive records, whether or not a requester already has or should have such records. Moreover, records may not be withheld simply because the same information is contained in other records which have been provided. If a record is responsive, the record must be provided, irrespective of the judgment of an agency as to the utility of the record. "FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information." *Stolt-Nielsen Transp. Group LTD. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008).

Accordingly, we are ordering a new search for the period beginning August 2009 and ending on the date of the new search. DOH shall provide any additional responsive records which are located to Appellant, subject to any claim of exemption and without prejudice to Appellant to challenge the results of the revised search.[1]

Conclusion

Therefore, the decision of DOH is upheld in part, is moot in part, and is reversed in part. DOH shall conduct a new search in accordance with the previous 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.

[1] Appellant has also appealed the invocation of the 10-day extension by DOH. However, DOH has now responded to the FOIA Request and any denial on this basis is moot. See Freedom of Information Act Appeal 2011-49.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Phillip Husband, Esq.