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

Freedom of Information Act Appeal: 2012-30

March 9, 2012

Fritz Mulhauser, Esq.

Dear Mr. Mulhauser:

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 February 6, 2012 (the "Appeal"). You, on behalf of the American Civil Liberties Union ("Appellant"), assert that the District of Columbia Housing Authority ("DCHA") improperly withheld records in response to your request for information under DC FOIA dated December 19, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought "all records that are data or analysis for the last two completed fiscal years, 2010 and 2011, and the partial year of 2012, concerning DCHA barring of individuals from its properties." The FOIA Request requested records showing:

> (1) The number of barring orders issued (by month, property, cause and length of bar);
>
> (2) The number of hearings to defend barring orders challenged by residents (by month, property and result);
>
> (3) The number of arrests for unlawful entry for violation of barring orders (by month and property);
>
> (4) Any tally, summary, study, memo, analysis or report on the incidence of barring, its causes and its effectiveness; and
>
> (5) Any listing, tally, or analysis of complaints (at property or central office levels) about barring.

DCHA responded by letter, dated January 26, 2012, and provided a 20-page table to Appellant.

On Appeal, Appellant challenges the response to his FOIA Request, asserting that DCHA "failed to locate and release substantial materials about a practice common knowledge suggests is extensive . . ." As the search only produced "a simple list of barring orders," Appellant contends that the search must be deemed inadequate.

> Our request included a number of other kinds of records—of hearings, arrests and complaints in connection with barring orders, as well as analyses or reports on barring; the ACLU has taken numerous complaints of arrests and taken part in Office of Fair Hearings Review of a complaint on the subject. We conclude that it is highly likely that in DCHA records exist in the categories we requested.

In addition, Appellant requests that we review the denial by DCHA of the fee waiver request of Appellant and that we review the propriety of the invocation by DCHA of a 10-day extension provided by DC FOIA to respond to the FOIA Request.

In its response, by email dated March 7, 2011, DCHA reaffirmed its position. As to the adequacy of its search, it maintains that it conducted a reasonable and adequate search for the records requested pursuant to the FOIA Request. DCHA states:

> The information not disclosed, any tally, summary, study, listing or analysis of the barring process, its effectiveness, or any complaints lodged regarding barring, is information not maintained on record by DCHA. . . . Mulhauser's request would have required DCHA to create documents that it does not normally maintain in order to respond to his request. As such, DCHA responded and disclosed all responsive documents it had in its possession at the time of our response.

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).

Appellant contests the adequacy of the search, contending that, given the nature of the FOIA Request, an adequate search by DCHA should have yielded more responsive records.

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).

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).

In order to establish the adequacy of a search,

> 'the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.' [*Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a 'reasonableness test to determine the 'adequacy' of a search methodology, *Weisberg v. United States Dep't of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

In testing the adequacy of a search, we have looked to see whether an agency has made reasonable determinations as to the location of records requested and made, or caused to be made, searches for the records. See, e.g., Freedom of Information Act Appeal 2012-04, Freedom of Information Act Appeal 2012-26, and Freedom of Information Act Appeal 2012-28. However, a search will be deemed to be adequate if an individual familiar with the records of an agency states that an agency does not maintain the responsive records. *American-Arab Anti-Discrimination Comm. v. United States Dep't of Homeland Sec.*, 516 F. Supp. 2d 83, 88 (D.D.C. 2007).

In this case, the FOIA Officer is also the Assistant General Counsel and, although she does not expressly state the same, as both Assistant General Counsel and FOIA Officer, she would be familiar with the legal proceedings attendant to "barring" proceedings and the records associated therewith. She has stated that DCHA has produced the only records responsive to the FOIA Request. We find that this is credible. Appellant contends that the FOIA Request included a "number of other kinds of records—of hearings, arrests and complaints in connection with barring orders . . ." While the records associated with barring proceedings would be expected to produce more records than the 20-page table provided to Appellant, the FOIA Request was not so broad. It was phrased as a request for records which were quantitative in nature, e.g., the number of barring orders issue, the number of hearings to defend barring orders, the number of

arrests for unlawful entry for violation of barring orders. Although barring proceedings would have generated a significant number of documents, such documents would not necessarily be in the nature of "data or analysis" concerning these proceedings.

While Appellant may feel that DCHA should have maintained the requested records, as we have stated in prior decisions, DC FOIA provides no warrant to second-guess the management practices of an agency in the compilation and maintenance of its records.

Appellant also requests that we review the denial by DCHA of the fee waiver request of Appellant. We will repeat what we stated when Appellant made a similar request in Freedom of Information Act Appeal 2012-26:

> However, we read our jurisdiction under D.C. Official Code § 2-537(a) to be limited to adjudicating whether or not a record may be withheld and not encompassing fee disputes. This is in accord with prior decisions under D.C. Official Code § 2-537(a). See MCU 406151, 51 DCR 4213 (2004); Matter No. 390592, 51 DCR 1527 (2004); OSEC 102301, 49 DCR 8641 (2002). See also Freedom of Information Act Appeal 2012-21. Thus, we will not consider this request of Appellant.

Finally, Appellant requests that we review the propriety of the invocation by DCHA of the 10-day extension provided by DC FOIA to respond to the FOIA Request. As we decided in Freedom of Information Act Appeal 2011-49 when the same request and argument was made, and as Appellant acknowledges, the issue is moot as the agency has responded. As we stated in the previous paragraph, we read our jurisdiction under D.C. Official Code § 2-537(a) to be limited to adjudicating whether or not a record may be withheld and we have already addressed that issue in this case in the context of withholding of records alleged to be caused by failure to conduct a reasonable and adequate search.

Conclusion

Based on the foregoing, the decision of DCHA is upheld and the Appeal is dismissed.

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: Qwendolyn Brown, Esq.