GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2012-48

June 8, 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) (the "DC FOIA"), dated May 12, 2011 (the "Appeal"). You, on behalf of the American Civil Liberties Union ("Appellant"), assert that the Corrections Corporation of America ("CCA"), as a contractor for the Department of Corrections ("DOC"), improperly withheld records in response to your request for information under DC FOIA dated April 7, 2012 (the "FOIA Request") by failing to respond to the FOIA Request.

Background

Appellant's FOIA Request, which it appears was sent not only to CCA, a DOC contractor, but also to DOC and Aramark Corporation ("ARA"), sought records regarding food service in the DOC facility operated by CCA. Appellant stated that it was not seeking duplicative records, but was seeking all responsive records, in fifteen separately stated categories, as the three parties chose to provide them. Appellant stated that it filed the Appeal when it did not receive a response within the statutory deadline from CCA, alleging that CCA has improperly withheld records by failing to respond to the FOIA Request. Appellant also alleges that it has received no records from ARA and few records from DOC, but that it is filing a separate appeal with respect to DOC and ARA.

In response to the Appeal, by email dated June 4, 2012, DOC stated that it sent its response and the response of CCA by letter dated May 8, 2012. Referencing its statement in the May 8 letter, DOC stated that the request of Appellant for contracts between CCA and DOC and between CCA and ARA (or other food provider) should be directed to the Office of Contracting Procurement, which maintains such contracts for the District government. DOC also stated that, together with such letter, it sent one 37-page record to Appellant for one category of requested records, which category was records regarding notifications by DOC chaplains to CCA or other food service providers (and other records related thereto). Although it was not addressed in the May 8 letter, DOC states that it was unable to locate any records relating to another category of requested records, which category was reports by DOC or any other food service monitors. Finally, DOC re-states its expectation, as indicated in May 8 letter and based on its

communication with ARA, that ARA would respond to the balance of the category of requested records in the FOIA Request.

DOC also states that it supplemented its May 8 response with a letter dated May 18, 2012, in response to the filing of the Appeal. The May 18 letter stated that DOC had provided a response on behalf of CCA.

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 states that it indicated that the response to its FOIA Request could be apportioned among the DOC, CCA, and ARA. Appellant also states that the Appeal is specifically limited to CCA. Accordingly, we will limit the scope of review to records maintained by CCA.

D.C. Official Code § 2-532(a-3) provides:

> A public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function, and the public body with programmatic responsibility for the contractor shall be responsible for making such records available to the same extent as if the record were maintained by the public body.

Accordingly, while CCA is not a party under this Appeal, DOC is responsible for compliance by CCA with a request for records and with the decision pursuant to the Appeal.

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).

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, neither CCA nor DOC has provided a sufficient basis to conclude that the search was, in fact, adequate.

First, it does not appear that CCA made any search for the contracts requested. While DOC may not maintain copies of the contracts requested, that is, contracts between CCA and DOC and between CCA and ARA (or other food provider), it does not seem reasonable that CCA would not maintain such contracts among the records that it maintains. Under D.C. Official Code § 2-532(a-3), DOC must ensure that CCA, as its contractor, provides them. Accordingly, the requested contracts shall be provided to Appellant.

Second, in order to make a reasonable and adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. Such determinations may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files which the agency maintains. Even as to the two categories for which DOC has made a search (notifications by DOC chaplains to CCA or other food service providers (and other records related thereto) and reports by DOC or any other food service monitors), DOC has provided no indication as to the manner in which CCA made a search for its records. Accordingly, we have no basis to conclude that the search of CCA was reasonable and adequate.

Here we have an unusual situation as Appellant generously allowed the three parties to apportion the responsibility for producing the records. Nevertheless, this proffer does not absolve a party from compliance with the requirement to provide records if the other parties do not do so. Presently, based on the administrative record, ARA has not fulfilled the expectations that it would provide the records in other categories of records not specified in this decision.[1]

[1] A complicating factor is that the contractual relationship regarding ARA and DOC, if any, is not clear.

Because, as stated, we have no basis to conclude that the search of CCA was reasonable and adequate, we order that DOC shall cause CCA to conduct an additional search as to the categories of records as to which DOC responded and a search for the other categories of records to which DOC has not responded. In addition, it shall state the manner in which each category of the requested records is maintained and the manner in which the search was conducted.

Conclusion

Therefore, we remand this matter to DOC for disposition in accordance with this decision. DOC shall be required to do the following:

1. Provide to Appellant the contracts between CCA and DOC and between CCA and ARA (or other food provider).

2. Cause CCA to:

A. Conduct an additional search for the two categories of records to which DOC responded in the Appeal (notifications by DOC chaplains to CCA or other food service providers (and other records related thereto) and reports by DOC or any other food service monitors); and

B. Conduct a search a search for the other categories of records.

C. State the manner in which each category of the requested records is maintained and the manner in which the search was conducted.

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the response of DOC pursuant to this order.

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: Oluwasegun Obebe, Esq.