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

Freedom of Information Act Appeal: 2012-54

June 20, 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 30, 2011 (the "Appeal"). You, on behalf of the American Civil Liberties Union ("Appellant"), assert that the Department of Corrections ("DOC") improperly withheld records in response to your request for information under DC FOIA dated March 31, 2012 and that ARAMARK Correctional Services ("ARA"), as a contractor for DOC, improperly withheld records in response to your request for information under DC FOIA dated April 7, 2012 by failing to respond (individually, each may be referred to as the "FOIA Request," and collectively, the requests may be referred to as the "FOIA Requests.")

Background

Appellant's FOIA Requests, which it appears were sent not only to DOC and ARA, a DOC contractor, but also to the Corrections Corporation of America ("CCA"), sought records regarding food service in the DOC facility operated by ARA. In Freedom of Information Act Appeal 2012-48, Appellant challenged the failure by CCA to respond to the FOIA Request as it pertained to CCA. The Appeal challenges the responses (or lack thereof) of DOC and ARA.

In the FOIA Requests, 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. By letter dated April 25, 2012, ARA responded to Appellant by stating that ARA was a private company not subject to DC FOIA and that Appellant was not entitled to obtain records from ARA. By letter dated May 8, 2012, DOC stated that it sent one 37-page record to Appellant. In addition, DOC stated that ARA elected to respond directly to Appellant and that the ARA response would address most of the requested records in the FOIA Requests. Finally, 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.

On Appeal, as stated, Appellant challenges the responses (or lack thereof) of DOC and ARA. Appellant states that because ARA is performing a public function and is subject to the authority of DOC, the requested records are subject to DC FOIA. As to DOC, Appellant maintains that,

pursuant to D.C. Official Code § 2-532(a-3), "DOC could and should have searched records produced by Aramark pursuant to the contract, yet the agency released not a single record. The DOC even disclaimed any plan to search, assuring the ACLU instead to 'expect' that Aramark would do so." In addition, based on a conversation with a "senior official," Appellant believes that DOC has responsive records which were not produced.

In response to the Appeal, by email dated June 4, 2012, DOC stated that it

> submits this response solely on behalf of the DOC.
>
> The issue is not that the DOC denied ACLU's FOIA Request; it is simply an issue of gathering records that are responsive to the request. Most of the records sought are in the possession of DOC's food service contractor, Aramark, which stated that it would directly respond to ACLU. Since we learned that ACLU was unsuccessful in obtaining the records from Aramark, we have asked in the attached letter that Aramark provide the records to DOC. We expect to receive the records from Aramark and produce them no later than Monday, June 25, 2012.

In addition, DOC states that it will provide the contracts as required by this office in Freedom of Information Act Appeal 2012-48.

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).

The Appeal is a companion case to Freedom of Information Act Appeal 2012-48. While Appellant states that it indicated that the response to its FOIA Request could be apportioned among the DOC, CCA, and ARA, Freedom of Information Act Appeal 2012-48 was specifically limited to CCA. Here, the review involves the records maintained by DOC and ARA. However, the applicable legal authority and principles remain the same, which we will re-state in our analysis below.

First, we will look at the records maintained in the physical custody of DOC.

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, DOC has not provided a sufficient basis to conclude that its search was, in fact, adequate.

As we stated in Freedom of Information Act Appeal 2012-48, 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. On Appeal, Appellant set forth, with particularity, reasons why it suspects that DOC did not conduct an adequate search. However, the response of DOC fails to address this contention. As Appellant credibly suggests that there are responsive records in the possession of DOC which were not produced, and DOC has not any offered any showing that it conducted a search reasonably calculated to produce the relevant documents, we have little choice but to order DOC to conduct a search reasonably calculated to produce the responsive records, subject to any exemptions which may be applicable.

Second, we will look at the records maintained in the physical custody of ARA on behalf of DOC.

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, like Freedom of Information Act Appeal 2012-48, while ARA is not a party under this Appeal, under D.C. Official Code § 2-532(a-3), DOC is responsible for compliance by ARA with a request for records and with the decision pursuant to the Appeal.[1]

Responding to the alleged failure to produce records held by ARA, DOC states that it did not deny the FOIA Request and this "is simply an issue of gathering records that are responsive to the request." DOC misconstrues the use of the word "denial" under DC FOIA. When a request for records is made, the task is one of "gathering records that are responsive to the request." When no response, or an inadequate response, is made within the statutory period prescribed for the production of those records, a denial is deemed to have occurred.

DOC implicitly acknowledges that a denial has occurred as, in response to the Appeal, it has sent a letter to ARA directing them to provide the requested records. Ordinarily, we would consider that this would cause the Appeal to be moot. However, in this case, ARA has specifically disavowed any obligation to produce the records set forth in the FOIA Request. Therefore, it is not clear that the letter of DOC to ARA will resolve the controversy. Accordingly, as the controversy is in issue, similar to the relief we ordered with respect to contractor CCA, we order DOC to cause ARA to conduct a search for the responsive records set forth in the FOIA Request and to provide the responsive records to Appellant, subject to any exemptions which may be applicable.

As indicated above, DOC states that it has contacted the Office of Contracting and Procurement, which "is the primary custodian of D.C. government contracts," and will provide the contracts as required by this office in Freedom of Information Act Appeal 2012-48. DOC misconstrues our decision. We did not require DOC to obtain the contracts from the Office of Contracting and Procurement. We required DOC to obtain the contracts from CCA pursuant to D.C. Official Code § 2-532(a-3). To the extent that ARA maintains any contracts, the contracts must be provided pursuant to D.C. Official Code § 2-532(a-3) as well.

Conclusion

[1] It is unclear whether Appellant argues that ARA has an obligation to produce the records independent of D.C. Official Code § 2-532(a-3) or whether ARA has an obligation to produce agency records because of D.C. Official Code § 2-532(a-3). We believe that the obligations in this matter are governed by D.C. Official Code § 2-532(a-3), which requires an agency, as a result of a FOIA request, to obtain from a contractor records maintained by the contractor in performing a public function under the contract, and not as a result of another legal theory.

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

1. DOC shall conduct a search for the records set forth in the FOIA Request and shall provide the responsive records to Appellant, subject to any exemptions which may be applicable.

2. DOC shall cause ARA to conduct a search for the responsive records set forth in the FOIA Request and provide the responsive records to Appellant, subject to any exemptions which may be applicable.

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, 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.