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

Freedom of Information Act Appeal 2012-55

June 26, 2012

Ms. Renee L. Bowser

Dear Ms. Bowser:

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 June 4, 2012 (the "Appeal"). You ("Appellant") assert that the District of Columbia Water and Sewer Authority ("WASA") improperly withheld records in response to your request for information under DC FOIA dated April 27, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought records relating to liens which WASA placed on the real property of District homeowners from 2008 through 2011. Specifically, Appellant requested those documents which:

1. Identify all properties, by street address, zip code, and ward, on which WASA has placed a lien;

2. Indicate the amount of the liens placed on those properties;

3. Identify all properties on which WASA collected the debt secured by the lien;

4. Identify all liens which were sold to private entities.

In response, by letter dated May 18, 2012, WASA stated that it did not maintain the records requested in the FOIA Request and that it does not sell or auction real property or sell liens to private entities. WASA also indicated that it does not provide customer information because it would constitute an unwarranted invasion of personal privacy.

On Appeal, Appellant challenges the response to the FOIA Request. First, Appellant asserts that because WASA, "by its own statements," places liens on real properties for unpaid billings, it must have records for real properties on which it has placed liens and for the amount of such liens. Second, "given that the agency sells the liens to private companies," Appellant asserts that

it must have records tracking the liens sold and the liens retained. In support of the contention that WASA sells liens to private companies, Appellant cites a recent case in which "WASA and its successors conveyed a lien on Heyward's property to purchaser Crusader." Third, Appellant maintains that WASA has waived claims of privacy because they furnish information to private companies when they sell the liens. Fourth, Appellant asserts that "even if WASA documents are housed in another location by the DC government, these documents are generated from a principal activity of the agency. Accordingly, they are WASA documents and should be produced . . ."

In its response, by email dated June 20, 2012, WASA revised its position in part. Upon receipt and review of the Appeal, its FOIA officer consulted again with the custodial department (presumably the department which maintains the records) and, after extended inquiry, it was determined that a record encompassing the first two categories of the FOIA Request can be produced. However, on such record, for single family residences, WASA stated that it redacted the house numbers for such residences of individuals based on exemption under D.C. Official Code § 2-531(a)(2) for an unwarranted invasion of personal privacy. WASA attached the redacted records as part of the response.

As to the third and fourth categories of the FOIA Request, WASA reaffirmed its prior position. It attached a declaration by its Director of Customer Service stating that WASA does not have responsive records for such categories. The Director explained that "WASA receives its pro-rata share of payments from tax sales after the payments are processed by the Office of Tax and Revenue" and, therefore, it does not have records regarding the date of sale and the amount for which the lien was sold. In addition, the Director stated that WASA "does not maintain any records of liens sold to private entities" and "[t]he Office of Tax and Revenue maintains all records related to tax sales." As to the cited case, WASA separately explains that the first assignment of the lien in that case occurred in 1998 and that the lien was re-transferred by the assignee in 2003 "between 9 and 14 years ago"), but that WASA "no longer maintains any records of liens sold to private entities."

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 stated above, WASA has revised its position as to the first two categories of the FOIA Request and reaffirmed its position as to the last two categories of the FOIA Request. We will review each of these groupings separately.

Upon receipt and review of the Appeal, to its credit, WASA reviewed the adequacy of its search and ascertained that there was a responsive record encompassing the first two categories. WASA indicates that it will provide to Appellant the record, but with redactions for the house numbers for the residences of individuals based on exemption under D.C. Official Code § 2-531(a)(2) for an unwarranted invasion of personal privacy. This would ordinarily make this portion of the Appeal moot. However, as Appellant has challenged the assertion of an exemption for privacy, we will consider the claim of exemption by WASA for the redactions.

D.C. Official Code § 2-534(a)(2) exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether there is a sufficient privacy interest present.

A privacy interest is cognizable under DC FOIA if it is substantial, that is, anything greater than de minimis. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). A substantial privacy interest in personal identifying information has been found when combined with financial information. *See Seized Prop. Recovery, Corp. v. United States Customs & Border Prot.*, 502 F. Supp. 2d 50, 58 (D.D.C. 2007) ("[I]ndividuals have a privacy interest in the nondisclosure of their names and addresses when linked to financial information . . ."); *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008) ("Telling the public how many crops are on how much land or letting the public look at photographs of farmland with accompanying data will in some cases allow for an inference to be drawn about the financial situation of an individual farmer.") Here, the disclosure of the house number in an address reveals that a lien due to a delinquent debt has been filed against the real property of an individual. This disclosure can be embarrassing to the individual and lead to inferences about the financial health of the individual. Thus, there is a sufficient privacy interest present.

As stated above, the second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the purpose of FOIA, which is

> 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed

> focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773 (1989).

Appellant contends that the information is needed "for the purpose of raising the dangers to property owners that the actions of private lien holders, such as the one in *Crusader v. Heyward*, may inflict on property owners." The purpose of FOIA is to inform the public as to the activities of the government. We note that Appellant recites actions of private, not government, actors as the purpose for the disclosure. However, even if the public interest is the policy behind the granting of liens, there seems to be a rather tenuous connection between revealing the addresses of delinquent individuals and shedding light on abuses. Here there is no evidence on the administrative record of significant abuse by private lien holders and the public interest in allowing a fishing expedition to uncover possible abuse cannot overcome the invasion of the individual privacy interests.[1] Accordingly, we uphold the redactions made by WASA under D.C. Official Code § 2-534(a)(2).

Appellant also contests the adequacy of the search for the latter two categories of the FOIA Request, contending that, "given that the agency sells the liens to private companies," an adequate search by WASA should have yielded 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

[1] We note that the circumstances described in *Crusader as Custodian for Strategic Mun. Lien Invs., LLC v. Heyward*, 22 A.3d 744 (D.C. 2011), occurred under a tax sale law which is no longer in effect.

> (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, WASA has presented a declaration of an agency official who is familiar with the agency records, stating that WASA does not have responsive records for such categories. The official also explained that WASA does not have such records as receives its pro-rata share of payments from tax sales after the payments are processed by the Office of Tax and Revenue" and, therefore, it does not have records regarding the date of sale and the amount for which the lien was sold. In addition, the official stated that WASA "does not maintain any records of liens sold to private entities" and "[t]he Office of Tax and Revenue maintains all records related to tax sales." We find that this is credible. The liens in question here are enforced by tax sales under Chapter 13A of the District of Columbia Official Code. As provided by Chapter 13A of the District of Columbia Official Code, and as the official indicates, tax sales are conducted by the Chief Financial Officer through the Office of Tax and Revenue. Therefore, as the official also indicates, the Office of Tax and Revenue would maintain any records related to tax sales. We find that the search was adequate.

Appellant contends that WASA must provide the records because the "documents are generated from a principal activity of the agency." However, this contention is not correct. D.C. Official Code § 2-532(a) provides, in pertinent part, that "[a]ny person has a right to inspect . . . any public record of a public body . . . in accordance with reasonable rules. . . " DCMR § 1-402.1 provides that "[a] request for a record . . . shall be directed to the particular agency." Under the test enunciated by the Supreme Court in *DOJ v. Tax Analysts*, 492 U.S. 136 (1989), agency records are those that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. In this case, neither test has been met. Generally, an agency "is under no duty to disclose documents not in its possession." *Rothschild v. DOE*, 6 F. Supp. 2d 38, 40 (D.D.C. 1998).

While Appellant may feel that WASA 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.

Conclusion

Based on the foregoing, the decision of WASA, as revised to provide to Appellant the redacted record attached to its response to the Appeal, 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: Katherine Cahill, Esq.