

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



June 4, 2010

The Honorable Vincent C. Gray, Chairman
Council of the District of Columbia
John A. Wilson Building, Suite 504
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Litigation under the District of Columbia Freedom of Information Act

Dear Chairman Gray:

I write to bring to your attention the concerns expressed by a number of Superior Court judges regarding litigation brought against the District of Columbia under the D.C. Freedom of Information Act ("FOIA" or "Act"), D.C. Official Code § 2-531 *et seq.* (2006 Repl. and 2009 Supp.).

As you know, although the District's FOIA is modeled generally on its federal counterpart, the Act contains no provision for extending an agency's final deadline for compliance beyond the maximum combined deadline of 25 days from receipt of a FOIA request. *Compare* D.C. OFFICIAL CODE § 2-532(c) and (d)¹ (allowing 15 days for a response, plus an additional 10 days

¹ These subsections of the District's FOIA statute provide:

(c) A public body, upon request reasonably describing any public record, shall within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.

(d) In unusual circumstances, the time limit prescribed in subsection (c) of this section may be extended by written notice to the person making such request setting forth the reasons for extension and expected date for determination. Such extension shall not exceed 10 days (except Saturdays, Sundays, and legal public holidays). For purposes of this subsection, and only to the extent necessary for processing of the particular request, "unusual circumstances" are limited to:

(1) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(2) The need for consultation, which shall be conducted with all practicable speed, with another public body having a substantial interest in the determination of the request or among 2 or more components of a public body having substantial subject-matter interest therein.

in "unusual circumstances," as defined in the statute) with 5 U.S.C. § 552(a)(6)(A)(i) and (B)² (allowing 20 days for a response, plus *unspecified additional time* for a response in "unusual circumstances," as defined in the statute). Thus, unlike the federal law on which it is modeled, the Act makes no allowance whatsoever for an agency's inability to comply with a FOIA deadline, even if the request giving rise to it is extremely burdensome and the agency is doing everything in its power to comply.

It should be noted that despite tightened District agency budgets and reduced agency resources, last fiscal year the District as a whole received a total of 5,637 FOIA requests, which represents a 14 percent increase in volume from FY '06. An analysis the Office of the Attorney General ("OAG") and the Executive Office of the Mayor ("EOM") undertook last year conservatively estimated that the overall cost of the District's FOIA-compliance program was approximately \$2.4 million in 2009.

² The latter of these two subsections of the federal FOIA statute provide:

(B) (i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

In the context of significant FOIA request volumes, increased complexity of the FOIA requests made, and reduced agency resources, the absence in our FOIA statute of a time-frame "safety valve" similar to that in the federal FOIA is creating insurmountable challenges for the District. These challenges are felt first at the administrative level but are increasingly resulting in litigation outcomes highly unfavorable to the District, despite the documented best efforts of agency employees and officials to meet their obligations.³

Judges of the Superior Court are becoming increasingly unsympathetic to *any* good faith argument made by the District about its efforts to comply with the Act, even where evidence of partial compliance, due diligence, and limited resources is appropriately documented in the record by OAG lawyers and not seriously contested by the plaintiff. I direct your attention to the following examples:

- Judge Brooke Hedge recently rejected the above arguments and evidence in two FOIA cases before her, in each case setting a deadline for full compliance well in advance of the dates by which it was shown the responsible agency was able to comply and stating that the District's inability to comply is a matter it must raise with the Council.⁴
- Judge John Ramsey Johnson recently rejected the above arguments and evidence in a FOIA case before him, setting a deadline for full compliance approximately six months earlier than possible based on the undisputed evidence in the record.⁵
- Judge Erik Christian recently issued an Order rejecting the above arguments and stating in pertinent part:⁶

³ The most active litigant in these cases continues to be the Fraternal Order of Police, Metropolitan Labor Committee ("FOP"), which is involved in all the matters discussed in detail in this letter. FOP's recent FOIA litigation includes the following D.C. Superior Court civil actions: Nos. 1244-05, 7011-05, 4866-08, 4867-08, 5557-08, 6299-08, 8104-08, 618-09, 6775-09, 6776-09, 6777-09, and 6778-09.

⁴ *Fraternal Order of Police, Metropolitan Labor Committee v. District of Columbia*, Nos. 4867-08 and 8104-08 (oral statements of the Court made during status hearings through and including April 30, 2010). A motion to stay the Court's former ruling was made by OAG trial counsel and denied by the Court; a final decision has not yet been made by this Office as to whether an appeal will be taken. The latter ruling does not appear to be an appealable Order.

⁵ *Fraternal Order of Police, Metropolitan Labor Committee v. District of Columbia*, Nos. 4866-08 (oral statements of the Court during March 25, 2010, status hearing, and Order of March 30, 2010). A motion to stay the Court's ruling has been made by OAG trial counsel and is pending a decision by the Court; an appeal of the decision has also been noted.

⁶ *Fraternal Order of Police, Metropolitan Labor Committee v. District of Columbia*, No. 6778-09 (Order of April 27, 2010). A motion for reconsideration has been filed by OAG trial counsel and remains pending at this time.

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[The District's brief] ... is almost entirely devoted to explaining that limited resources have prevented a timely response to Plaintiff's FOIA request. This assertion neither raises a dispute of fact nor a legal defense. Under D.C. FOIA, a public agency must respond to a request [within the time frames provided in the Act]. Though this Court is not insensitive to the administrative burdens that this right may impose on government, any relief from the statutory obligation must come from the political branches. As it is, there is no genuine dispute that Defendant violated D.C. FOIA, and Plaintiff is therefore entitled to judgment as a matter of law. (Footnotes omitted.)

My concern about these rulings is that they expose to contempt citations our employees tasked with the difficult responsibilities of FOIA compliance and those officials whom the Court may find are in a position to affect such compliance. They also expose the District to the payment of attorneys' fees and costs at a time of severe fiscal constraints. This situation is a serious one that I believe Council should promptly address through legislation allowing agencies additional time to comply with FOIA requests (including those now in litigation) – along the lines of the “safety valve” of the federal FOIA – or through additional funding to enable agencies to meet the strict requirements of the Act, or both. If it would be helpful, I would be pleased to have my staff submit proposed legislation for your consideration.

I would welcome the opportunity to discuss these issues with you.

Sincerely,


Peter J. Nickles

Attorney General for the District of Columbia

cc: Yvette Alexander, Council of the District of Columbia
Marion Barry, Council of the District of Columbia
Muriel Bowser, Council of the District of Columbia
Kwame Brown, Council of the District of Columbia
Michael Brown, Council of the District of Columbia
David Catania, Council of the District of Columbia
Mary Cheh, Council of the District of Columbia
Jack Evans, Council of the District of Columbia
Jim Graham, Council of the District of Columbia
Phil Mendelson, Council of the District of Columbia
Harry Thomas, Jr., Council of the District of Columbia
Tommy Wells, Council of the District of Columbia