

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

Docket No. _____

GOVERNMENT ACCOUNTABILITY & OVERSIGHT)
1309 Coffeen Avenue)
Suite 3556)
Sheridan, WY 82801)

Plaintiff,)

v.)

THE DISTRICT OF COLUMBIA)
Serve:)
Mayor Muriel Bowser)
1350 Pennsylvania Avenue, NW)
Washington, DC 20004)

and)

OFFICE OF THE ATTORNEY GENERAL)
FOR THE DISTRICT OF COLUMBIA)
Serve:)
Brian Schwalb)
441 4th Street, NW)
Washington, DC 20001)

Defendants.)

COMPLAINT UNDER THE FREEDOM OF INFORMATION ACT

Plaintiff GOVERNMENT ACCOUNTABILITY & OVERSIGHT (“GAO”), by and through its attorneys, brings this action under the Washington, D.C. Freedom of Information Act (“FOIA”), DC Code §§ 2-531–539, against the District of Columbia and its Office of the Attorney General (hereinafter collectively referred to as “Defendant” or “OAG”), and in support thereof alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under the Washington, D.C. Freedom of Information Act (“FOIA”), D.C. Code § 2-537(a-2).

2. Venue in this Court is proper under D.C. Code § 2-537(a-2).

PARTIES

3. Plaintiff Government Accountability & Oversight (“GAO”) is a nonprofit research, public policy and public interest litigation center organized under the laws of Wyoming. GAO is dedicated to education regarding responsible regulation and transparency in government, a key part of which is seeking public records illuminating how policymakers use public resources, and with whom.
4. Defendant District of Columbia is the government for the District of Columbia and is in possession of the records Plaintiff seeks, by and through the District’s constituent agency, the Office of the Attorney General for the District of Columbia.
5. The Office of the Attorney General for the District of Columbia is an agency of government for the District of Columbia led by Brian Schwalb, whose duties and powers are set forth in D.C. Code § 1-301.81.
6. Plaintiff acknowledges that there is some contradiction in the case law regarding whether the proper defendant in a FOIA action is the District itself or is instead the agency which received the FOIA request, as a “public body.” See, e.g. *Kane v. District of Columbia*, 180 A.3d 1073, 1078 (D.C. 2018) (A person aggrieved by the action or inaction of a *non sui juris* body within the District government must name the District as the defendant in order to sue for relief.”). But see *M.B.E., Inc. v. Minority Bus. Opportunity Comm’n.*, 485 A.2d 152 (D.C. 1984) (as an example of an agency being the proper defendant in a FOIA suit), *Hines v. D.C. Bd. of Parole*, 567 A.2d 909 (D.C. 1989) (same), *Office of the People’s Counsel v. PSC of the D.C.*, 21 A.3d 985 (D.C. 2011) (same), *Frankel v. D.C. Office for Planning & Econ. Dev.*, 110 A.3d 553 (D.C. 2015) (same), *Newspapers, Inc. v. Metro. Police Dep’t*, 546

A.2d 990 (D.C. 1988) (same), *Dunhill v. Dir., D.C. Dep't of Transp.*, 416 A.2d 244 (D.C. 1980) (same). For purposes of this case, Plaintiff is agnostic as to whether one Defendant or the other is the proper Defendant in this action, but names both in an abundance of caution.

INTRODUCTION

7. This is an action under the Washington, D.C. Freedom of Information Act to compel production of records responsive to a single FOIA request submitted by Plaintiff.
8. “The public policy of the District of Columbia is 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. To that end, provisions of this subchapter shall be construed with the view toward expansion of public access...” D.C. Code § 2-531.
9. The District of Columbia acknowledges on its own website that “All public bodies are required to respond to a FOIA request within 15 business-days (that is, excluding Saturdays, Sundays and legal public holidays) following the receipt of a request by the FOIA Officer of the public body that maintains the records you are requesting. Public bodies may extend the time for a response by an additional 10 business-days (again, excluding Saturdays, Sundays and legal public holidays) for unusual circumstances, as defined by DC Code § 2-532 (d).” District of Columbia, *Freedom of Information Act*, <https://dc.gov/page/freedom-information-act-foia> (last visited Nov. 14, 2023).
10. An agency that wishes to withhold records has the burden of showing an exemption to the FOIA applies. D.C. Code § 2-537(b). “[T]o meet its burden the agency typically is required to provide a reviewing court with sufficient information in the form of affidavits, so-called *Vaughn* indexes, oral testimony, or an *in camera* review of responsive documents to enable the court — not the agency — to be the final arbiter of the propriety

of the agency's decision to withhold information.” *Riley v. Fenty*, 7 A.3d 1014, 1018 (2010).

11. The D.C. FOIA is properly interpreted by applying federal Freedom of Information Act precedents. The District of Columbia FOIA, D.C. Code §§ 1-1521 through 1-1529 (1981), was modeled on the corresponding federal statute, 5 U.S.C. § 552 (1982), and many of its provisions closely parallel those of the federal act. See *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (1987); see also, *District of Columbia v. Fraternal Order of Police, Metropolitan Police Dept. Labor Committee*, 75 A.3d 259, 266 (2013).

12. Records may contain exempt and non-exempt materials. Any reasonably segregable part(s) of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to enumerated exemptions found in D.C. Code § 2-534(a). D.C. Code § 2-534(b). “As the court explained in *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), “[i]t is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath government obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.” *Riley v. Fenty*, 7 A.3d at 1018.

13. Statutory exemptions from disclosure are to be narrowly construed. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 (D.C. 1989).

GOVERNMENT ACCOUNTABILITY & OVERSIGHT’S FOIA REQUEST

14. On October 10, 2023, Plaintiff submitted by email a three-part request to Defendant seeking copies of certain specifically identified records, and certain other described records

pertaining to disclosures made to the District by attorneys hired by the District to pursue a particular matter. A true and correct copy of the request is attached hereto as Exhibit A.

15. Central to the request is an agreement that by law must be publicly posted but which is not.
16. As requester noted, “The District of Columbia’s RFP that led to the above-cited contract requires successful contract proposals to be made public. In June 2020 DC filed suit pursuant to that RFP and presumably the contract awarded therefrom. However, neither [a specified] proposal nor [Contract Number DCCB-2019-C-0011] with the OAG is published on the Office of Contracts and Procurement (OCP) or the Office of Attorney General (OAG) websites as required.”
17. Plaintiff requested fee waiver or reduction on the alterative bases of public interest and its status as a media requester.
18. OAG did not acknowledge the request or assign it a tracking number.
19. Plaintiff emailed Defendant on October 13, 2023, and again on November 1, 2023, reconfirming submission of the request which Plaintiff re-attached each time, seeking information on Defendant’s processing of the request.
20. The OAG did not respond to those prompts.
21. The OAG has simply ignored Plaintiff’s request and subsequent prompts.
22. The OAG is now past its statutory period for issuing such a determination on the above-described requests without providing any substantive response to Plaintiff’s requests in violation of its obligations under FOIA.
23. “Unless the agency gives notice of an extension, the agency is required to respond to a FOIA request within 15 days, by either providing access to the requested documents or explaining the

agency's reasons for deciding not to do so.” *Dubose v. District of Columbia*, No. 19-CV-1239, 2023 D.C. App. LEXIS 266, at *4 (Sep. 14, 2023).

24. “[T]he... consequence provided in FOIA for an agency’s failure to comply with the Act’s time provisions is that the request is deemed to have been denied and the requestor is deemed to have exhausted his administrative remedies (a prerequisite to seeking judicial relief to compel agency action).” *FOP v. District of Columbia*, 79 A.3d 347, 363 (D.C. 2013).
25. By virtue of the District’s failure to timely respond, Plaintiff’s request is deemed to have been denied. This Court should therefore intervene to review and overturn the constructive denial of both the underlying FOIA request and of the Plaintiff’s request for a fee waiver.
26. By virtue of the District’s failure to timely respond, Plaintiff is deemed to have exhausted its administrative remedies.

FIRST CLAIM FOR RELIEF
Duty to Produce Records under the FOIA – Declaratory Judgment

27. Plaintiff re-alleges paragraphs 1-26 as if fully set out herein.
28. Plaintiff has sought and has been denied access to records reflecting the conduct of official business.
29. Plaintiff is entitled to responsive records subject only to legitimate withholdings.
30. Plaintiff has no requirement to pursue further administrative remedies.
31. Plaintiff asks this Court to enter a judgment declaring:
 - a. The records requested in the October 10, 2023 request are agency records subject to the FOIA;
 - b. OAG’s refusal to provide responsive records is unlawful; and
 - c. Defendant must produce responsive records subject to only legitimate withholdings.

SECOND CLAIM FOR RELIEF

Duty to Produce Records under the FOIA —Injunctive Relief

32. Plaintiff re-alleges paragraphs 1-31 as if fully set out herein.
33. Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to the D.C. FOIA request described, *supra*, without fees, subject to legitimate withholdings.
34. Plaintiff asks the Court to order the Defendant to produce to Plaintiff, within 10 business days of the date of the order, the requested records described in Plaintiff's request subject only to legitimate withholdings.
35. Plaintiff asks the Court to require that Defendant create an index, listing, in detail, the date, subject matter, signatories, the extant or reasonably anticipated litigation that each purported Common Interest Agreement pertains to, and how any asserted specifically applies to the withheld document.
36. Plaintiff asks the Court to order OAG to submit the withheld documents to the Court for *in camera* review of whether and to what extent the exemptions found in D.C. Code §§ 2-534(a)(2), 2-534(a)(3)(A)(i) and/or 2-534(a)(4) apply.
37. Plaintiff asks the Court to allow counsel for the parties to review the documents under seal, pending further order of the court, and to make arguments relating to whether any claimed exemptions, whether in D.C. Code §§ 2-534(a)(2), 2-534(a)(3)(A)(i), 2-534(a)(4) or otherwise apply.

THIRD CLAIM FOR RELIEF

Costs and Fees – Injunctive Relief

38. Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.

39. Pursuant to D.C. Code § 2-537(c), Plaintiff is entitled to recover costs and fees. (“If a person seeking the right to inspect or to receive a copy of a public record prevails in whole or in part in such suit, he or she may be awarded reasonable attorney fees and other costs of litigation.”)
40. Plaintiff is statutorily entitled to recover fees and costs incurred as a result of Defendant’s refusal to fulfill the open records request at issue in this case. Plaintiff asks the Court to order the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

PRAYER FOR RELIEF

Government Accountability & Oversight respectfully requests this Court:

1. Assume jurisdiction in this matter, and maintain jurisdiction until the Defendants complies with FOIA and every order of this Court;
2. Declare Defendants have violated FOIA by failing to provide Plaintiff with the requested records, and/or by failing to notify Plaintiff of final determination within the statutory time limit;
3. Declare that the documents sought by the requests, as described in the foregoing paragraphs, are public records under the D.C. FOIA and must be disclosed;
4. Order Defendants to expeditiously provide the requested records to Plaintiff within 20 business days of the Court’s order and without cost to the Plaintiff;
5. Award Plaintiff’s attorneys their fees and other litigation costs reasonably incurred pursuant to D.C. Code § 2-537(c); and
6. Grant such other relief as this Court deems just and proper.

Respectfully submitted this the 16th day of November, 2023,

GOVERNMENT ACCOUNTABILITY & OVERSIGHT

By Counsel:

/s/Matthew D. Hardin

Matthew D. Hardin, D.C. Bar No. 1032711

Hardin Law Office

1725 I Street NW, Suite 300

Washington, DC 20006

Phone: (202) 802-1948

Email: MatthewDHardin@protonmail.com