SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KIRBY VINING, Plaintiff v. DISTRICT OF COLUMBIA, Defendant	Docket No. 2013 CA 8189 B Civil 2 Calendar #11 Judge Stuart G. Nash

ORDER

Before the Court is defendant's Motion to Dismiss for Lack of Jurisdiction, and plaintiff's opposition thereto. For the reasons set forth below, the motion is denied.

I. FACTS

On November 12, 2013, plaintiff made a request under the District of Columbia Freedom of Information Act ("DCFOIA"), D.C. Code Sec. 2-531, et seq., to Dianne Barnes, the Commissioner of Advisory Neighborhood Commission ("ANC") 5E, requesting documents related to the proposed development of the McMillan Sand Filtration site. Ms. Barnes denied plaintiff's request, claiming that all responsive documents had already been provided to plaintiff. On December 11, 2013, plaintiff filed this lawsuit to require production of all documents responsive to his request.

In response to the lawsuit, the District of Columbia ("District") undertook a search of documents in Ms. Barnes' possession stored either electronically or in hard copy. In connection with the electronic search, the District limited its search to e-mails associated with an account maintained by the District of Columbia's Office of the Chief Technology Officer for official use

by Ms. Barnes in her capacity as Commissioner of ANC 5E. As a result of its search, the District provided 1363 pages of documents to plaintiff.

The District took the position that e-mails associated with Ms. Barnes's personal e-mail account were outside the coverage of the DCFOIA statute, and therefore that no search of that account for relevant documents was required by the statute. Having produced all the documents that, in its view, were required by the DCFOIA statute, the District has moved to dismiss this case as moot.

Plaintiff has opposed this motion, claiming that the District has an obligation, under DCFOIA, to search Ms. Barnes's personal e-mail account and produce the relevant documents contained therein.

II. DISCUSSION

It appears to be an open question in this jurisdiction whether the e-mails of a government official, made in the course of transacting government business, are covered by the DCFOIA statute, when those e-mails are sent and received from a non-governmental e-mail account.

In the absence of any binding precedent, the District refers the Court to federal case law interpreting the federal Freedom of Information Act ("FOIA") statute. The United States Supreme Court has determined that a document will be deemed to fall within FOIA if: (1) it is created or obtained by a government agency; and (2) the document is within the agency's control at the time of the FOIA request. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989). The D.C. Circuit, in turn, has crafted a four-factor test to determine whether an agency exercises sufficient control over requested documents to render them agency records. The four factors to be assessed under the D.C. Circuit test are:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and

> dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

United We Stand America, Inc. v. IlRS, 359 F.3d 595, 599 (D.C. Cir. 2004) (quoting *Burka v. U.S. Dep't of Health & Human Serv.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (internal citations omitted)).

A federal district court judge has recently applied the D.C. Circuit test to find that e-mails of a government employee, maintained on a non-governmental e-mail account, did not qualify as agency records subject to production under FOIA. *See Competitive Enter. Inst. v. Nat'l Aeronautic and Space Admin.*, 2013 U.S. Dist. LEXIS 155529 (D.D.C. 2013). The District urges this Court to reach a similar result.

The flaw in the District's reasoning is that, in defining what documents are subject to disclosure, the DCFOIA statute is not equivalent to the federal FOIA statute. While the D.C. Court of Appeals has indicated that cases interpreting the federal FOIA law may be "instructive authority with respect to our own Act," *Washington Post v. Minority Business Opportunity Commission*, 560 A.2d 517, 521 n.5 (D.C. 1989), it has also cautioned that such instructive authority should be applied "except where the two acts differ." *Id.*

The text of the federal FOIA statute provides that the statute is applicable to "agency records," but declines to define that term. Thus, the definition of what constitutes an "agency record" under the federal FOIA statute is entirely a construct of the common law. The DCFOIA statute, by contrast, contains an explicit statutory definition of the records to which it applies. The DCFOIA statute applies to "public records." DCFOIA expressly borrows its definition of "public record" from another provision of the D.C. Code, which provides:

> The term "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics, prepared, owned, used, in the possession of, or retained by a public body. Public records include information stored in an electronic format.

D.C. Code § 2-502(18).

Plainly, the definition of what documents are covered by the DCFOIA statute is different than the common law definition of "agency records" from the federal case law. This circumstance severely limits the utility of the federal case law in assessing whether certain documents fall within the ambit of DCFOIA. Thus, while analogous questions of an agency's "possession" or "control" of documents are relevant to the inquiry under each of the respective statutes, there are other factors that have emerged as judicial gloss in the federal common law -- such as whether a "document was integrated into the agency's record system or files" -- that clearly have no basis in D.C. law.

Putting aside the federal case law, the Court is left with the rather straightforward question of whether there is a possibility that any of the e-mails contained within Ms. Barnes's personal e-mail account were documents "prepared, owned, used, in the possession of, or retained by a public body."

At the hearing on this motion, he District argued that none of the e-mails on Ms. Barnes's personal account were "prepared, owned, used, in the possession of, or retained by a public body," because all of the documents were "prepared, owned," *etc*., by Ms. Barnes, and she is an individual, not a public body. However, this argument requires the Court to ignore Ms. Barnes's position as Commissioner of the ANC. To the extent that Ms. Barnes is acting in her capacity as Commissioner of the ANC, then communications made or received by her would be

communications of the ANC, irrespective of whether such communications were associated with her personal e-mail account.

The mere possibility that such e-mails might exist in Ms. Barnes's personal account would be sufficient for this Court to deny the District's Motion to Dismiss, and to allow discovery to proceed in this case. It is worth observing, however, that we are not dealing in mere possibilities. To the contrary, plaintiff has attached to his opposition an e-mail from Ms. Barnes's personal e-mail account (which plaintiff obtained from a source other than the FOIA request) in which Ms. Barnes was indisputably transacting ANC business relative to the McMillan Sand Filtration site development.[1]

Consistent with the oral ruling made by this Court on June 27, 2014, the District is ordered to produce e-mails from Ms. Barnes's personal e-mail account that are responsive to plaintiff's FOIA request.

For the foregoing reasons, defendant's motion to dismiss is hereby **DENIED.**

Stuart G. Nash
Judge
Signed in chambers

Dated and docketed on July 9, 2014

[1] It is possible to conceive of e-mails contained in Ms. Barnes's personal e-mail account related to the McMillan site that would not represent communications of the ANC. However, given Ms. Barnes's position as Commissioner of the ANC, and given the status of the McMillan site development project as a matter of public concern within the purview of the ANC, a strong presumption exists that any communication by Ms. Barnes on the matter would be a communication on behalf of the ANC. Very clear indications would have to exist that Ms. Barnes was communicating a personal view on the project, as opposed to her view as ANC Commissioner, before the District would be entitled to withhold production of a document on the ground that it was not a communication of the ANC. If, after searching Ms. Barnes's personal account, the District withholds production of any e-mails on the ground that they are personal, non-ANC communications, the District should furnish a log to the plaintiff, listing such documents being withheld, to allow plaintiff to challenge, if necessary, the District's determination.

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