



U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

April 16, 2014

Dr. Jeffrey L. Bailie
4501 South Glenview Place
Rapid City, SD 57702

Re: Appeal No. AP-2014-01225
Request No. 13-00461-F
ADW:JMB

VIA: U.S. Mail

Dear Dr. Bailie:

You appealed from the action of the Civil Rights Division of the United States Department of Justice on your request for access to "the signed complaint document submitted to initiate DJ No. 204-69-50" concerning the City of Rapid City Convention Center in Rapid City, South Dakota.

After carefully considering your appeal, I am affirming, on modified grounds, the Civil Rights Division's action on your request. Subsequent to your appeal, the Civil Rights Division conducted a second search, but was unable to locate any responsive records subject to the Freedom of Information Act. I have determined that the Civil Rights Division has conducted an adequate, reasonable search for such records.

Please note that, although the Civil Rights Division, by letter dated December 4, 2013, "determined that access to documents [responsive to your request] should be denied," the Civil Rights Division has now confirmed that there is no "signed complaint document." In fact, the Civil Rights Division used the wrong paragraph inadvertently in its December 4 letter; it should have informed you that it could locate no responsive records subject to the FOIA in its files. The Civil Rights Division regrets any confusion caused by its error.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of the Civil Rights Division in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information

Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road,
College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll
free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,

Sean R. O'Neill
Chief
Administrative Appeals Staff

By: *Anne D. Work*

Anne D. Work
Senior Counsel
Administrative Appeals Staff

Dr. Jeffrey L. Bailie
4501 So Glenview Place
Rapid City, South Dakota 57702
605.430.0509

December 9, 2013

Melanie Ann Pustay, Director
Office of Institutional Policy
United States Department of Justice
1425 New York Avenue, NE
Suite 11050
Washington, D.C. 20530

Re: Freedom of Information Act Appeal Request
FOI/PA No. 13-00461-F

Dear Ms. Pustay,

Please accept this request for appeal in response to the recent decision rendered by Nelson Hermillia, Chief of the Civil Rights Division, the U.S. Department of Justice ("U.S.D.O.J.") refusing to disclose a document relating to DOJ File No: 204-69-50. I believe that Mr. Hermillia's refusal to disclose segregable portions of the requested document is in clear disregard to interests extended by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., as amended. In response, I do hereby request an appeal pursuant to 5 U.S.C. § 552(a)(6)(1990).

On August 30, 2012, Rapid City Mayor Samuel Kookier was notified by the Civil Rights Division that a complaint alleging that the "*Rapid City Convention Center*" had violated Title II of the American with Disabilities Act of 1990 ("ADA"). No further detail regarding the basis of the complaint was offered. The signatory of the notification indicated that an investigator would be in contact "soon" to inform the Mayor of the allegations surrounding the complaint. Ironically, the notification concluded with the parting suggestion that [the Office] looked "forward to working with you to bring this matter to a prompt resolution." However, despite the multiple and continuous efforts of various elected and appointed officials representing the Rapid City, South Dakota community over the past eighteen months, nothing beyond the rudimentary information included in the August 2012 form letter has been divulged (Attachment A). Sadly, in response to the continued delay toward offering information, even a bipartisan congressional inquiry made for the most basic of information related to this claim by U. S. Senator's Thune and Johnson has gone without a response from the U.S.D.O.J. (Attachment B).

As you might imagine, such unresponsiveness afforded by the U.S.D.O.J. has made it extremely difficult to not only address the concerns of a single patron so aggrieved as to file a formal complaint, but to also offset the risk of further infraction possibly encountered by otherwise protected (yet unknowing) citizens should the allegation(s) be valid. Additionally, as the local news outlets have become aware of the ADA complaint, calls to keep the public informed about our local government's receptivity toward alleged civil rights infractions have come into

question. In response, as one of limited options of available means in an effort to gain basic detail relative to the complaint, I filed a FOIA request on August 1, 2013 and DOJ-361 on September 9, 2013 (Attachment C) "recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens." Pansy v. Borough of Stroudsburg, 23 F.3d 772, 792 (3rd Cir. 1994).

As noted in my original FOIA request dated August 1, 2013 (Attachment C) and the follow up request dated November 12, 2013(Attachment D), the request was limited to the two-page OMB No. 1190-000 that initiated the investigation. Unfortunately, from the response issued by Mr. Hermillia in his letter dated December 4, 2013 (the timeliness of which is in violation of FOIA's 10 day response deadline, 5 U.S.C. § 552(a)(6)(A)(i), 7 C.F.R. § 1.8(a), and 36 C.F.R. § 200.10), the U.S.D.O.J. has refused to disclose the requested form. This denial was predicated on Exemptions (5), (7)(A), and (7)(C) of the Freedom of Information Act.

While it is said that "the wheels of justice turn slowly, but grind exceedingly fine," it was believed that filing the FOIA would prompt the timely disclosure of the information relative to the allegations, as suggested in the August 2013 notification. After all, the release of the requested document would be used to further facilitate the public's understanding of this important issue, as well as the City's timely and mindful responsiveness to concerns of its citizenry. The release of the document should in no way interfere with an "active" investigation, or to invade on the privacy of others, and no attorney work product or intra-agency memoranda is being requested. When one considers the fields included in OMB No. 1190-000, it is absurd for Mr. Hermillia to fabricate such a position in his decision to block access to this public information.

As a volunteer board member of the public facility "apparently" identified within the complaint (noting that there is no public facility legally described as the "*Rapid City Convention Center*"), the request seeks to extend the courtesy of additional insight as to the nature of the complaint so that a devoted effort toward resolve can be initiated. By way of Mr. Hermillia's denial, even more valuable time elapses. So too does our interest in offering a swift response otherwise extended by the American with Disabilities Act of 1990, since the basics of the complaint remain unknown to the City of Rapid City due to the prolonged delay by the U.S. D.O.J.

It is apparent that the Mr. Hermillia has acted in an arbitrary and capricious manner by improperly denying the disclosure of any part of the two-page OMB No. 1190-000 since those elements of the report which might otherwise be withheld under exemption 5, 7A, or 7C cannot prevent the release of the rest of the requested document. As you are keenly aware, even when a requested document contains *some* information which might fall under one of the exemptions, the FOIA requires that all non-exempt portions of the record must still be released. The Act expressly mandates that any "reasonably segregable portion" of a record must be disclosed to a requester after the redaction of the parts which are exempt, 5 U.S.C. § 552(b). This prohibits U.S.D.O.J. from withholding the entire document merely because one or two lines might be, in his judgment, exempt.

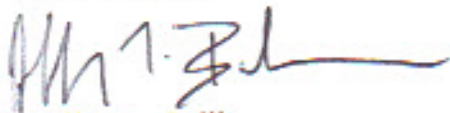
Accordingly, because I do not agree that the requested materials (in their entirety) are exempt from disclosure, I request that Mr. Hermillia's denial of my FOIA request be reversed and that requested document be immediately released. Specifically, I would request that:

- the requested document, allegedly exempted from disclosure by exemption 5, be provided pursuant to the powers of discretionary release bestowed under 36 C.F.R. § 200.11(b), and 7 C.F.R. § 1.17(b).
- should your decision be to uphold the denied access to the requested full record as rendered by Mr. Hermillia, I be provided with all non-exempt portions which are reasonably segregable.
- should any portions of the requested document continue to be withheld, that you would describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Fortunately, the Freedom of Information Act embodies a strong rule of disclosure while placing the duty to disclose on our federal agencies. As district courts have recognized, 'disclosure, not secrecy, is the dominant objective of the Act,' Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). Ms. Pustay, I am hopeful that your consideration of this matter will reflect the overriding principle of the FOIA, "to encourage the maximum feasible public access to government information," Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C.Cir.1977).

Given the continued delays and the clear and continued indifference demonstrated by U.S.D.O. J. staff, time continues to be of the essence in this matter. Should this appeal is out rightly denied, or the response is not forthcoming within 20 working days, I fear that I will left with no other option than to advance this matter for judicial review. I await the courtesy of your prompt reply.

Very truly yours,



Dr. Jeffrey L. Bailie
Board Member
Rushmore Plaza Civic Center

Encl.

Attachment A



U.S. Department of Justice

Civil Rights Division

Disability Rights Section - NYA
950 Pennsylvania Ave. NW
Washington, DC 20530

August 17, 2012

RECEIVED

AUG 30 2012

MAYOR'S OFFICE

VIA FIRST CLASS MAIL

Mayor Samuel Kooiker
Rapid City Convention Center
Office of the Mayor
300 Sixth Street
Rapid City, SD 57701

Re: **ADA Complaint DJ No. 204-69-50**

Dear Mayor Kooiker:

The Department of Justice has received a complaint alleging that the Rapid City Convention Center in Rapid City, South Dakota, has violated Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181-12189. This office has opened a routine investigation of the complaint. Please note that our decision to investigate does not reflect any determination as to the merits of the complaint. Our goal is to investigate this matter in a fair and impartial manner and to work with you, if necessary, to reach a productive and amicable resolution.

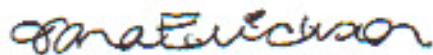
Title II of the ADA prohibits discrimination against qualified individuals with disabilities by public accommodations. A copy of the Department's regulation implementing Title III of the ADA is enclosed for your convenience. The text of the ADA, the Department's regulation, and many technical assistance publications can also be accessed on our ADA Home Page at <http://www.ada.gov>.

An investigator from this office, Ms. Celeste Adams-Simmons, will be contacting you soon to inform you about the allegations of the complaint and, if necessary, obtain documents and information this office needs to determine if any problems exist. Ms. Adams-Simmons will also explain ways in which this matter can be promptly resolved.

We look forward to working with you to bring this matter to a prompt resolution. If you have any questions, please do not hesitate to contact Ms. Adams-Simmons at 202-307-1084.

Please refer to the case number referenced above whenever you contact this office about this case.

Sincerely,



Jana Erickson
Deputy Chief of Enforcement
Disability Rights Section

Enclosure: Title II Regulation

Attachment B

United States Senate

WASHINGTON, DC 20510

September 20, 2013

Celeste Adams-Simmons
U.S. Department of Justice
Civil Rights Division
Disability Rights Section – NYA
950 Pennsylvania Ave NW
Washington D.C. 20530

RE: ADA Complaint DJ No. 204-69-50

Dear Ms. Adams-Simmons:

We are contacting you for the status of a request made by the Rushmore Plaza Civic Center Board of Directors on September 5, 2013, for more information related to a complaint filed in August, 2012 regarding an alleged violation of the Americans with Disabilities Act (ADA) and subsequent complaint noted above.

Over the past year, there have been many attempts by federal, city and board officials to determine the specific nature of the complaint. In fact, the Rushmore Plaza Civic Center Board of Directors commissioned an ADA assessment report from FourFront Design, Inc. of Rapid City to determine potential issues and concerns. A copy of the report was recently submitted to you. A copy of the report was submitted to you with recent correspondence from Board Member Jeffrey Bailie. According to the return receipt, this was received by your office staff on September 5. The Board and city officials remain concerned as they have received no further updates from your office since Jana Erickson's initial August 17, 2012 letter.

We are requesting your efforts to obtain specific information of the ADA complaint that was filed. As stated in the letter that accompanied the report, Rapid City officials are "intent on addressing and correcting any noted violations" and your efforts to share critical information about the complaint will assist officials in their efforts.

Please direct your reply to our respective staff in Rapid City: Wes Roth (Wes_Roth@thune.senate.gov) and Darrell Shoemaker (Darrell_Shoemaker@johnson.senate.gov). Thank you for your time and attention to this matter. We look forward to hearing from you soon.

Kindest Regards,


TIM JOHNSON


JOHN THUNE

Attachment C

Dr. Jeffrey L. Bailie
4501 So Glenview Pl
Rapid City, SD 57702
605.430.0509

August 1, 2013

Nelson Hermilla, Chief
FOIA/PA Branch
Civil Rights Division
BICN, Room 3234
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: FOIA Request

Greetings:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552.

I request that a copy of the signed complaint document submitted to initiate DJ No. 204-69-50 alleging that the City of Rapid City Convention Center in Rapid City, South Dakota has violated Title II of the Americans with Disabilities Act of 1990 be provided to me. I am willing to pay fees for this request up to a maximum of \$10. If you estimate that the fees will exceed this limit, please inform me first.

Sincerely,


Dr. Jeffrey L. Bailie

Dr. Jeffrey L. Bailie
4501 So Glenview Pl
Rapid City, SD 57702
605.430.0509

September 9, 2013

U.S. Department of Justice
Civil Rights Division
FOI/PAC - BICN
950 Pennsylvania Avenue, NW
Disability Rights - NYAV
Washington, D.C. 20530

Re: FOI/PA No. 13-00461-F

Greetings:

Thank you for your response of August 13, 2013. Enclosed, please find Form DOJ-361 to be filed with the previous request for records in the matter captioned above.

Also, for the purpose of clarification, please know that my request for records dated August 1, 2013 (attached) should include the release of the signed copy of the OMB No. 1190-0009 for that was filed with the USDOJ to initiate DJ No. 204-69-50. I offer this clarification as the Subject of Request affixed to your correspondence of August 13 refers to a "signed complaint letter." If a signed letter accompanied the signed Discrimination Complaint Form, I would welcome its release as well. However, my formal request is for the OMB No. 1190-0009 form.

While the timeliness of a response does not warrant a request to expedite, I would welcome a true estimate of what constitutes "some delay" in the processing of this request. Do you estimate that it will take an additional 20 business days to process the request for this one-page document? Additional detail on the anticipated timeline would be welcomed.

Sincerely,

Jeffrey L. Bailie

Encl.

Attachment D

Dr. Jeffrey L. Bailie
4501 So Glenview Pl
Rapid City, SD 57702
605.430.0509

November 12, 2013

Nelson D. Hermillia, Chief
U.S. Department of Justice
Civil Rights Division
FOI/PAC - BICN
950 Pennsylvania Avenue, NW
Disability Rights - NYAV
Washington, D.C. 20530

Re: FOI/PA No. 13-00461-F

Greetings:

Please accept this reminder as a courteous notification that it has been more than two full months since the FOIA request acknowledged in the above captions matter was received by your office. Although I might be somewhat empathetic toward the volume of FOIA requests that your office must be receiving these days (in addition to the obvious setback encountered by the recent government shutdown), this period of time clearly exceeds the 20 days provided by the statute. Nonetheless, the basic information which I have requested appears to be clearly releasable under the FOIA guidelines and, in my opinion, is not protected by any of the Act's exemptions.

As I have made this request in my capacity as an appointed member of the Board of Directors of the Rushmore Plaza Civic Center in Rapid City, South Dakota, and the receipt of this information is of timely value, I would appreciate any and all diligence toward expediting the provision of the requested two-page document (OMB No. 1190-0009). I will welcome a response relative to this request within the next 20 business days, thus rendering the timing of a simple response to close to four months' time. Should another 40 business days elapse without satisfaction of this simple request, available judicial remedies for collecting the requested material through the Act will be considered.

Thank you for your prompt and kind attention to this matter.

Sincerely,

Jeffrey L. Bailie