SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

PARTNERSHIP FOR CIVIL JUSTICE FUND	)	
	)	**2009 CA 000748 B**
Plaintiff,	)	
	)	**JUDGE JUDITH N. MACALUSO**
v.	)	
	)	**Calendar 9**
THE DISTRICT OF COLUMBIA,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S PARTIAL MOTION TO DISMISS

Before the Court is "Defendant District of Columbia's Partial Motion to Dismiss," filed on May 4, 2009. Plaintiff Partnership for Civil Justice Fund ("PCJF") filed their opposition on May 21, 2009, and the District filed replied on June 3. For reasons expressed below, the Motion is denied.

Factual and Procedural Background

This complaint was brought under the District of Columbia's Freedom of Information Act ("FOIA"). D.C. Code §2-531 *et seq*. Two specific FOIA provisions are at issue in this case. The first establishes a cause of action for injunctive or declaratory relief in the Superior Court for the District of Columbia whenever a request to inspect a public record has been denied. D.C. Code §2-537 (a)(1). The second creates a class of records that must be made public by posting on the internet or other electronic means. DC Code §2-536 (a) - (b).

PCJF is a not-for-profit legal and educational organization, which has as one of its goals "ensuring constitutional accountability within police practices." (Complaint, 6). On September 29, 2008, PCJF submitted a FOIA request to the Metropolitan Police Department ("MPD") seeking "copies of all MPD staff manuals and instructions, including all general orders, special orders, and all Departmental directives and all statements of policy." (Complaint, 6). In its

request, PCJF also indicated that it believed that the requested information was statutorily required to be published on the internet. On November 13, 2008, PCJF received an acknowledgment of the receipt of its request from MPD.

In Count One of its complaint, PCJF alleges that the District of Columbia ("the District") did not comply with its statutory obligations to produce the documents or issue a denial of the request within ten days as required by D.C. Code § 2-523 (b). Count Two, the portion of PCJF's complaint being challenged in this motion, concerns the District's failure to maintain and publish the requested records on the internet, as required by D.C. Code §2-536 (b). This section requires as follows:

> For records [that must be made public pursuant to this subsection] created on or after November 1, 2001, each public body shall make records available on the Internet or, if a website has not been established by the public body, by other electronic means.

In its complaint, PCJF requests that the court order the District to comply with this section and make all records within the categories enumerated in DC Code §2-536 available on the internet.

Motions to Dismiss

When reviewing a motion to dismiss, the Court must construe the pleadings in the light most favorable to the party not seeking dismissal. *Atraqchi v. GUMC Unified Billing Servs.*, 788 A.2d 559, 562 (D.C. 2002). The court should not dismiss the complaint because the court doubts that the plaintiff will prevail in the action. *McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C. 1979). Dismissal for failure to state a claim upon which relief can be granted under Super. Ct. Civ. R. 12(b)(6) is only proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief." *Id.* (citing *Owens v. Tiber Island Condo. Ass'n.*, 373 A.2d 890, 893 (D.C. 1977)); *see also Bell Atl. Corp. v. Twombly*, 550

U.S. 554 (2007). Here, if PCJF lacks standing or a right of action to support Count II of its complaint, dismissal under Super Ct. Civ. R. 12(b)(6) would be appropriate.

Discussion

The District asserts that PCJF lacks standing because the statute does not create a private right of action, and the organization does not have a specific, identifiable injury that results from the government's failure to post MPD records online. These arguments are unavailing in light of District of Columbia Court of Appeals' decision in District of Columbia v. Sierra Club, 670 A.2d 354 (D.C. 1996), which is mirrors the instant case in legally determinative respects.

In *Sierra Club*, as in this case, legislation enacted by the District of Columbia City Council required the District government to perform an act that broadly benefited the public. In *Sierra Club,* the act was curbside collection of recycleables; here, it is online posting of MPD documents. There, as here, the District was noncompliant with the statute. There, as here, an advocacy organization with an interest in enforcement of the statute brought suit for injunctive relief requiring the District to comply with statutory requirements. In fact, in *Sierra Club*, the advocacy organization had a less immediate interest than does Plaintiff in the instant case: There is no indication that the Sierra Club wanted its recycleables picked up, while PCFJ needs the documents in question to perform its core function of conducting police oversight.

In *Sierra Club*, as here, the government argued that the plaintiff lacked standing because the legislature had not created a private right of action. The District of Columbia Court of Appeals rejected this argument. Because the Court's decision in this case is dispositive, it is quoted below at considerable length (670 A.2d at 357 - 59):

> Distilled to its essence, the Sierra Club's complaint seeks equitable relief from adverse and allegedly unlawful action by a public officer....It is the District's position that, even if [the government violated the law], the Superior Court lacks

authority to do anything about it. This contention cannot be reconciled with the applicable precedents or with the sound reasons of policy that underlie them.

As the Supreme Court explained, almost a century ago, in *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 23 S.Ct 33, 47 L.Ed. 90 (1902), courts

> must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.

....Accordingly, "[t]he actions of government agencies are normally presumed to be subject to judicial review unless [the legislature] has precluded review or a court would have no law to apply to test the legality of the agency's actions....As Judge Ferren has written,

> [t]he strong presumption favoring judicial review of agency action reflects a recognition that review is essential to promoting agency responsiveness to legislative mandates.... [U]nreviewability gives the executive a standing invitation to disregard...statutory requirements.

People's Counsel v. Public Serv. Comm'n of the District of Columbia, 474 A.2d 1274, 1278 n. 2 (D.C. 1984) (concurring opinion) (citations and internal quotation marks omitted).

"[O]nly on a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbot Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) (citations omitted)....

There are two principal exceptions to the presumption of judicial reviewability. First, the legislature may commit the challenged action entirely to agency discretion. Second, it may preclude review, explicitly or implicitly, by statute. Neither of these exceptions applies here.

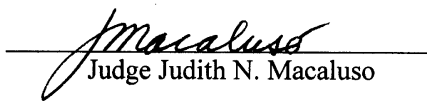
A legislative intention to commit an action entirely to agency discretion--a "very narrow exception" to the governing presumption--may properly be inferred only in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820-21, 28 L.Ed.2d 136 (1971)....In this case, the statute requires the Mayor to provide collection services...and the Mayor's acts or omissions can readily be evaluated by reference to that obligation. Furthermore, nothing in the [statute] explicitly or implicitly precludes judicial review....The presumption thus stands unrebutted.

> We have held that the Superior Court may entertain claims for equitable relief from allegedly unlawful action by public officials pursuant to D.C. Code § 11-921(a)(6) (1995), which vests that court with jurisdiction over "any civil action or other matter, at law or in equity, brought in the District of Columbia."....
>
> .... Judicial reviewability of agency action does not depend on the creation of a private right of action in the statute sought to be enforced....On the contrary, as Judge (now Justice) Breyer explained for the court in *N.A.A.C.P. v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987),
>
> > it is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the *federal* government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable for conformity with statutory obligations without any such "private right of action."

The controlling principles distilled from this lengthy excerpt are that a private entity directly affected by governmental noncompliance with statutory directives has standing to seek to compel the government to comply with those directives. The limited exceptions that would block such standing are not present. The FOIA statute does not explicitly commit the decision of whether to post agency documents to the government's discretion. To the contrary, the statute requires that "each public body *shall* make records available on the Internet...." D.C. Code § 2-536 (b) (emphasis added). Nor does the statute implicitly commit action entirely to agency discretion. As in *Sierra Club*, "the Mayor's acts or omissions can readily be evaluated by reference to the [statutory] obligation." 670 A.2d at 358.

ACCORDINGLY, it is this 22nd day of September 2009,

ORDERED, that the Defendant's Motion to Dismiss is DENIED.



Judge Judith N. Macaluso

(Signed in Chambers)

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