



**LEGAL SERVICES CORPORATION**

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Alexander D. Forger  
President

Writer's Direct Telephone  
(202) 336-8800

July 5, 1994

Murphy Bell, Esquire  
840 East Boulevard  
Baton Rouge, Louisiana 70802

Dear Mr. Bell:

This is in response to your appeal, dated June 8, 1994, of the Legal Services Corporation's ("LSC" or "Corporation") partial denial of your request for information under the Freedom of Information Act ("FOIA"). 45 C.F.R. § 1602.12.

In your FOIA request, dated April 22, 1994, you asked for the following information: A list of the Board members who were present at the April 6, 1994, meeting of the Board of Directors ("Board") of Capital Area Legal Services Corporation ("CALSC") and whether the CALSC Board had authorized the expenditure of LSC funds to bring a breach of contract suit against you in connection with your resignation as Executive Director of CALSC. By letter dated May 20, 1994, LSC's FOIA Administrator informed you that the Corporation was not able to locate any records containing the information you requested. Thus, your request was denied in part.<sup>1</sup>

This appeal of the Corporation's partial denial of your FOIA

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<sup>1</sup> You also asked for the names and dates of appointment of current members of CALSC's Board. This information was provided to you. See letter, dated May 20, 1994, from LSC's FOIA Administrator and enclosures thereto. ...

Your other request for information was, in fact, a request for a legal opinion as to whether a specific Board resolution was validly passed. In response, the Corporation's General Counsel, by letter dated May 19, 1994, suggested that you consult local counsel because this part of your request was outside the Corporation's purview.

BOARD OF DIRECTORS—Douglas S. Eakeley, Chairman, Morristown, NJ

Hulett H. Askew Atlanta, GA	LaVeeda M. Battle Birmingham, AL	John T. Broderick, Jr. Manchester, NH	John G. Brooks Boston, MA	Maria L. Mercado Lubbock, TX
F. William McCalpin	Nancy H. Rogers	Thomas F. Smegal, Jr.	Ernestine P. Watlington	Edna Fairbanks-Williams

Murphy Bell, Esq.  
Ltr. responding to FOIA appeal  
July 5, 1994  
- Page 2

request presupposes that (1) the requested information exists in the form of minutes to the April 6, 1994, Board meeting and (2) LSC has an obligation to obtain such information from CALSC and, in turn, provide the minutes to you under the FOIA. The bases for these contentions are CALSC's by-laws, which you state require the recordation of names of Board members who are present at meetings as well as actions and votes taken, and a specific condition of CALSC's grant, which you allege requires that minutes of all Board meetings be sent to LSC.

Your contention regarding CALSC's by-laws relates to the issue of whether the minutes you requested exist or should be in existence. However, as discussed below, if the record you request has not been created by the Corporation or is not within its possession or control at the time of the request, LSC has no obligation to obtain such information from a third party pursuant to a FOIA request.<sup>2</sup> Thus, your supposition about the Corporation's obligation in this regard is incorrect.

By way of background, for 1994, CALSC received a basic field grant which is not subject to any special grant condition. (A copy of CALSC's acceptance of grant award for 1994 is enclosed.) Therefore, CALSC is not required to submit minutes of its Board meetings to the Corporation.

Although CALSC is not required to provide LSC with such information, in order to respond to your FOIA request, we conducted a search to establish whether that information had nonetheless been submitted to us. Upon receiving this appeal, LSC offices which would have received such information, if it had been submitted, were again requested to determine whether the minutes to CALSC's Board meeting of April 6, 1994, had been submitted subsequent to May 20, 1994, the date of our initial response to you. It was determined such minutes were not submitted to the Corporation during this interim period. Thus, we do not possess such minutes and, consequently, are unable to provide them to you.

Moreover, as stated above, there is no support under FOIA for your contention that the Corporation has an obligation to obtain from CALSC, at your request, information that it does not currently possess nor require from recipients.<sup>3</sup> See Forsham v. Harris, 445

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<sup>2</sup> See, e.g., U.S. Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841 (1989).

<sup>3</sup> "[T]he FOIA does not convert an agency into a research bureau; the agency does not have the legal duty to request records from the private sector. Members of the public cannot compel an

Murphy Bell, Esq.  
Ltr. responding to FOIA appeal  
July 5, 1994  
- Page 3

U.S. 171, 100 S.Ct. 977 (1980), wherein the FOIA petitioners claimed that the agency (HEW) had a right of access with respect to the grantee in question and a right, if it so chose, to obtain custody of the requested record. The Supreme Court held, under FOIA, that

written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA.

445 U.S. 171, 100 S.Ct. 980. Furthermore, the Court stated, at 445 U.S. 182, 100 S.Ct. 985, that it agreed

with the opinions of the courts below that Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA.

Thus, the Court concluded

the FOIA applies to records which have been in fact obtained, and not to records which merely could have been obtained. . . . We rejected a similar argument in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162, 95 S.Ct. 1504, 1521-1522, 44 L.Ed.2d 29 (1975), by holding that the FOIA imposes no duty on the agency to create records. By ordering HEW to exercise its right of access, we effectively would be compelling the agency to "create" an agency record since prior to that exercise the record was not a record of the agency. . . .

[The grantee] is not a "federal agency" as that term is defined in the FOIA, and the data petitioners seek have not been created or obtained by a federal agency. Having failed to establish this threshold requirement, petitioners' FOIA claim must fail . . . .

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agency to collect any records." Federal Information Disclosure, at § 4.04, 4-19, James T. O'Reilly (1990). See generally Simmons v. I.C.C., 757 F.2d 296, 297 (D.C. Cir. 1985).

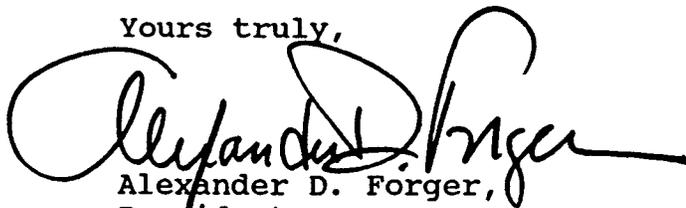
Murphy Bell, Esq.  
Ltr. responding to FOIA appeal  
July 5, 1994  
- Page 4

445 U.S. 186-87, 100 S.Ct. 987.

In conclusion, under the FOIA, the Corporation has no duty to either create records or to compel CALSC to provide the records you request. As mentioned above, we do not possess the minutes of the April 6, 1994, Board meeting. Therefore, I must uphold the partial denial of your FOIA request, dated May 20, 1994.

If you are not satisfied with this response, you may file suit in federal district court. 5 U.S.C. § 552(a)(4).<sup>4</sup>

Yours truly,



Alexander D. Forger,  
President

Enclosure

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<sup>4</sup> A FOIA complaint may be filed in the district court of the district in which the complainant resides, in the district in which the records are maintained, or in the District of Columbia. 5 U.S.C. § 552(a)(4)(B).