

Letter from Jonathan Bari, The Constitutional Walking Tour of Philadelphia, to National Park Service, Freedom of Information Appeal resulting from the FOIA denial from Independence National Historical Park, dated July 18, 2006, to FOIA Request dated June 19, 2006, pursuant to 43 CFR § 2.28. As of March 24, 2008, Appeal Number 2006-189 is still pending with the Department of the Interior, in spite of the fact that the Freedom of Information Act requires an agency to make a determination on an appeal within 20 (twenty) workdays after receipt of such appeal - 5 U.S.C. § 552(a)(6)(A)(ii).



July 27, 2006

Sent Via U.S. Priority Mail with Delivery Confirmation

National Park Service
FREEDOM OF INFORMATION APPEAL
Departmental FOIA Appeals Officer
MS-6556-MIB
1849 C Street, NW
Washington, D.C. 20240

Re: FREEDOM OF INFORMATION APPEAL resulting from the partial denial from Independence National Historical Park, dated July 18, 2006, to FOIA Request dated June 19, 2006, pursuant to 43 CFR § 2.28

To Whom It May Concern:

As a follow up to a letter that I received from Dennis Reidenbach, Superintendent, Independence National Historical Park, dated July 18, 2006, I am writing to appeal the partial denial of The Constitutional Walking Tour of Philadelphia's ("The Constitutional") FOIA request from June 19, 2006.

This partial denial specifically pertains to Independence National Historical Park ("INHP")/National Park Service ("NPS") not providing The Constitutional with the current Draft Long Term Agreement ("Long Term Agreement") by and between INHP/NPS and the Independence Visitor Center Corporation ("IVC") in Philadelphia.

In order to effectively make our appeal arguments, enclosed please find the following documents that provide background and information that we deem relevant to this FOIA appeal:

- Copy of letter dated July 18, 2006 from Mr. Reidenbach to Jon Bari of The Constitutional.
- Copy of FOIA request that The Constitutional made on June 19, 2006.
- Copy of page one of a draft License Agreement ("License Agreement"), dated August 10, 2005, by and between the IVC, in consultation with INHP, with a third party Tour Operator Licensee which states that drafts of the current Service-Licenser Agreement (alternatively and previously referred to herein as the "Long Term Agreement") between the IVC and

INHP have been provided to other third party tour operators (not including The Constitutional).

- Copy of letter dated June 29, 2006 from The Constitutional's counsel, Edward Hoffman, Esq. at Blank Rome, to William Moore, President and CEO of the IVC, with a copy of the letter to Mr. Reidenbach, documenting operational issues with the IVC and INHP, and specifically the several issues involved here that have had a material adverse effect on The Constitutional's day-to-day operations and the overall visitor experience to the INHP area.
- Copy of the Gateway Visitor Center Authorization Act of 1999 and Special Use Permit and the 15th Amendment and extension thereof (in absence of a Long Term Agreement) as provided by INHP in response to previous FOIA request dated May 30, 2006, also enclosed herein.

In Mr. Reidenbach's letter dated July 18, 2006, Mr. Reidenbach stated that his decision to withhold the above referenced Long Term Agreement, was made by him with consultation with Regional [National Park Service] Solicitor Anthony Conte.

The reasons provided for the denial were that the Long Term Agreement,

“...reflects the personal opinions, preliminary staff recommendations, and deliberative matters. Disclosure of such material would inhibit the open and candid discussion or expression of such views in future deliberations, could confuse the public as to the official agency position on an issue, and have a detrimental effect on our decision-making process. Therefore sound grounds exist for withholding such information which is authorized pursuant to Exemption 5 of the Act, 5 U.S.C. § 552(b)(5) and 43 CFR Part 2, Appendix E(5), which permits an agency to withhold ‘inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.’ [See 383 DM 15.5.4E.]”

First, while I recognize that drafts may not be subject to FOIA requests, I think that there are extenuating circumstances here that reasonably address any of those issues and provide sound grounds for such disclosure.

Second, pursuant to Public Law 106-131, dated December 7, 1999 and other documents which we have reviewed, it is my understanding and belief that the National Park Service and the Independence Visitor Center Corporation, at one point in time intended to enter into a Cooperative Agreement (also referred to as a Long Term Agreement or Service-Licensors Agreement, and as such used interchangeably with either to denote one and the same agreement).

Third, it is my understanding and belief that in the more than six and one half years since that Public Law 106-131 was passed that the IVC and the INHP/NPS have not yet entered into any such Cooperative Agreement (for reasons that have not been provided). In lieu of a Long Term Agreement, the current extent of the agreement between the parties seems to boil down to a two page Special Use Permit (which has been amended 15 times in order to allow the parties more time to negotiate) as referenced herein and enclosed herewith, with just one ambiguous term that states, “For the duration of this permit, operational procedures for the Independence Visitor Center will be determined through consultation with, and consent of, the National Park Service.”

Fourth, absent having any executed written Long Term Agreement and based on various

information that we have received, including the documents provided by INHP, it is my understanding and belief that current drafts of the Long Term Agreement have previously been shared with other third party vendors and tour operators starting in late Summer 2005 which do business with the IVC and/or possibly INHP, pursuant to the License Agreement, as previously referenced and enclosed herein, with third party tour operators, not including The Constitutional. As such, the Long Term Agreement is fair game for us to request, given certain operational issues, including those that have been documented by our legal counsel, Mr. Hoffman, in his June 29, 2006 letter, as previously referenced and enclosed herein.

Fifth, in spite of what is specified in the Gateway Visitor Center Authorization Act of 1999 (a copy of which is enclosed herein from INHP), there is still no Long Term Agreement between INHP and the IVC as of the date of this letter. As such, there do not appear to be any contractual obligations, or formalized rules and regulations derived therefrom, which IVC follows with respect to its discretionary management-related activities of the Visitor Center. As the IVC is constructed on public land and owned by the United States Government, such unchecked discretionary authority is of great concern. Additionally, it is of great concern that the rules applied to third party tour operators and vendors by the IVC and INHP are done so arbitrarily and inequitably, and without any written Long Term Agreement, there is no real oversight and/or checks and balances in place.

Sixth, given that INHP and the IVC have an Act of Congress signed into law by President Clinton in December 1999, one can reasonably argue that the parties are complacent with the status quo of not having a Long Term Agreement, and/or they are unwilling and/or unable to reach a Long Term Agreement with one another. Sixth, given enabling legislation with Act of Congress, if there are indeed willing parties, then there is no reason, arguably speaking, why 6½ plus years have passed and there is no agreement.

We argue that not having a definitive Long Term Agreement is counter-productive and detrimental to the mission and effective implementation thereof for both the IVC and INHP, both of which are public trusts, as well as third parties in the INHP ecosystem such as third party tour operators like The Constitutional. Without any tangible terms in the form of a written and publicly available document, then specific management goals and responsibilities are next to impossible to meaningfully track and it is very easy for both the IVC and INHP to always point fingers at one another, and say that various issues are the other party's responsibility, as it is occurring with The Constitutional, as documented by Mr. Hoffman's letter to Mr. Moore and Mr. Reidenbach dated June 29, 2006.

Given those reasons, it does not seem to make sense that INHP can sustain its arguments for denial of such Long Term Agreement in which he stated,

“Disclosure of such material would inhibit the open and candid discussion or expression of such views in future deliberations, could confuse the public as to the official agency position on an issue, and have a detrimental effect on our decision-making process.”

To the contrary, it is the prolonged absence of having a Long Term Agreement, rather than the current disclosure of the Long Term Agreement to third parties such as The Constitutional (plus the Long Term Agreement has previously been disclosed to third party tour operators), which: i) inhibits the open and candid discussion or expression of various points of view in future deliberations, ii) could confuse the public as to the official agency position on an issue, and iii) have a detrimental effect on our decision-making process.

As a measure of goodwill on our behalf, to the extent that there is information in the Long Term Agreement that is deemed so critical with the personal opinions, preliminary staff recommendations and deliberative matters, then we would consider accepting a minimally blacklined version of the Long Term Agreement which we think may solve our right to know the information requested with the INHP's concerns over disclosure.

As such, I would like to kindly request that we receive a copy of the current draft of the Long Term Agreement so that we can understand the nature of such agreement including the specific extent of activities and services being provided by the National Park Service as well as those undertaken by the IVC within the IVC and/or adjacent to the IVC.

Moreover, we want to understand the nature of such Long Term Agreement including how the IVC conducts activities appropriate for a regional visitor center as well as "revenue producing activities" described in the Long Term Agreement "toward the goal that the IVC will be economically self-sustaining" (which is expressly stated in the License Agreement). To that end, we believe that this License Agreement Recital represents a very liberal interpretation of the Gateway Visitor Center Authorization Act of 1999, and one that might be better understood in seeing the Long Term Agreement. Absent seeing the Long Term Agreement, we believe that this generous interpretation is incorrect since the law only states that "Revenues from activities engaged in by the Corporation [Independence Visitor Center] shall be used for the operation and administration of the Center." Using revenues from activities to help support operations and administration of the IVC is one matter, but being economically self-sustaining is another matter.

For the above mentioned arguments and rationale, we respectfully request that you consider the information provided herein and grant The Constitutional's appeal to be provided with the current draft Long Term Agreement between INHP/NPS and the IVC. Thank you for your consideration.

Sincerely,

Jonathan H. Bari
President
jon@TheConstitutional.com