

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

**Freedom of Information Act Appeal: 2011-44**

July 27, 2011

Mr. Joseph A. Davis, II

Dear Mr. Davis:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated June 24, 2011, as supplemented June 29, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the State Superintendent of Education (“OSSE”) improperly withheld records in response to your requests for information under DC FOIA dated May 13, 2011 (collectively, the “FOIA Request”).

Background

Appellant’s FOIA Request sought records relating to the following:

1. Agreements between OSSE and the U.S. Department of Education 21<sup>st</sup> Century CCLC program administration during 2008 through 2011.
2. Monitoring team reports and OSSE-generated documents for the Youth Engaged for Success, Inc., monitoring visit on August 5 and 6, 2010.
3. Emails related to the termination of Youth Engaged for Success, Inc., subgrants dated September 15, 2009 and July 8, 2010 from August 1, 2010 through May 13, 2011.

In response, by email dated June 21, 2011, OSSE provided records to the Appellant, but stated that it had not completed its search for email records and would “supplement its preliminary release once our search and review are final.”

On Appeal, Appellant challenges the response to the FOIA Request as follows:

1. The June 21, 2011 response did not include any monitoring team reports. Appellant states that he was present at the monitoring visit and observed team members completing monitoring reports.
2. The June 21, 2011 response did not include any emails as requested.

In its response, on June 30, 2011, OSSE summarized its June 21, 2011 response to the FOIA Request. OSSE stated that it had “explained in its response that the agency would supplement his request with additional information once it was received from the program and the Office of the Chief Technology Officer.” It concluded: “OSSE has not withheld any records in part or in whole pertaining to this FOIA. Mr. Davis has received all documents related to this FOIA and OSSE now considers this FOIA closed.” OSSE was afforded an opportunity to supplement its response, but did not do so.

### Discussion

It is the public policy of the District of Columbia (the “District”) government that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, the DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that the DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Appellant presents a challenge to the adequacy of the search and response of OSSE. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government’s search for responsive documents was adequate. *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep’t of Justice)*, 578 F.2d 261 (9th Cir. 1978).

There seems to be ambiguity in the response of OSSE on Appeal. On one hand, it states that it has provided all records requested by Appellant as it stated in its June 21, 2011 response letter. On the other hand, the response letter stated that it would supplement the response when it received additional information from program personnel and the Office of the Chief Technology Officer. Nine days after this letter, OSSE states that it has provided all records requested by Appellant, but it has not addressed on the administrative record the results of its promised supplementary production to its “preliminary release.” Thus, it appears that OSSE has provided all of the records in the possession of the FOIA Officer, but not all of the records in the possession of the agency. We note that in a prior decision, Freedom of Information Act Appeal 2010-38, the agency was found not to have provided all responsive records where it only provided responsive records that it had in the possession of the FOIA officer at the time of the

response. Although the administrative record is not clear, this seems to be the same situation here and relief is warranted.

First, Appellant contends that OSSE has failed to produce the monitoring reports prepared in an OSSE visit on August 5 and 6, 2010, as requested in the FOIA Request. An agency has the burden to establish the adequacy of its search, *Patterson v. IRS*, 56 F.3d 832, 840 (7th Cir. 1995), and we must consider its response in the context of the circumstances. Here, OSSE indicated that, nine days before its response, it was still awaiting information from its program personnel, which response may include the monitoring reports. Furthermore, Appellant states that he observed such reports being prepared. This is more than mere speculation that such reports should exist. At the least, the response of OSSE to the Appeal should have addressed the factual contention of Appellant. Accordingly, OSSE shall either: (1) produce the records which the Appellant describes as monitoring reports; or (2) state in writing to Appellant the efforts that it has made to locate such records and that such records do not exist or are not maintained by the agency.

Second, Appellant contends that OSSE has failed to produce emails as requested. Again, OSSE indicated that, nine days before its response, it was still awaiting information from the Office of the Chief Technology Officer, which information may include the requested emails. Accordingly, OSSE shall either: (1) produce the emails which the Appellant requested; or (2) state in writing to Appellant the efforts that it has made to locate such emails and that such emails do not exist.

We are not unmindful that after the provision of records pursuant to, and by, the June 21, 2011 response letter, OSSE changed FOIA officers. This transition may have contributed to what seems to be the incomplete response to the FOIA Request or lack of confirmation as to the completeness of the FOIA Request. Nevertheless, Appellant is entitled to a complete response to the FOIA Request.

### Conclusion

Therefore, we remand this matter to OSSE as follows:

1. OSSE shall either produce the records which the Appellant describes as monitoring reports or state in writing to Appellant the efforts that it has made to locate such records and that such records do not exist or are not maintained by the agency.
2. OSSE shall either produce the emails which the Appellant requested or state in writing to Appellant the efforts that it has made to locate such emails and that such emails do not exist.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman  
Deputy General Counsel

cc: Tracey Langley