

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2011-71**

April 18, 2012

BY U.S. MAIL

Fritz Mulhauser, Esq.

Re: Freedom of Information Act Appeal 2012-39

Dear Mr. Mulhauser:

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) (the “DC FOIA”), dated April 7, 2011 (the “Appeal”). You (“Appellant”) assert that the District of Columbia Public Schools (“DCPS”) improperly withheld records in response to your requests for information under DC FOIA dated February 28, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request, consisting of identical requests to both DCPS and OCFO, sought the budget estimates for DCPS for Fiscal Year 2013. Appellant filed an appeal when it did not receive a response within the statutory deadline from DCPS or OCFO, alleging that DCPS and OCFO have improperly withheld records by failing to respond to the FOIA Request. In response, by email dated March 27, 2012, OCFO stated that it had been awaiting the receipt of records from DCPS and, by email dated March 26, 2012, it responded to the FOIA Request by providing Appellant with a hyperlink to the page on its website where the records were located. The response to Appellant indicates that these were only records which were in its possession. In response, by email dated April 5, 2012, DCPS stated that it responded to the FOIA Request on March 28, 2012. Like OCFO, it provided a hyperlink to the page on its website where the records were located. We dismissed the appeal, but without prejudice to Appellant to challenge, by separate appeal, the responses to the FOIA Request.

On April 7, 2012, Appellant filed the Appeal, challenging the response of DCPS. Appellant contends that DCPS failed to fully respond to its FOIA Request for “records that are estimates of revenues from all sources and records that are plans for expenditures of all kinds [emphasis added by Appellant in Appeal of quoted FOIA Request].” Appellant states that the pages furnished by hyperlink “are brief.” It also states that such pages are deficient:

1. They only contain information regarding local school budgets and are “an unknown fraction of the total \$800 million-plus spending plan.”

2. The DCPS budget includes more expenditures than shown.
3. Other than a few federal sources, revenue sources are not identified.

Appellant contends that there is “a full budget (sometimes called the ‘load file’ in finance office jargon) and it is well known to officials.”

In its response, by email dated April 13, 2012, DCPS reaffirms its position. It notes that Appellant states that the pages on the DCPS website are brief and that Appellant also states “three reasons why ‘they could not be possibly what we asked’.” It states its position as follows:

DCPS FOIA is not in a position to answer questions regarding the budget provided on the DCPS website. It is well established that the FOIA is made available to the public [sic] to provide documents in response to request. FOIA is not a vehicle merely to provide answers to questions. As such, DCPS does not have documents responsive to ACLU’s questions.

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, 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 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).

Essentially, Appellant contests the adequacy of the search, contending that an adequate search by DCPS should have yielded more responsive records.

An agency is not required to conduct a search which is unreasonably burdensome. *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep’t of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990).

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).

In order to establish the adequacy of a search,

‘the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’ [*Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a ‘reasonableness test to determine the ‘adequacy’ of a search methodology, *Weisberg v. United States Dep't of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

While it is true, as DCPS states, that the law only requires the disclosure of nonexempt documents, not answers to interrogatories, see, e.g., *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978), Freedom of Information Act Appeal 2011-21, it is clear that the FOIA Request was a request for documents—“records that are estimates of revenues from all sources and records that are plans for expenditures of all kinds.” This was clear not only in the FOIA Request but in the Appeal as well. Thus, the contention of DCPS that Appellant is seeking answers to questions has no support in the administrative record.

The FOIA Request provided clarification as to the nature of its request. First, it stated that it was not seeking the brief budget submission by the Mayor to the Council. Appellant stated that it was seeking “the full DCPS budget, not the limited version included in the Mayor’s budget.” Second, Appellant stated that individual school budgets “are also incomplete; proper analysis of spending decisions proposed by the executive requires data on central office and other expenditures.”

In response, DCPS provided a hyperlink only to the individual school budgets and did not have “data on central office and other expenditures” as requested by Appellant. This alone indicates that the search was inadequate on its face. In addition, it is a matter of public record, posted online, that the Mayor’s submission to the Council contained additional information of the type requested by Appellant, but the hyperlink provides no responsive records regarding the same. This also indicates that the DCPS response was inadequate. However, Appellant’s FOIA Request was clear that it was broader than the information found online. DCPS has not argued, nor does it seem that it could argue, that it searched all locations where the requested records would have been found. It is clear that a reasonable and adequate search would have produced additional information. Accordingly, DCPS is ordered to make a new search for the records requested in the FOIA Request and to provide promptly the responsive records to Appellant.

Conclusion

Based on the foregoing, the decision of DCPS is reversed and remanded. DCPS is ordered to make a new search for the records requested in the FOIA Request and to provide promptly the responsive records to Appellant.

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the response of DCPS pursuant to this order.

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Donna Whitman Russell, Esq.