

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

Freedom of Information Act Appeal: 2012-77

September 21, 2012

Mr. Mark Buscaino

Dear Mr. Buscaino:

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 August 31, 2012 (the “Appeal”). You (“Appellant”) assert that the District Department of Transportation (“DDOT”) improperly withheld records in response to your request for information under DC FOIA dated August 15, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the following records in connection with a referenced tree canopy study by the Urban Forestry Administration, a division of DDOT (“UFA”):

1. “The 2006 and 2011 high-resolution land cover data sets used to determine the results published in UFA’s report.”
2. “The final grant paperwork from the US Forest Service/State Forestry Agencies and/or other organizations used to execute the analysis.”

In response, by letter dated August 29, 2012, DDOT stated that it did not have any records responsive to the first part of the FOIA Request, but produced eight pages of records responsive to the second part of the FOIA Request. However, DDOT provided Appellant with a hyperlink to a page on a District government website where the information responsive to the first part of the FOIA Request could be found.

On Appeal, Appellant challenges the response by DDOT to the FOIA Request as incomplete. Although no data was provided pursuant to the first part of the FOIA Request, Appellant states that “[t]his data must exist or the documentation [the report] could not have been produced.” With respect to the second part of the FOIA Request, Appellant states that “the final grant paperwork was not provided. What was provided [referencing attached records produced] was an unsigned contract to conduct a tree analysis assessment with the University of Vermont who did not do the analysis.”

In its response, by email dated September 19, 2012, DDOT reaffirmed its position. With respect to the first category of the FOIA Request, as was the case at the time of the response to the FOIA Request, DDOT states that it does not currently have the requested “data sets.” It indicates in the main response as well as attached exhibits that such data sets are in the possession of a contractor hired by the Metropolitan Washington Council of Governments (“COG”) to conduct the referenced tree canopy study. With respect to the second category of the FOIA Request, DDOT reaffirms that it “provided the Appellant with the documentation that was in the Agency’s possession at time of its response to Appellant’s FOIA request.” DDOT also states that, on September 7, 2012, it received a copy of the federal grantor agency response to a FOIA request for the “final grant paperwork,” which is attached as an exhibit, and proffers that it will provide a copy of the same to Appellant upon request.

In order to clarify its response and the administrative record, DDOT was invited to supplement the response and did so by email dated September 20, 2012. In its initial response to the Appeal, DDOT stated that it had “partnered” with various nonprofit organizations to conduct the still project, still ongoing, which is to “to help develop and assess urban tree canopy progress within the District.” In its supplement, DDOT explained that it “merely works in collaboration with the other state agencies regarding the tree canopy analysis project.” With respect to clarifying its role in the grant, it stated: “The United States Forest Service and the Council of Governments negotiate directly amongst each other regarding the grant’s final terms and requirements. State Agencies, such as DDOT’s UFA, merely submitted a proposal to become a participant in the project.” With respect to the statement in the grant application, included in an exhibit, indicating that the District of Columbia will provide funding of \$65,000, DDOT stated that the “dollar amount represents an ‘In Kind Services’ contribution derived from data that was obtained from the District’s Office of Chief Technology Officer. No local, grant, or other monetary contributions are being made by DDOT’s UFA towards this project.”

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 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).

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). Under the law, an agency "has no duty either to answer questions unrelated to document requests or to create documents." *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). An agency is not required to produce records that it does not possess or control. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980); *Anderson v. U.S. Dept. of Justice*, 518 F.Supp.2d 1, 10 (D.D.C. 2007).

Essentially, Appellant asserts that DDOT has failed to provide all available records pursuant to the FOIA Request based upon its belief that more records exist than have been produced. There are two categories of records which Appellant has placed in issue: "high-resolution land cover data sets" and "final grant paperwork."

The administrative record reflects that the tree canopy study referenced by Appellant, the underlying subject of the FOIA Request, was not conducted solely by DDOT. Rather, DDOT and several entities, including COG, agreed to contribute efforts or resources to a project and to share the results of the project. The project was funded in part by a grant from the federal government as well as by a nonmonetary contribution by the District of Columbia. One of the exhibits submitted as part of the Appeal indicates that DDOT submitted a grant proposal to the federal government in connection with the project, which proposal identified DDOT as a project applicant and COG as the recipient of the funds. DDOT explains that this proposal was submitted in connection with its proposed participation in the project funded in part by the grant. DDOT also indicates that COG negotiated and agreed upon the terms of the grant with the federal government. This is reflected in an "Application for Federal Assistance" submitted by COG and a grant addendum and modification submitted by COG. DDOT states that the District of Columbia did not make any monetary grants to the project, nor does it appear that there are any grants other than that by the federal government.

The first category of records alleged by Appellant to be withheld is the "high-resolution land cover data sets used to determine the results published in UFA's report." Based on the project description in the submission to the federal government by DDOT, these "data sets" would be developed by an analysis of remote sensed data such as satellite imagery, aerial photographs, and field visits. COG engaged a consulting firm to prepare the analysis of the data sets. DDOT states that "it does not have possession of the requested data sets" and that these data sets "are in the possession of the consulting firm hired by COG." This representation is consistent with an email from COG regarding the status of the analysis being conducted by such contractor. Moreover, based on the administrative record, we do not believe that DDOT is in control of the records as the consulting firm is not a DDOT contractor nor does the arrangement among the parties on the project appear to create a legal entity which would otherwise provide DDOT with control. While Appellant assumes that DDOT must have the data sets as it has issued a report based on the data sets, DDOT

states that a press release, not a report, was issued and that the analysis is ongoing. DDOT also states that insofar as the preparation of the press release was concerned, the original draft was prepared by COG and DDOT provided only comments to the press release. Again this is supported by emails submitted by exhibit. Based on the foregoing, we find that DDOT is not in possession of this category of records and has complied with its obligations under DC FOIA with respect thereto.

The second category of records alleged by Appellant to be withheld is “[t]he final grant paperwork from the US Forest Service/State Forestry Agencies and/or other organizations used to execute the analysis.” As we set forth above, as represented by DDOT and reflected in the grant applications and modifications submitted by DDOT, COG, not DDOT, was the applicant for, and recipient of, the grant from the federal government and, accordingly, it is not unreasonable that, on the date of the response to the FOIA Request, DDOT would not be in possession of the “final grant paperwork.” Based on the foregoing, we find that DDOT is not in possession of this category of records and has complied with its obligations under DC FOIA with respect thereto.¹

In this case, DDOT cannot be required to produce records which it does not possess. Appellant may believe that DDOT should have acquired and maintained more records than have been provided as a matter of prudent and sound management practices. DC FOIA provides no warrant to second-guess the management practices of an agency in the compilation and maintenance of its records. FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Although a requester may believe that additional records exist, mere suspicion is not sufficient to provide a basis for relief. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

Conclusion

Therefore, the decision of DDOT is upheld. The Appeal is hereby dismissed.

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

¹ We note that the records which were provided to Appellant pursuant to this category of the FOIA Request were not responsive to the terms of such request, but were an accommodation to Appellant in the absence of responsive records.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Nana Bailey-Thomas, Esq.