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

Freedom of Information Act Appeal: 2012-80

October 3, 2012

Mr. John Merrow

Dear Mr. Merrow:

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 6, 2012 (the "Appeal"). You ("Appellant") assert that the District of Columbia Public Schools ("DCPS") improperly withheld records in response to your request for information under DC FOIA dated May 17, 2012 and revised on May 21, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought "a report to DCPS by [a named individual] and perhaps others that analyzed the DC CAS test results for the school year 2007-2008." In its revision, Appellant states his belief that the named individual was under contract to DCPS and reported to the Chief of Data and Accountability of DCPS. Appellant also believes that "the report would most likely have been commissioned after November, 2008."

In response, by letter dated August 20, 2012, DCPS stated that it did not have the requested report.

On Appeal, Appellant disputes the statement of DCPS that it does not have report.

> We know that the report was commissioned by DCPS. Since high numbers of wrong-to-right erasures on DC CAS tests continued to be an issue after Chancellor Rhee resigned, we find it difficult to believe that DCPS would not have retained a copy. We know that the author of the report, Sandy Sanford, has a copy and would provide it to DCPS if asked.

In its response, by email dated September 26, 2012, DCPS reaffirmed its position. DCPS states that it requested the record from its Office of Data and Accountability and the Office indicated that it did not have the record. In order to clarify its response and the administrative record, DCPS was invited to supplement the response to address the manner in which the search for records was conducted. In response, by email dated October 3, 2012, DCPS supplemented the

response. It stated that the current Chief of its Office of Data and Accountability personally searched for the requested records. The Chief searched the paper-based files of the Office and the electronic files on the "shared drive" of the Office. DCPS indicated the nature of the search terms used.

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).

The crux of this matter is the adequacy of the search and the belief of Appellant that the record exists.

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).

In order to make a reasonable and adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. Such determinations may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files which the agency maintains. See, e.g., Freedom of Information Act Appeal 2012-05; Freedom of Information Act Appeal 2012-04, Freedom of Information Act Appeal 2012-26, Freedom of Information Act Appeal 2012-28, and Freedom of Information Act Appeal 2012-30, Freedom of Information Act Appeal 2012-35, and Freedom of Information Act Appeal 2012-56. The determinations as to the likely locations of records would involve a knowledge of the record creation and maintenance practices of the agency. Indeed, in Freedom of Information Act Appeal 2012-28, DOES stated that its search was conducted by examining the electronic database of unemployment compensation records and paper files. It also stated that there was no search of emails because their "routine and customary business practice" is to request records via facsimile and receive them via facsimile. By contrast, in Freedom of Information Act Appeal 2012-28, while the agency identified its employees who would have knowledge of the location of the requested records and stated that those employees searched agency records, it did not establish that it made reasonable determinations as to the location of records requested and made searches for the records in those locations.

In this case, it appears that DCPS has made a good-faith effort to locate the responsive record pursuant to the FOIA Request. In the FOIA Request, Appellant identified the relevant division in which the requested record was likely to be located, that is, the Office of Data and Accountability. Here the search was conducted by the Chief of that division, who we must presume is familiar with the records its records and the type of files which should be searched. It has identified the paper-based files of the Office and the electronic files on the "shared drive" of the Office as the relevant files to be searched and we believe these would be the likely places where the responsive record would be located. Accordingly, we find that DCPS has employed a search methodology which is reasonably calculated to locate the record and that the search was reasonable and adequate.

Under D.C. Official Code § 2-532(a-3), an agency must produce, subject to applicable exemptions, records produced or collected pursuant to a contract with a private contractor.[1] Appellant has indicated its belief that the named individual who was alleged to have written the report was under contract to DCPS. We note that in its original FOIA Request on May 17, 2012, Appellant indicated its belief that such individual worked for a third-party corporation. Subsequently, Appellant indicates its belief that the individual was a "contract worker" who reported directly to the then Chief of the Office. Therefore, it is unclear, based on the administrative record, what relationship, if any, that the individual had with DCPS. Moreover, it

[1] D.C. Official Code § 2-532(a-3) provides: "A public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function, and the public body with programmatic responsibility for the contractor shall be responsible for making such records available to the same extent as if the record were maintained by the public body."

is also unclear whether a report was, in fact, done at the direction of DCPS. Although Appellant states that "[w]e know that the report was commissioned by DCPS," there is no indication given as to the basis of its knowledge. The fact that such report was not maintained suggests that there was, in fact, no report. Thus, based on the administrative record, we cannot find that the report was produced by a contractor and require DCPS to pursue the alleged contractor. As stated above, speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made.[2]

Conclusion

Therefore, the decision of DCPS is upheld and the Appeal is 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.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Donna Whitman Russell, Esq.

[2] Nevertheless, Appellant may request a reconsideration of the Appeal if he submits sufficient evidence that the named individual was a contractor, that DCPS contracted with individual to produce the report, and that the report was produced. Such evidence may be written evidence of the contract or an affidavit, based on personal knowledge, not hearsay, detailing the matters set forth in the previous sentence.