

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-38**

April 7, 2017

VIA ELECTRONIC MAIL

Mr. Jordan Rau

RE: FOIA Appeal 2017-38

Dear Mr. Rau:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In your appeal, you assert that District of Columbia Public Schools ("DCPS") improperly withheld records you requested under the DC FOIA.

Background

On February 10, 2017, you submitted a FOIA request for all DCPS documents relating to teachers associated with the LEAP Teacher Professional Development Program.

On March 20, 2017, DCPS granted your request, providing you with responsive documents and directing you to online DCPS school budgets.

On March 22, 2017, you appealed DCPS's denial, challenging "the integrity of the search for record." In support of your appeal, you argue that additional responsive documents should exist because of inconsistencies between the records DCPS provided and your personal knowledge of the LEAP program as it relates to a specific school.

This Office notified DCPS of your appeal. DCPS responded<sup>1</sup> by explaining the search that it conducted of the DCPS's Office of Instructional Practice. DCPS's response "acknowledges that responsive documentation does exist"<sup>2</sup> as not all responsive documents were located in the centralized repository that was searched. DCPS explains that the records are not centralized because decisions related to LEAP can be made by principals at the school level, and that schools are not required to report to Office of Instructional Practice in real time. As a result, DCPS proffers that providing you with "100% current and accurate" documentation would be difficult and could amount to the creation of new records, which DCPS is not obligated to do under DC FOIA. DCPS's response ends by offering to provide additional responsive records if you agree to limit the scope of your request to the schools that you enumerated in your appeal.

---

<sup>1</sup> DCPS's response is attached to this decision.

<sup>2</sup> This Office assumes that this is in addition to what has already been produced.

## Discussion

It is the public policy of the District of Columbia 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 . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

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). Accordingly, 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).

### *Adequacy of the Search*

The primary issue raised by your appeal is whether DCPS conducted an adequate search for the records you are seeking. 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. U.S. 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).

To conduct a reasonable and adequate search, an agency must make a reasonable determination as to the locations of records requested and search for the records in those locations. *Doe v. D.C. Metro. Police Dep’t*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). This first step 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 that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in

fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

On appeal you challenge DCPS's search as incomplete because the records DCPS provided to you are inconsistent with your personal knowledge of a specific school.

Here, the DCPS FOIA officer identified the Office of Instructional Practice as the repository most likely to contain responsive records and conducted a search there. In DCPS's response to this appeal, "DCPS acknowledges that [additional] responsive documentation does exist" and offers an explanation as to why such additional documentation would not be located in the centralized repository at the Office of Instructional Practice; namely, because individual schools are not required to report this information in real time. It does not appear from DCPS's response that DCPS searched for responsive records at the school level, or reached out to school principals to provide responsive documents that reflect the "autonomy to determine LEAP personnel and LEAP structures that work best in [the principal's] unique school environment."

A search is reasonable when it is conducted not just of the repository most likely to contain responsive records, but of all repositories likely to contain responsive records. *Hall v. CIA*, 881 F. Supp. 2d 38, 59 (D.D.C. 2012) ("only searching the databases 'most likely' to contain responsive documents does not satisfy FOIA, as it may preclude record systems that are less likely than others to contain responsive documents, yet may still likely contain them."); *Steinberg v. United States Dep't of the Treasury*, No. 93-2348, slip op. at 8 (D.D.C. Sept. 18, 1995) (declaring that search solely of one repository was inadequate when 'it is reasonable to conclude that additional systems exist,' and that it would not be unduly burdensome to search other systems). Here, DCPS has acknowledged that additional records exist, and has identified where they would be located (maintained at the school level) but has appeared to not have searched these locations. Based on DCPS's representations, we conclude that DCPS's search was inadequate.

A subsequent search conducted by DCPS should be inclusive of all schools, unless you agree to limit the scope of your search in the manner contemplated by DCPS's response. It is our reading of your appeal that you identified specific schools as examples to indicate that the original search was inadequate, and you did not intend to limit your request. DCPS has not argued that your request is overly broad, *see* 1 DCMR § 402.5, and DCPS's offer to provide additional responsive records for specific schools within 3 days indicates to this Office that the type of record requested is identifiable and producible.

### *Creating New Records*

DCPS is obligated to search all record repositories likely to contain a responsive record, but it has no obligation under FOIA to create a new record or to answer interrogatories. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."). 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). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21

(D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). As a result, DCPS is not obligated to create a report for you if one does not already exist.

DCPS expressed concern in its response, that it would have to “engage in follow-up that would include making amendments to documents and databases containing responsive information,” in order to provide “documentation that is 100% current and accurate.” DCPS is not obligated to provide you with information that is current and accurate; instead DCPS is obligated to identify responsive records existing at the time your request was made, and to provide them to you after reviewing them for applicable exemptions. If DCPS would like to update reports to present you with up-to-date information, DCPS is free to do so, but DCPS is not obligated to do so under DC FOIA.

### Conclusion

Based on the foregoing, we remand DCPS’s decision. DCPS shall, within the 10 business days of the date of this decision, conduct an additional search using your original search terms (unless you consent to change them) and provide non-exempt responsive records to you on a rolling basis. If no additional responsive records are found from the second search, DCPS shall notify you by letter with a description of the search it conducted. You may challenge DCPS’s subsequent response by filing a separate appeal.

This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Eboni J. Govan, Attorney Advisor, DCPS (via email)