

General ("OAG") was able to perform a more extensive search for comparable data without recourse to lawyers.

On November 14, 2006, DCPS submitted a response to your appeal, with a copy to you via e-mail. The agency reiterates that much of the information you seek is not maintained in its records or can be retrieved only with difficulty and at considerable expense. DCPS acknowledges that it can provide a printout from the Office of the Chief Financial Officer ("OCFO") "dating back to 2000 [and] indicating payments made from DCPS' outside counsel account," with the names of payees and amounts paid. Any other information, DCPS says, "would require that DCPS staff search through existing records, create a list of cases located or that current staff are aware of where outside counsel represented the Agency, as well as answer questions posed as FOIA requests." As for the inquiry "whether the legal services were put out to bid, who the other bidders were and a brief explanation of why the lawyer/firm was chosen as outside counsel," DCPS says that "there are no documents in existence that would be responsive to this request."

In previous administrative appeals to the Mayor from rulings of the DCPS, we have concluded that although the DCPS is an independent agency in many respects under the Home Rule Act, for purposes of the FOIA, the agency is a "public body" whose actions under the FOIA are subject to administrative review by the Mayor on appeal by the requesting party.

It is the public policy of 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 (2006 Supp.). In aid of that public policy, the FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." *Id.* § 2-532(a). However, the statutory right does not extend to the imposition of an obligation on the agency to create documents that do not exist. Moreover, even as to extant records, the agency is permitted to charge fees in reimbursement of the costs incurred in retrieving, reviewing, and reproducing responsive documentation to the extent provided by the statute. *Id.* § 2-532(b).

The FOIA requires that certain categories of documents be provided upon request, without the formality of a demand under the FOIA. Included in these categories are, among other things, "[i]nformation in or taken from any account, voucher, or contract dealing with the . . . expenditure of public . . . funds by public bodies . . ." D.C. Official Code § 2-536(a)(6) (2006 Supp.). Conversely, the public right of access to records is subject to limits, in the form of exemptions from the disclosure requirement, including a so-called "Exemption 4" for "inter-agency or intra-agency memorandums or letters, . . . which would not be available by law to a party other than a public body in litigation with the public body." *Id.* § 2-534(a)(4). This exemption is understood to encompass information protected by the attorney-client, deliberative-process, and work-product privileges. See *Maydak v. United States Dept. of Justice*, 254 F. Supp. 2d 23 (D.D.C. 2003) (interpreting counterpart provision of federal FOIA).

We conclude that DCPS should provide the OCFO printout described in the third paragraph of the agency's November 14, 2006 letter to this office, setting forth payees and amounts paid as listed in the agency's "outside counsel" account. As described, the printout appears to fulfill the request for records sought in categories [i] and [ii], above. To the extent that DCPS has in its possession extant records that reflect the information sought in categories [iii], [v], [vi], [viii] and [ix], above, DCPS should produce the records, or at the agency's election, compilations derived from those records, subject to the agency's discretion to charge fees as discussed further below. DCPS is not obligated to create records where none exists.

Categories [iv] and [x] read like requests for written explanations or responses to interrogatories. As stated above, the FOIA does not require DCPS to create records where none exists. However, the FOIA requires agencies to process requests with a view to providing access to extant public records. Accordingly, Category [iv] should be construed narrowly to request extant records that provide the reason for payments to outside counsel. To the extent that DCPS has records, such as scope of work or retainer agreements that set forth the nature of services warranting payment, DCPS should provide those records, subject to redaction or withholding of information protected by Exemption 4 or other applicable exemptions.

Likewise, Category [x] should be interpreted as a request for extant records that set forth the reason a lawyer or law firm was selected as outside counsel, as in the instance of sole-source contracts with accompanying justifications for selection. Again, the responsive records, to the extent any exist, are subject to redaction or withholding pursuant to Exemption 4 or other applicable exemptions.

DCPS need not compile reports in response to category [vii], which would require the agency to make professional evaluations concerning the cases at issue and to create new documents to record those evaluations.

In assessing fees to compensate for the costs of retrieving and compiling records, DCPS is bound by the FOIA, which provides pertinently: "Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . ." D.C. Official Code § 2-532(b-1)(2) (2006 Supp.). Without doubt, you qualify as a media representative within the meaning of the foregoing provision. Hence, in this case DCPS may not charge a fee for the expense incurred in retrieving, compiling, or evaluating records, but only for the expense incurred in their duplication. The fee charged should be reasonable and proportionate to the character of the service provided. On its face, a charge of \$200 per hour for attorneys' time would be excessive for duplication services.

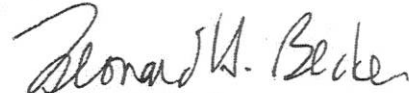
We are mindful of the administrative burdens imposed on DCPS, as on other District government agencies, by the requirements of the FOIA. The parties are encouraged to discuss methods by which the burdens imposed on the DCPS by your request may be mitigated without compromising the journalistic integrity of the production effort. For example, you might consider limiting your search request to fees

greater than \$10,000 in any single legal retention. Another possibility is that you might redirect your documentary request, or portions of it, to the OAG, which, as noted in DCPS' response, maintains a computerized data base that may readily and comprehensively provide at least portions of the data you seek. Still another possibility is that you might await DCPS' production of the "outside counsel" account and then tailor a follow-up request to seek records specific to transactions of particular interest.

The matter is remanded to DCPS for action not inconsistent with this decision. DCPS should provide the OCFO printout of legal vendors and amounts paid as shown in the "outside counsel" account within 10 days of the date of this letter. Otherwise, DCPS should complete the search and produce responsive records, as provided in this decision, within 30 days of the date of this letter. As the appellant, you may write this office at any time, with a copy directed to DCPS' FOIA officer, to report any alleged failure on the part of the agency to comply with this directive.

As the appellant, you are free under the FOIA to commence a civil action against the District of Columbia government at any time in the District of Columbia Superior Court, without awaiting the outcome of DCPS' production in response to this ruling.

Sincerely,


Leonard H. Becker
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cc (by e-mail):

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Deputy General Counsel, DCPS

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