

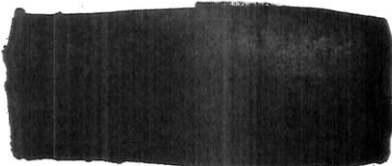
GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

November 29, 2006

BY HARD COPY AND E-MAIL



Re: Freedom of Information Act Appeal

Dear 

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act (the "FOIA"), D.C. Official Code § 2-531 *et seq.* (2001 & 2006 Supp.), dated November 6, 2006, and received in this office initially on November 14, 2006. On the latter day, we requested by e-mail that you forward directly to this office copies of the attachments that you had included in your letter addressed to the Office of the Secretary of the District of Columbia. We received the attachments by facsimile on November 15, 2006, and accept your appeal as of that date. Also on that date, we forwarded a copy of your administrative appeal to the respondent agency, the District of Columbia Public Schools ("DCPS").

In your initial FOIA request to DCPS' FOIA officer, made in an e-mail dated August 28, 2006, you sought the following:

- "1. [T]he name and location of all schools in the District of Columbia that have cell towers located on school buildings or any where on their property.
- "2. The Company (ies) that have leased school space for these towers.
- "3. Names of the official(s) who negotiated the lease(s).
- "4. Minutes of School Board or other Meetings where the lease(s) were approved.
- "5. Copies of written notification provided to the affected communities."

In your e-mail, you continued:

"In addition, I would like the above documents for the cell tower installed at the front door of [REDACTED] elementary School [REDACTED] SE) the week of August 21-25. Copies of permits for the installation. Description of the efforts made, and by who[m], to inform and involve[] the affected community."

In a reply erroneously dated July 12, 2006, and apparently sent September 13, 2006, DCPS: (i) provided records in response to your first two numbered requests; (ii) identified, in response to your third numbered request, the Army Corps of Engineers "as consultants to the Office of Realty for the purpose of negotiating all such contracts"; (iii) explained, in response to your fourth request, that no provision in the District government's regulations requires the Board of Education's approval of use or license agreements; and (iv) acknowledged, in response to your fifth request, that no written notification had been provided affected communities. The DCPS in its response did not address your inquiries relating to [REDACTED] Elementary School.

On September 13, 2006, you replied to the FOIA officer, thanking her for her response and expanding on your numbered requests 3 and 4 in pertinent part as follows:

"Question 3. . . . [i] I am requesting a copy of the signed written lease agreement for the tower at [REDACTED]

"Question 4. . . . [If the undertaking was the plan of a single individual, without discussion concerning the use of school property,] . . . [ii] I would like the name and job title of that individual. [iii] Additionally, please include the name and location of the consultants from the Army Corps of Engineers, and [iv] copies of the signed contract negotiated with Sprint related to the installation of the tower at ML King and [v] signed contracts for any other installations for towers in SE schools.

"Also, please note in the second part of my FOIA, I request the following for [REDACTED] Elementary:

" [vi] Copies of permits for the installation.

" [vii] Description of the efforts made, and by who[m], to inform and involved[] the affected community" (bracketed Roman numerals added).

From the documentation that you have provided in support of your FOIA administrative appeal to the Mayor, it does not appear that you received a response from DCPS to your September 13, 2006 e-mail.

On October 22, 2006, you addressed an e-mail to the Office of the Secretary, requesting assistance in obtaining a response to your outstanding inquiries to DCPS. It is unclear whether the Secretary received your e-mail. At any event, it appears that you did not receive a response from the Secretary's office.

On November 6, 2006, you wrote a letter to the Office of the Secretary, noting your appeal from DCPS' failure to respond to your second FOIA request. A copy of your

letter, addressed to the Mayor, was forwarded to this office, to which the Mayor has delegated authority to resolve administrative appeals to the Mayor under the FOIA. In your letter, you note that your follow-up inquiries addressed to the DCPS Superintendent and the agency's FOIA officer have not produced a substantive response from the agency.

On November 28, 2006, we received DCPS' response to your administrative appeal and on the following day, a corrected response. By its letter, DCPS provided you a copy of the signed written lease agreement for the tower at [REDACTED] Elementary School. DCPS did not address other aspects of your FOIA 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," the actions of which 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 limitations, in the form of specified exemptions from the disclosure requirement.

It appears that DCPS has provided the record responsive to your request no. [i]. In addition, we conclude that DCPS should provide any records in its possession that contain information responsive to your requests in categories that we have numbered [iii], [iv], [v], and [vi]. DCPS may withhold records, or portions of records, under one or more of the statutory exemptions only upon a clear marking or identification of the records (or portions) showing the deletions and an identification of the exemption or exemptions relied upon in making those deletions. DCPS may assess fees associated with the retrieval, review, and reproduction of responsive records to the extent provided in the FOIA.

DCPS need not respond to requests number [ii] and [vii], which are in the nature of interrogatories requiring the agency to create written responses.

DCPS is requested to produce records responsive to your requests as provided in this directive within 30 days of the date of this letter. If you are dissatisfied with any aspect of DCPS' response to this letter order, you may write this office again, with a copy to the DCPS FOIA officer, setting forth the reasons for your dissatisfaction.

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  
General Counsel, EOM

cc (by e-mail):

Erika Pearson  
Deputy General Counsel, DCPS

Karen Jones Herbert  
FOIA Attorney-Advisor, DCPS

Clifton Posey  
Office of Documents and Issuances  
Office of the Secretary, District of Columbia