

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-210**

January 27, 2023

VIA ELECTRONIC MAIL ONLY

Mr. Harry Gural

RE: FOIA Appeal 2022-210

Dear Mr. Gural:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the District of Columbia Housing Authority (“DCHA”)

Background

On April 1, 2022, you submitted a DC FOIA request to DCHA which sought the following:

1. Any agreement, formal or informal, including by not limited to Housing Assistance Payments Contracts, between DCHA and Smith Property Holdings Van Ness or Equity Residential, pertaining to the property at 3003 Van Ness Street, NW.
2. The aggregate number of residents supported by DCHA vouchers in calendar years 2015, 2016, 2017, 2018, 2019, 2021, and 2022, broken down by program (e.g., Housing Choice, Housing First, etc.) and by provider (e.g., via DCHA, DHS, another agency, or non-governmental nonprofit, etc.).
3. A list of current rents paid to Equity Residential or Smith Property Holdings for apartments at 3003 Van Ness using DCHA vouchers or any other DCHA funding, including the total rent received by the landlord, the amount paid by DCHA, and the number of bedrooms.

DCHA responded to your request on April 19, 2022 by advising you that after a search of the applicable agency records it did not have any responsive documents. DCHA also stated Housing Choice Voucher Program (“HCVP”) rental rate information is publicly available on the Landlord Section of the DCHA website and, while DCHA does not keep a historical record of HCVP rents, this information may be found in the Department of Urban Development’s Fair Market Rent Documentation System. Further, DCHA explained that it is not required “to

conduct research for requesters, answer written questions, or in any other way create records (such as lists or statistics) to respond to a request.”

On August 22, 2022, you filed an appeal with this Office asserting “it does not seem plausible that DCHA has no records of how many vouchers it processes at a specific address and at what cost.”

We notified DCHA of your appeal on September 16, 2022 and requested a response. DCHA responded on September 19, 2022 reiterating “it does not have any Housing Assistance Payments Contracts (HAP) with entities named “Smith Property Holdings Van Ness,” “Smith Property Holdings,” or “Equity Residential” for apartment units located at 3003 Van Ness St NW, Washington, DC 20008.” DCHA also noted that request #2 “was not for a document, but for DCHA to answer a question concerning voucher quantities” and “staff did not find a document responsive to this question and FOIA does not require DCHA to create or generate new records to conform to [your] FOIA request if no such records already exist.”

Discussion

It is the public policy of the District of Columbia 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. Code § 2-531. In aid of that policy, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body” D.C. Code § 2-532(a).

DC FOIA was modeled on the corresponding federal Freedom of Information Act. See *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. See *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Adequacy of the Search

In determining whether an agency conducted an adequate search in response to a records request, the test is not whether documents might conceivably exist, but whether the agency’s search for responsive documents was adequate. See *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).

In this instance, DCHA has indicated that it “thoroughly searched the applicable agency records”, and did not locate any responsive documents. In the absence of anything more than speculation in the record, this explanation is generally accepted. However, DCHA’s response filed with this Office has raised an issue that needs to be addressed. Specifically, in response to your appeal, DCHA stated the following:

In regard to questions 1 and 3, DCHA reiterates that it does not have any Housing Assistance Payments Contracts (HAP) with entities named “Smith Property Holdings Van Ness,” “Smith Property Holdings,” or “Equity Residential” for apartment units located at 3003 Van Ness St NW, Washington, DC 20008.

With regard to request #1 this response suggests DCHA might have only searched for Housing Assistance Payments Contracts, while you specifically requested “any agreement” between DCHA and the named entities pertaining to the referenced property. For this reason, a remand to the agency is appropriate to clarify the search that was performed and to confirm this search was not limited solely to Housing Assistance Payments Contracts. Finally, DCHA is correct that your request #2 is not phrased as a document request and you are encouraged to revise and resubmit this portion of your request to DCHA if appropriate.

Conclusion

Based on the foregoing, we remand this matter to DCHA to clarify the search performed and to take any additional action necessary, if any. The remainder of your appeal is denied.

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 in Superior Court of in accordance with D.C. Official Code § 2-537.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Kimberly J. August, DCHA FOIA Officer (via email only)