

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



January 29, 2016

VIA ELECTRONIC MAIL

Commissioner Mark Eckenwiler
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VIA ELECTRONIC MAIL

Ms. Melinda Bolling, Director
Department of Consumer and
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RE: OOG-002_1.29.16_AO

Dear Commissioner Eckenwiler:

The Office of Open Government (OOG) is in receipt of your October 15, 2015, request for a Freedom of Information Act (FOIA) advisory opinion concerning Department of Consumer and Regulatory Affairs (DCRA) compliance with the mandatory disclosure requirement of local FOIA. At issue is D.C. Official Code § 2-536(a)(8A) which states: “[a]ll pending applications for building permits and authorized building permits, including the permit file”; and D.C. Official Code § 2-536(b) requiring such files to “...be made available on the Internet.” The foregoing non-binding opinion is issued by the OOG, pursuant to § 503(a)(4) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593 *et seq.* (2016), granting the OOG the authority to issue opinions on the implementation of Subchapter II, D.C. Official Code § 2-531 *et seq.* (2016) Freedom of Information Act.

Background

On October 15, 2015, Commissioner Eckenwiler sought from DCRA a copy of the permit file B1505521, 625 5th Street NE.¹ Contrary to the requirement that all building permit files be supplied on the DCRA website without the necessity for a FOIA request, DCRA concedes that such records are not published to dcra.dc.gov.² Commissioner Eckenwiler was required to submit

¹ 10.15.15 M. Eckenwiler email to OOG Director, Traci Hughes, seeking a formal advisory opinion regarding DCRA compliance with D.C. Official Code § 2-536.

² DCRA does provide some information on its Property Information Verification System (PIVS) website, such as the description of issued permits, and the status of the permits. PIVS does not provide permit files. *See*, <http://pivs.dcra.dc.gov/PIVS/Results.aspx> (last accessed 12.16.15).

a Records Request Form, requiring all requestors to “[C]ontact the copier to arrange for payment of documents.”³ The Records Request Form for the 2015 permit file was submitted⁴ on October 19, 2015, and was provided to the requestor on November 19, 2015. The record was provided to Commissioner Eckenwiler at no cost.⁵

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.” DC Official Code § 2-531. District of Columbia FOIA creates the right “to inspect...to copy any public record...” *Id.* at § 2-532(a); and conveys the right of the public to inspect and copy certain public records without the necessity of a FOIA request. *Id.* at § 2-536(a). It is mandatory that such records be disclosed by all District agencies, and made available on agency websites. *Id.* at § 2-536(b). Among others, the categories of information that must be made available to the public include, “All pending applications for building permits and authorized building permits, including the permit file.” *Id.* at § 2-536(a)(8A).

The DCRA does not dispute that its pending applications for building permits and approved building permits cannot be found on the agency’s website. The OOG finds that DCRA is not in compliance with District FOIA, and must therefore make all records created on or after November 1, 2001, available to the public on its website.

Recommendations for Compliance With FOIA

The determination that DCRA is woefully out of compliance with FOIA is not novel or in controversy, but it must be noted that agency leadership and staff have been transparent⁶ and the OOG is of the opinion that the current state of non-compliance is not willful.

In order to fully inform this opinion, a necessary review of internal operations revealed systemic failures which have coalesced and resulted in DCRA’s inability to conform with D.C. Official

As required under D.C. Official Code § 2-536(a)(8A)and(b), and supported by Mayor’s Order 2014-17, DCRA does maintain an *Open Government and FOIA* link under the About DCRA tab <http://dcra.dc.gov/page/open-government-and-foia-dcra> (last accessed 12.16.15). The URL does provide a link to a Building Permits List, but the link directs the user to permits applied and issued between May 1, 2014 and May 21, 2014. The OOG finds that although the tab is populated, it does not contain all records which must be mandatorily provided to the public.

³ Fee payments are paid directly to the copier service provider, not the District of Columbia Treasurer, nor to DCRA.

⁴ The request form was submitted by Joel Kelty on 10.19.15 on behalf of M. Eckenwiler, et al.

⁵ 12.17.15 M. Eckenwiler email to OOG Director, Traci Hughes, indicating than the director of DCRA “instructed the Acting Deputy Building Official to prepare a copy (which he did promptly and at no charge).”

⁶ On 12.16.15, the director of OOG, Traci Hughes, met with officials DCRA officials (Runako Allsopp, Assistant General Counsel; Kevin Edwards, Director of Office Information Systems; Herbert Williams, Computer Specialist; and Brandon Bass, FOIA Officer) to discuss DCRA’s internal FOIA process and impediments to compliance.

Code § 2-536. The OOG would be remiss in its advisory capacity if it did not herein address the internal process and offer recommendations for compliance. Training and infrastructure investment are the key critical outcomes required to bring the agency into compliance.

Director Melinda Bolling should be credited for her openness in making her staff available to answer questions about the agency's non-compliance with FOIA.⁷ DCRA personnel were candid about the need for training⁸ and the antiquated IT infrastructure, especially the rigid legacy systems it must first address to enable the publication of large-scale building permit records (including blue prints and other architectural records) on the agency's website.

Technology and Process⁹

There are two legacy document management systems which impact compliance with FOIA: FileNet and ProjectDox. FileNet contains all approved and supplemental permits. ProjectDox is an entirely online system used for submitting building permit applications and plans. FileNet contains records submitted to DCRA prior to 2013, and ProjectDox contains records submitted to DCRA 2013 to present.¹⁰ All building plans are processed through ProjectDox.

All pending permits are maintained at DCRA, and may or may not be available if the permits and corresponding documents are sent back to engineers for corrections. Pending documents may be submitted via ProjectDox, or they can be filed in person with DCRA, depending on the size of renovations. Small projects can be submitted via ProjectDox and reviewed in one day.

⁷ On 12.15.15, the director of OOG, Traci Hughes, spoke to the Director of DCRA, Ms. Melinda Bolling. Ms. Bolling conceded non-compliance, but stated that no one on her staff was aware of the requirement of mandatory disclosure of pending and authorized building permits under FOIA. The OOG respectfully accepts the explanation, but finds it unpersuasive. Prior to her appointment as director, Ms. Bolling served as DCRA General Counsel. Historically, DCRA has been among the top three agencies in the District to receive the highest number of FOIA requests (See, <http://os.dc.gov/page/annual-reports>). Given the volume of requests, it is inescapable that an agency general counsel would not be keenly aware of the provisions of FOIA. Further, DCRA provided its Open Government Report 2014 as acknowledgement to Mayor's Order 2014-170. See, http://dcra.dc.gov/sites/default/files/dc/sites/dcra/page_content/attachments/open_govt_report2014.pdf (last accessed 1.27.16), requiring agencies to comply with the mandatory disclosure of certain categories of records.

⁸ On 12.16.15, DCRA FOIA Officer, Brandon Bass, also claimed to have no knowledge of the mandatory disclosure requirement. The OOG finds Mr. Bass' claim implausible, as Mr. Bass has attended two FOIA trainings conducted by OOG Director, Traci Hughes, which includes the categories of documents which must be mandatorily disclosed under D.C. Official Code § 2-536.

⁹ DCRA provides on its website Standard Operating Procedures for its Permit Operations Division in compliance with D.C. Official Code § 2-536(a)(2). The document, dated May 2013, provides a description of six permit tracking, storage, filing, intake, and document queue systems. (See http://dcra.dc.gov/sites/default/files/dc/sites/dcra/page_content/attachments/DCRA_SOP_Part1.pdf (last accessed 1.27.16). This opinion addresses only two systems, FileNet and ProjectDox, as each were discussed during the 12.16.15 meeting. Additional information regarding DCRA technology and processes were provided during the meeting with aforementioned DCRA personnel.

¹⁰ As characterized in the 12.15.15 meeting with DCRA personnel.

Issued permits are maintained on the DCRA website in accordance with the agency's three-year record retention policy. Permits older than three years are archived at facilities in Suitland, MD and in Boston.¹¹ Requests for copies of drawings and plans attendant to authorized permits which are less than three years old are sent to Blue Boy Printing Corporation (Blue Boy).

It is the absence of these drawings and plans on the DCRA website which require resolution. DCRA not only fails to provide copies of such blueprints, but also fails to publish the records online because it does not have the equipment necessary to make copies and/or digitize such large-scale records. DCRA has no input regarding pricing or ultimate costs incurred by requestors.

Blue Boy charges requestors \$0.15/square foot; \$0.50/page to scan, with a minimum charge per job of \$15.90.¹² Fees are paid directly to Blue Boy, rather than the D.C. Treasurer as required under 1 DCMR § 408.7. The agency informed OOG that payments to Blue Boy are not tracked. In addition, no documentation was provided to the OOG as to how long these improperly required FOIA requests have been outsourced to a fee-for-service third party. As of January 14, 2016, there were no contracts on file with the Office of Contracting and Procurement between Blue Boy and DCRA.¹³

Findings and Recommendations Regarding DCRA's Internal Processes Impacting FOIA

FILENET AND PROJECTDOX

The DCRA finds itself in a predicament that is not unusual to District Government agencies: Legacy systems are inherited containing dated government records; new systems are built using technology and platforms which do not pull in data from the old systems, while managing the new data which is generated daily. It is clear that the FileNet and ProjectDox platforms are not interoperable. DCRA IT personnel inform the OOG that the cost of migrating all documents, including scanning large building plans, blueprints, etc. from years 2013, 2014 and 2015 will be completed by the end of Fiscal Year 2016, and requires more than one million dollars to be

¹¹ It is unclear to OOG if the archives are of hard copy documents only, and/or whether electronic files are archived within FileNet and ProjectDox under the same archival schedule. The request of OOG for clarification of which vendor, if any, handles the archival process for DCRA has gone unanswered. A general listing of building permits may be found in pdf format on the DCRA website at <http://dcra.dc.gov/page/building-permits> (last accessed 1.27.16), but is for permits from 5/1/2014 – 5/21/2014. The OOG is informed by DCRA, however, that regular building permit listings are emailed from the DCRA general counsel's office to Advisory Neighborhood Commissions in a searchable .csv file.

¹² 1.8.16 B. Bass email to OOG Director, Traci Hughes, in response to a question about the charges imposed by Blue Boy Printing, Corporation.

¹³ In the 1.8.16 email from Brandon Bass to Traci Hughes, Mr. Bass stated: "Blue Boy does not have a contract with the District as they do not provide services for the District. Coincidentally, a lot of employees refer to them as a "vendor" but by definition they actually are not. The services they provide are strictly for outside customers as the agency does not have the resources (both equipment and manpower) to make the volume copies at the rate they are requested. Blue provides pick up service from the agency and copies documents separate and apart from the agency."

allocated from DCRA's capital budget to upgrade the system, and migrate all data. Additionally, DCRA is met with the very significant challenge of managing the volume of data, and the strain on server capacity to comply with FOIA and District Government document retention standards as set out in 1 DCMR § 1500 *et seq.*

The DCRA informs the OOG that nearly a million critical land records must be incorporated into FileNet, in addition to merging all data housed within ProjectDox. By conservative standards, this will require DCRA to secure server capacity to accommodate two terabytes of data every year. Although the OOG has no say or influence regarding the needed budget allocation to merge both systems, and the necessary capacity to main such systems, it is highly recommended that DCRA receive funding to remedy this issue, as the data are increasing exponentially each day.

The OOG strongly advises that DCRA ensure any systems settled upon are interoperable, have the appropriate user-friendly interfaces for both external and internal access, and that any vendor in place to assist with the building of such systems and the migration of data does so in a manner that guarantees DCRA maintains and retains ownership of the data at all times.

BLUE BOY PRINTING CORPORATION

The OOG finds the payment of fees to Blue Boy for improperly required FOIA requests to be most egregious. DCRA is requiring the public to pay a third party, with whom it has no contractual relationship, to serve as the conduit for the inspection of public records which are (1) legally required to be disclosed on the DCRA website; and (2) must be made available for inspection without the necessity of a FOIA request, and therefore, free of charge.

Until DCRA secures the necessary IT infrastructure to intake, store, and produce large-scale documents to the public as required under D.C. Official Code §§ 2-536(a)(8A) and 2-536(b), the agency is advised to immediately procure these services in accordance with the provisions of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*).

Conclusion

In light of the findings in this opinion, the OOG recommends an extremely aggressive agency-wide FOIA education and training program be implemented by DCRA. Further, the OOG is compelled to remind DCRA that annual training of all District Government Agency FOIA officers is mandatory under D.C. Official Code § 2-538(d) and 1 DCMR § 401.4.

Sincerely,

//s//

TRACI L. HUGHES, ESQ.
 Director, Office of Open Government
 Board of Ethics and Government Accountability

Cc: Brandon Bass, FOIA Officer
Department of Consumer and Regulatory Affairs