

THE CENTER FOR MEDIA AND DEMOCRACY'S

PRWatch

May 5, 2016

Agency Administrator
U.S. Department of Education
Office of Management
400 Maryland Avenue, SW, LBJ-2W311
ATTN: FOIA Appeals
Washington, DC 20202-4500
(also transmitted via email)

Re: Freedom of Information Act Appeal on Requests: No. 16-00659-F
No. 16-00660-F
No. 16-00661-F

Dear Administrator:

This is an appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

On January 13, 2016, the Center for Media and Democracy sent three FOIA letters requesting records from the U.S. Department of Education.

On April 14, 2016, your agency denied our requests on the basis that it was “unable to locate any documents that were responsive to your requests.”

Copies of our requests and your denial are attached.

This letter is appealing that decision, on the grounds that the search for documents responsive to our requests must have been inadequate.

The records we requested all relate to data that was explicitly referred to in an article written and released by the U.S. Department of Education's Office of Innovation & Improvement on December 23, 2015, titled “A Commitment to Transparency: Learning More About the Charter Schools Program.” That release can be found at <http://innovation.ed.gov/2015/12/23/a-commitment-to-transparency-learning-more->

about-the-charter-schools-program/, and we have attached a copy, for your convenience.

Your agency's article described the Department's "commitment to transparency," and released a dataset of \$1.5 billion in grants awarded since 2006 "for the planning, initial implementation, and replication of public charter schools across the nation, as well as for dissemination and expansion." That dataset, however, did not contain information necessary to support the article's breakdown of funding between operational, closed, and prospective schools.

The article stated that, "The dataset released today draws from numerous sources to provide a comprehensive overview of CSP data." Yet your agency claims to be unable to locate any of those sources in response to our FOIA requests.

Similarly, an accompanying analysis linked to from your agency's article lists as data sources the "CSP Grantee Annual Reporting Data," covering the period 2006 through June 2015 and including grant award amounts and types, and the "G5," which has grant award data from 1995 to 2015. <http://www2.ed.gov/programs/charter/cspdata.pdf>.

We sent our FOIA requests referencing the terms used in your agency's article just three weeks after the Department published the article, yet the Department claims to have no records responsive to those requests.

It strains credulity and common sense that, despite spending billions in taxpayer dollars on charters and putting out this press release—among several—on the accomplishments of the Charter Schools Program, the Department claims to have no databases, no data analyses, and no internal communications about the program mentioned in its press release and charters that received funds but closed or never opened, nor any external communications with charter school grant recipients about the success or failure of those charters.

The Department's article states that, "CSP planning and startup capital facilitated the creation of over 2,600 charter schools that were operational as of SY 2013-14; approximately 430 charter schools that served students but subsequently closed by SY 2013-14; and approximately 699 "prospective schools." Yet the Department claims that it was unable to locate any lists of what schools those are, how much federal funding they received, or any correspondence or other records relating to that data.

Similarly, the Department claims that it has no records relating to an assessment of the suitability or eligibility for financial support of "prospective schools" and no correspondence regarding charter schools that closed or never opened.

Accordingly, the search conducted by the Department of Education's Office of Innovation & Improvement for records responsive to our requests must have been inadequate.

As you know, when a requester is dissatisfied with an agency's response to their request that no records have been found, that requester "may wish to challenge the adequacy of the agency's search." *Oglesby v. Dept. of Army*, 920 F.2d 57, 67 (D.C. Cir.

1990). While the search does not have to be perfect, it does need to meet a reasonableness standard. *SafeCard Servs., LLC v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

Our FOIA requests cannot be denied because we did not use the precise bureaucratic jargon used by the agency to describe the records internally, especially when we relied on the terminology used by the Department in its release to the public as part of its PR campaign and explicitly referenced that release. The nature and purpose of our requests were perfectly clear in the context of the Department's article and dataset release, and the requests used key words and phrases that came directly from the Department's release.

An agency performing a search for records based on a request must construe that request liberally. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). This mandate absolves requesters from being required to use "precise jargon employed by agency officials," as these officials should generally understand what information the requester is asking for. See *Nicholls v. U.S. Office of Personnel Mgmt.*, No. 11-1654 (JEB) (D.D.C. May 29, 2012).

As part of this appeal, we request information about who conducted the search for the Department, using what means, and searching what scope of documents.

Federal agencies are bound by strong ideals of transparency; an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby*, 920 F.2d at 68. Further, it is reasonable that specialized database or electronic searches may be required in the fulfillment of a request. *People for the Am. Way Found. v. U.S. Dept. of Justice*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006).

The agency's press release that was the predicate for our requests was entitled a "commitment to transparency," yet the Department has failed to fulfill this commitment by providing a single record relating to the data it touted in that PR document.

The existence of the records requested is not speculative, nor is their discoverability speculative. Our FOIA request number 16-00659-F asked for records relating to planning and startup funding for closed and prospective schools, and a list of closed or never opened charter schools. The Department referred to specific funding, and a specific number of closed and prospective charter schools, in its December 23 article. The Department made clear in this article that it had this information dating back to at least 2006. The Department must have an accurate list of closed and prospective charter schools as well, as they provided precise numbers of these types of schools in their December 23 article.

Our FOIA request number 16-00660-F asked for records relating to the suitability or eligibility for financial support of prospective schools. It would be shocking if it were merely speculative to assume that the Department has criteria that it uses to evaluate funding of prospective schools. This is especially true, considering that the Department has stated that "CSP funding is intended for operators best positioned to open high-quality schools . . ." Records relating to the evaluation of those criteria with respect to

closed and prospective schools could be easily compiled based on the list referenced above.

Our FOIA request number 16-00661-F asked for all agency communications relating to closed or prospective schools funded through the CSP. Again, it is clear that this information must exist. The Department has referred to specific amounts of funding that have flowed through specific CSP programs to those schools. It is not speculative to presume that the Department communicated with those schools or about them.

While the Department thought it best to assign these requests for information to the Office for Innovation & Improvement—which has a very close and uncritical relationship with the charter school industry—it must still make an effort to locate this information elsewhere if it is likely to exist elsewhere. The Department also has a duty to conduct a specialized electronic search if necessary.

For all of the above reasons, it appears that the Department has failed to conduct an adequate search in response to our FOIA requests.

We trust that, upon reconsideration, you will reverse the Department's decision and provide us with the requested records and do so expeditiously.

To the extent that some of the records are electronic databases, those records need to be provided in a readily usable and searchable electronic format.

As we have made these FOIA requests in our capacity as investigative journalists, and this information is of timely value, we would appreciate your expediting consideration of this appeal in every way possible. In any case, we will expect to receive your decision within 20 working days, as required by the Freedom of Information Act, 5 U.S.C. § 552 (a)(6)(A)(ii). If this appeal is denied, the Department is required to provide a written response describing the reasons for the denial and the procedures for judicial review for the determination. *Id.*

We intend to initiate a lawsuit to compel disclosure if the response to this appeal is not adequate.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Arn Pearson". The signature is written in a cursive, flowing style.

Arn Pearson
General Counsel