

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-47**

March 24, 2015

VIA ELECTRONIC MAIL

Mr. Alan Gambrell

RE: FOIA Appeal 2015-47

Dear Mr. Gambrell:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA") dated March 6, 2015, which this office received on March 11, 2015. In your appeal, you assert that the Department of Consumer and Regulatory Affairs ("DCRA") improperly withheld records you requested under the DC FOIA.

Background

On January 16, 2015, you submitted a request under the DC FOIA to the DCRA seeking "emails, drawings, plans, permit requests, permit approvals, telephone records, and visual voicemails regarding the building permits, issuance of a Stop Work Order on or about late November to early December 2014, and lifting of the Stop Work Order on 1636 Argonne Place, NW, Washington, DC, on or about December 19, 2014." You then made five (5) specific requests related to calculations used to determine the Floor Area Ratio and Lot Occupancy for 1636 Argonne Place, NW ("Property").

The DCRA responded to your request on March 3, 2015. In its response, DCRA provided you with a copy of the stop order you requested and advised that the information you sought pertaining to permits, drawings, permit requests, permit approvals and plans is publicly available at the DCRA Permit Center Records Room ("Records Room"). DCRA further provided you with the address and phone number of the Records Room.

On appeal, you challenge the DCRA's response to your request, contending that the response does not address information you are seeking, despite the fact that it is specific in terms of format, dates, and parties, and that although FOIA states that building permits and building plans are available from the DCRA Records Room, "such information is still not available from DCRA."

DCRA responded to your appeal in correspondence to this office dated March 16 and 23, 2015. The DCRA stated that as of March 13, 2015, you have obtained from the Records Room the

permit file for B1409228 and the first 17 pages of the permit file for B1404813.¹ DCRA explained that some of the information you are seeking has not yet become available in the Records Room because the agency is in the process of converting its permits and plans to digital format, and large format plans and documents for permits like B1404813 and B1409228 have not yet been scanned. According to DCRA, in these instances members of the public have the option of requesting that an authorized third party printing service retrieve specific plans and print copies at the requester's expense. DCRA stated that you have already done this for a number of documents. By way of further explanation, DCRA's assistant general counsel noted that "Since DCRA is in the process of converting to all-digital submissions, it may be that the DCRA Records Staff assumed that the permit and plans had been a hard copy submittal, and so were not able to retrieve the digital file. I will confirm if there are any additional plans in digital format, and if so, will submit them to Mr. Gambrell."

With regard to building permit application B1502210, DCRA indicated that the Records Room staff correctly informed you that this permit has not been issued because of an outstanding invoice. Once the fee is paid, the permit will be issued and the plans will be made publicly available in the Records Room.

DCRA addressed your contention that you have been denied specific calculations and specific information used to arrive at determinations as follows:

. . . FOIA provides for release of records, not "specific calculations" or "specific information" as requested by Mr. Gambrell, unless included in a record. For this reason, no records have been identified that respond to Mr. Gambrell's requests – except for emails referred to below. No records correspond to Mr. Gambrell's request because under the building and zoning permitting process, applicants are responsible for submitting plans and supporting documentation sufficient to enable the Zoning Administrator to confirm compliance with the Zoning Regulations. The Zoning Administrator therefore refers to, and uses, an applicant's plans and supporting documents in determining if the proposed project conforms with the Zoning Regulations, with any calculation based on the measurements included in the plans and documents. The "formulas" used to calculate various zoning requirements are based on the Zoning Regulations (Title 11 of the DCMR) and generally do not require an additional interpretive "formula" – for example the inclusion of a "basement" but not a "cellar" in the calculation of FAR (floor area ratio) is based on the definitions of "basement", "cellar", "gross floor area" and "floor area ratio", all in 11 DCMR 199.1. As a result, there is generally no separate "record" of a calculation used to determine if a particular proposed project conforms to the Zoning Regulations,

¹ DCRA indicated that only the first 17 pages of the permit file are available in the Records Room, and, as a result, the agency will be mailing you a hard copy of the entire permit file.

since the evidence of compliance is in the plans and documents submitted with the building permit application.

Lastly, with respect to the emails you are seeking related to the stop work order, DCRA acknowledged that it inadvertently failed to respond to this aspect of your request and stated that it is in the process of compiling responsive email messages to produce to you.

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.” D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body ...” *Id.* at § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute may be examined to construe the local law.

Your appeal consists of requests for three types of records: building permits and plans, calculations, and emails. Building permits and plans are publicly available in the DCRA’s Records Room, and to date you have obtained some of the information you are seeking from the Records Room. Because DCRA is in the process of converting its permits and plans to digital format, some of the information you have requested has not yet been scanned; however, the agency’s assistant general counsel has indicated that he will review the files to determine if any additional plans in digital format exist that you have not yet obtained, and he will provide these to you.

In your appeal you maintain that the specific calculations you have requested are not available in the Records Room and that DCRA has “fail[ed] to respond to FOIA request for information that serves as basis for administrative determination as documented in agency emails and calculation forms.” Under the DC FOIA, an agency is required to disclose materials if they were “retained by a public body.” D.C. Official Code § 2-502(18). In *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989), based on its prior decisions, the Supreme Court set forth two requirements that must be satisfied for records to qualify as “agency records”: first, an agency must either create or obtain the materials, and second, the agency must be in control of the requested materials when the FOIA request is made.

As DCRA explained at length in its response to your appeal and relayed in page 3 of this correspondence, there is generally no record of a calculation used to determine whether a particular proposed project conforms to the Zoning Regulations, “since the evidence of compliance is in the plans and documents submitted with the building permit application.” In other words, if written calculations of the nature you are seeking exist, they would be contained in the permit files that have been or will be made available to you. The DCRA has not withheld

any calculations from you; they are maintained as agency records in the permit files in the Records Room or they do not exist in writing for the reasons described above in DCRA's response to your appeal.

Lastly, with respect to the emails you have requested, DCRA has acknowledged that it has not yet produced these and is in the process of compiling them to be released.

Conclusion

Based on the foregoing, we hereby issue the following decisions:

- (1) With respect to the building permits and plans that you have requested, we remand this aspect of your appeal to the DCRA to determine what has not yet been produced to you and to make these records available within five business (5) days of the date of this decision;
- (2) With respect to your request for specific calculations and information used to arrive at zoning determinations, we uphold the decision of the DCRA on the grounds that any responsive written records that exist are or will be made available in the Records Room; and
- (3) With respect to the emails you are seeking, DCRA shall produce them to you, subject to appropriate exemptions under the DC FOIA, within five business (5) days of the date of this decision.

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 government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s/ Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor's Office of Legal Counsel

cc: Maximilian L.S. Tondro, Assistant General Counsel (DCRA)