GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

Mayor's Office of Legal Counsel

September 20, 2017

VIA ELECTRONIC MAIL

Mr. William Matzelevich

RE: FOIA Appeal 2017-147

Dear Mr. Matzelevich:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In your appeal, you challenge the response you received from the Department of General Services ("DGS") to a request you submitted under the DC FOIA.

Background

On July 19, 2017, DGS received a six-part FOIA request you submitted for records relating to the "Hearst Park & Pool Project."

On September 1, 2017, DGS granted your request in part, providing you with documents. Portions of some of the documents were redacted.

You appealed DGS's response by letter dated September 5, 2017. Your appeal lays out four examples of where you believe DGS's production was insufficient. Primarily, your appeal argues that the records you received indicate that additional records exist that DGS did not provide you. Additionally, your appeal contends that the redactions DGS made to one email were not labeled with an exemption.[1]

This Office notified DGS of your appeal. DGS responded to this Office and explained that some of the attachments that your appeal asserts were not part of its September 1, 2017 production were actually produced. DGS further represented that it identified several additional responsive documents on subsequent searches and will be providing them to you. Additionally, DGS's response indicated that "the Agency requested names of DGS employees and search terms for a general search, Mr. Matzelevich did not provide names nor search terms. DGS was unable to submit an OCTO search for emails without requested information."

[1] DGS's response indicates this redaction was made pursuant to D.C. Official Code § 2-534 (a)(4). Your appeal appears to challenge only the labeling and not the redaction itself, such that this decision will not address the issue further.

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 . . ." D.C. Official Code § 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. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18).

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). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Adequacy of the Search

We have interpreted your appeal as challenging the adequacy of DGS's search for the records you requested – as you cite specific examples of email attachments that you believe should have been included in DGS's production but were apparently not. DC FOIA requires that a search be reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *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).

To conduct a reasonable and adequate search, an agency must make a reasonable determination as to the locations of records requested and search for the records in those locations. *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). This first step may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.*

DGS did not satisfy the first element of conducting a reasonable search here because it failed to determine which record repositories were likely to contain responsive documents (i.e. which email accounts should be searched). Instead, DGS improperly shifted the burden to you by refusing to conduct a search until you identified the government employees associated with the records you sought. When you did not respond with email addresses, it appears that DGS instead gathered a collection of documents solicited from one employee. This was inadequate. Your request as submitted was not overly broad or vague, and DC FOIA does not require a requester to know the names of agency employees in order to request their email communications. *See* FOIA Appeal 2017-47. *See Fraternal Order of Police v. District of Columbia,* 139 A.3d 853, 863 (D.C. 2016) ("there is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request.")

It was DGS' responsibility to make a determination as to where the requested documents were likely to be located – a responsibility that can be met by identifying agency employees in the relevant programs and making inquiries about the nature of document creation and retention in those programs. *See* 1 DCMR § 402.5;[2] s*ee also Truitt v. Dep't of State*, 897 F.2d 540, 545 n. 36 (D.C. Cir. 1990) (quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess. at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271)). (finding a request to not be vague when "a professional employee of the agency who [is] familiar with the subject area of the request … [could] locate the record with a reasonable amount of effort."). Absent your direction to search a specific government employee's email account, DGS should have made an effort to identify the relevant programmatic DGS employees who were likely to have communicated about the subject of your request. As a result, we find that by not conducting an email search through the Office of the Chief Technology Officer, DGS did not conduct an adequate search for the portion of your request that sought "all communications between DGS" and enumerated individuals and organizations.

Specific Challenges

On appeal you have made four specific challenges to the adequacy of DGS's production. As previously discussed, we find that DGS's search for email correspondence was inadequate and that the agency must conduct another search. We shall also address the four specific challenges raised by your appeal.

First, you challenged that DGS did not provide "The Phase 1 Archeological Survey" in its September 1, 2017, production. DGS's response indicates that after receiving the appeal it conducted an additional search and has since located and provided to you a document titled "Hearst Park and Pool/Idaho Avenue Trail, Phase IB Archaeological Site Survey Management Summary." As a result of this production we find this portion of the appeal to be moot.

[2] 1 DCMR § 402.5 states ("Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. **Every reasonable effort shall be made by the agency to assist in the identification and location of requested records.**") (emphasis added).

Second, you asserted that an attachment of an April 27, 2017, email titled "04.06.17 Arborist Survey to DGS.zip" was not provided in the September 1, 2017 production. DGS clarified that the attachment was provided, not as a ".zip" file but as the three documents contained in the compressed file. These documents were titled "D.C. Act 21-386 dated May 4, 2016; Civil BTU Survey; Heart Park Pool Inventory Spreadsheet; and Hearst Park Pool Plan." We accept DGS's representation that it provided these documents to you, and find this portion of the appeal to be moot.

Third, you challenge that an April 6, 2017, email did not include an attachment. DGS has represented that all attachments were provided to you in the initial production. Further DGS retransmitted all of the attachments to you on September 19, 2017. We accept DGS's representation that it provided these documents to you, and find this portion of the appeal to be moot.

Fourth, you challenge the absence of picture of borings. DGS's response indicates that after receiving the appeal it conducted an additional search and has since located and provided you with an additional record titled "Hearst _ Test Borings pics.pdf." We accept DGS's representation that it provided this record to you and find this portion of the appeal to be moot.

On appeal, DGS had conducted subsequent searches that have yielded several responsive documents specified in your appeal as missing. Further, DGS has proffered that some of the attachments that your appeal claims are missing were in fact provided to you in DGS' September 1, 2017, production. We accept these representations and find these portions of the appeal to be moot, to the extent that documents have been provided to you. However, this subsequent search and production of specific documents does not cure the deficiencies of the underlying search for communications, which did not include a systemic search of relevant record repositories, i.e. email accounts of relevant DGS employees.

Conclusion

Based on the foregoing, we remand this matter to DGS to within 15 days of this decision conduct a subsequent search and to begin providing to you nonexempt responsive documents on a rolling basis. Your appeal is dismissed; though you may file a separate appeal of DGS's subsequent response.

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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Victoria Johnson, DGS (via email)