

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 2017-148

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 Parks and Recreation ("DPR") to a request you submitted under the DC FOIA.

Background

On July 6, 2017, you sent to DPR a five-part FOIA request for records relating to "Hearst Park."

On August 11, 2017, DPR granted your request in part, providing you with 100 responsive documents. DPR's initial response indicated that the search it had conducted returned a voluminous number of documents, and that DPR would review and provide them to you on a rolling basis. The response indicated a target date of September 1, 2017, for completion of production, at which time DPR would also provide a list of withheld documents.

Having not received a final response, on September 5, 2017, you filed this appeal, asserting that you had been constructively denied by DPR's untimely response. Your appeal sets out several examples of where you believe DPR's production was insufficient. One of these insufficiencies relates to DPR's failure to provide you with an assessment you requested.<sup>1</sup> Your appeal also challenges a lack of responsive documents regarding other park sites that may have been considered to host a public pool in Ward 3.

This Office notified DPR of your appeal. DPR responded to this Office, and explained that the initial delay in completing production was the result of DPR revising its search to include a wider range of email documents. DPR's response provides an index of withheld documents.<sup>2</sup> Additionally, DPR's response indicated that it had provided to you hundreds of documents and that it plans on completing production by October 2, 2017. Upon further review, DPR provided a

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<sup>1</sup> You included in your appeal a copy of a letter to the editor written by the DPR director referring to the assessment, as evidence that it exists.

<sup>2</sup> If you would like to challenge the withholding of these documents, you are free to file a separate appeal.

signed declaration to this Office that explained how DPR's search was conducted. DPR's response states that a new document has been provided to you that constitutes the "assessment" referred to in your appeal. Lastly, the statement clarified that no further documents exist as to the evaluation of other pool cite locations.

### 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).

### *Constructive Denial*

You submitted your request on July 6, 2017. DPR failed to provide all responsive requested records within the 15 days prescribed by D.C. Official Code § 2-532 (c)(1). Instead, DPR made a partial production and represented that it would continue reviewing and producing documents on a rolling basis. As a result of missing the deadline set by the statute, this Office finds that DPR constructively denied your request. D.C. Official Code § 2-532(e). In accordance with D.C. Official Code § 2-537 this Office orders DPR to complete the search it is processing.

### *Adequacy of the Search*

We have interpreted your appeal as challenging the adequacy of DPR's search for the records you requested – as you specifically cite examples of documents that you believe should have been included in DPR'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.*

Here, DPR provided a declaration that clarifies the search it conducted. DPR’s statement clarifies that in conducting the search, the DPR FOIA Officer contacted the current project manager of the project to which your request relates. DPR’s FOIA officer identified this individual as the person most likely to have responsive documents, and insured that all responsive documents were produced. Further, DPR’s statement clarifies that because this project has been the subject of earlier requests, some of the documents were already identified. Lastly, DPR’s FOIA Officer conducted a search of the emails of past project managers, and used the search terms “Hearst Park,” “Pool,” “EIS,” and “ES.” We accept DPR’s representation that these repositories were searched, and we find that these search terms used and the repositories searched were adequate.

Your appeal specifically requests an “assessment” referred to in a letter to the editor attached to your appeal. DPR’s statement clarifies that it has now provided to you the DPR document that was used to assess community needs for pools. DPR’s statement clarifies that “no other documents exist concerning alternative locations for this pool project as it relates to the initial assessment of the pool location.” We accept this representation.

Having reviewed DPR’s response to your appeal, we find that DPR made a reasonable determination as to where the documents you are seeking would be located if they existed. We find that DPR conducted an adequate search for the documents, and we accept DPR’s representation that it will finish reviewing and producing non-exempt responsive documents to you.

### Conclusion

Based on the foregoing, we remand this matter to DPR to, within 10 days of this decision, complete review of the search it is conducting and provide you with all non-exempt responsive documents. Your appeal is dismissed; though you may file a separate appeal of DPR’s subsequent response or challenge the documents withheld by DPR identified in its September 19, 2017 index of withheld documents.

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: Jamarj Johnson, DPR (via email)