

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

September 25, 2017

VIA ELECTRONIC MAIL

Mr. William Matzelevich

RE: FOIA Appeal 2017-154

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 failure of the Office of the Chief Financial Officer ("OCFO") to respond to a request you submitted under the DC FOIA.

Background

On August 6, 2017, you sent to OCFO a FOIA request for "All communications, emails and documents between the Office of the Chief Financial Officer and other DC departments to include but limited to the Department of Parks and Recreation (DPR) and the Department of General Services (DGS), ANC Council members, and DC City Council members used to develop a budget or otherwise earmark funds for the 'Hearst Park & Pool Improvement Project' (or as may have been otherwise named) since January 1, 2013 to present."

On August 28, 2017, OCFO spoke with you pursuant to 1 DCMR § 402.5 to modify your request to permit the identification and location of the records you were seeking. It appears that you did not modify your request despite OCFO's request. OCFO then invoked its right to an extension until September 11, 2017 to respond to your request.

On September 12, 2017, you filed this appeal, challenging OCFO's failure to issue a final response to your request.

This Office notified OCFO of your appeal. On September 20, 2017, OCFO responded to this Office and explained that the search:

would produce a voluminous amount of records due to the time span (4 years), indefinite number of e-mail boxes to be searched (staff of the Office of the Chief Financial Officer, Department of Parks and Recreation, Department of General Services, ANC Members, and City Council members, as well as all staff engaged in budget development and funding for the "Hearst Park and Pool Improvement Project").

The OCFO's response avers that "it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches reasonably describe the desired records." From this, OCFO concluded that fulfilling your request would be "unduly burdensome" and would "require an unreasonable amount of effort to complete."

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 to OCFO on August 6, 2017. OCFO failed to provide all responsive requested records within the 15 days prescribed by D.C. Official Code § 2-532 (c)(1). Instead, OCFO invoked its right to a 10-day extension, and told you that you would receive a final response by September 11, 2017. OCFO has yet to issue a final response.

OCFO maintains that it has not responded to your request because it is too broad to process. In accordance with DC FOIA, a request must "reasonably describe the desired record(s)." 1 DCMR § 402.4. A communication to a FOIA Officer that does not reasonably describe a record is not considered a proper request for that record; when a FOIA officer receives such a communication, he or she is obligated to reach out to the requester to ask for supplemental information and to make "[e]very reasonable effort . . . to assist in the identification and location of requested records." 1 DCMR § 402.5. Once a requester has clarified the communication such that it "reasonably describe[s] the desired record(s)," then the request is "deemed received" by the FOIA officer and the deadline for the agency's response is set. 1 DCMR § 405.6.

Here, OCFO appears to be arguing that: (1) your request does not reasonably describe a record; (2) its August 28, 2017, communication to you was a request for additional information made pursuant to 1 DCMR § 402.5; and (3) because you did not provide additional information, the request was never technically received and the deadline was never set, such that your request was never properly filed.

This Office rejects the premise that your request is too vague to process. Your request asks for emails to and from OCFO employees about a specific topic - the Hearst Park and Pool

Improvement Project. This aspect of your request describes records that are identifiable and retrievable. It was OCFO's 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; *see 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 narrow the subject of your search, OCFO should have made an effort to identify the relevant OCFO employees who were likely to have communicated about the subject of your request and conducted an email search for responsive messages these employees¹ sent and received during the specified time period using phrases such as "Hearst Park" and "Hearst pool." From there, OCFO would have been able to identify the number of documents retrieved and could have provided you with a fee estimate for reviewing these documents. In other words, your request is not so vague as to have prevented OCFO from conducting an initial search without additional input from you.

OCFO makes arguments relating to the scope of your request and its burdensome nature. These arguments do not constitute an exemption or justification to withhold records. *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."). However, pursuant to DC FOIA, OCFO may avail itself of fees to recoup costs. *See* D.C Official Code § 2-532(b-3) ("No agency or public body may require advance payment of any fee unless . . . the agency or public body has determined that the fee will exceed \$250."); 1 DCMR § 408.

As a result of missing the deadline set by the statute, this Office finds that OCFO constructively denied your request. D.C. Official Code § 2-532(e).

Conclusion

Based on the foregoing, we remand this matter to OCFO. Within 15 days of this decision, OCFO shall conduct a search in accordance with the guidance in this decision and provide you with a fee estimate based on the number of documents retrieved. If you agree to pay for the production, OCFO shall begin providing you with nonexempt responsive documents on a rolling basis.²

Your appeal is dismissed; however, you may challenge OCFO's subsequent response by separate appeal to this Office.

¹ We note that OCFO is responsible for maintaining only the records of OCFO employees and is not required to conduct a search for the emails of the employees of other agencies

² Please note that because of the size and scope of this request, you may be required to pre-pay for these services. *See* D.C Official Code § 2-532(b-3).

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: Stacie Mills, OCFO (via email)