GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

Mayor's Office of Legal Counsel

October 13, 2017

VIA ELECTRONIC MAIL

Mr. William Matzelevich

RE: FOIA Appeal 2017-184

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 August 6, 2017, DGS received a five-part FOIA request you submitted for records relating to a survey associated with the "Hearst Park & Pool Project."

On September 20, 2017, DGS informed you that the search it had conducted, using search terms you identified, returned 29,906 emails and would cost $13,916 to review. You indicated that you would withdraw your request and would not pay the $13,916. The same day, DGS sent you a close-out letter that indicated that you could file this appeal.

You appealed DGS's response by letter dated September 28, 2017. You state that DGS has not conducted a reasonable search likely to produce the information that you have requested, and that you withdrew your request because of the high cost estimate. You argue that this appeal is similar to FOIA Appeal 2017-147, in which we found that DGS improperly limited the scope of its request to specific email inboxes that it made you identify. You argue that the search terms that DGS solicited from you and used to conduct its search here similarly indicate that the search was inadequate.

This Office notified DGS of your appeal, and DGS responded by asserting that its search was reasonable.[1] DGS states that "it is not the role or responsibility of the agency [to] tell the requester what to search for, [to] guess at what the requester is seeking or to limit the search request." DGS claims that the large number of documents returned by the search does not indicate that the search was inadequate, but instead that "it simply means that there were tens of thousands of documents responsive to the requested search." DGS further argues that the cost of the review is not at issue in this appeal.

[1] A copy of DGS's response is attached.

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

Your appeal challenges the adequacy of DGS's search for the records you requested. 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.*

In a previous decision, FOIA Appeal 2017-147, we determined that DGS had not satisfied the first element of conducting a reasonable search because it failed to determine which record repositories were likely to contain responsive documents (i.e. which email accounts should be searched). We explained there that DGS had improperly shifted the burden to you by refusing to conduct a search until you identified the government employees associated with the records you sought. We concluded that your request as submitted was not overly broad or vague, and that DC FOIA does not require a requester to identify 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) ("[T]here is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request."). Here, DGS did the same thing, in that it conducted a search only after you identified employees and then searched only the inboxes that you identified instead of making an independent determination of where responsive documents were likely to be located. [2]

Additionally, the matter here is a similar request about a related subject matter. In the same manner that DGS required you to identify employee inboxes in FOIA Appeal 2017-147, it also asked you to create search terms before it conducted a search here. You complied and provided a list of terms; however, that list of terms did not constitute your request. Your request was described in the letter that you sent to DGS on August 6, 2017. DGS used the searched terms that you provided upon DGS's solicitation without the use of Boolean operators, (i.e., "and," "or," "not"). As a result, the search of 8 employee inboxes returned 29,906 emails.

It seems likely that the voluminous number of emails that this search returned is the result of a large number of false positives that are unrelated to your original August 6, 2017 request. For example, it appears from the way that the search was conducted that every single email in the 8 identified employee inboxes for the search period that contained the word "survey" or "dccouncil.us[3]" would be flagged as responsive – even if the email had nothing to do with the Hearst Pool project that your original request concerned. As a result, we do not accept DGS's statement that the voluminous number of records "simply means that there were tens of thousands of documents responsive to the requested search."

DGS claims that it requested search terms from you pursuant to 1 DCMR § 402.5. However, the purpose of 1 DCMR § 402.5 is to narrow voluminous search results to assist in finding responsive documents. Here, it appears that the use of 1 DCMR § 402.5 in fact greatly broadened the search such that it resulted in a voluminous number of documents, the great majority of which are unlikely to be responsive to your August 6, 2017 request. DGS has asked you for $13,916 before it will sort out these false positives. In response to this appeal, DGS claims that "it is not the role or responsibility of the agency [to] tell the requester what to search for, [to] guess at what the requester is seeking or to limit the search request." But that is exactly what

[2] As in FOIA Appeal 2017-147, DGS must make an independent determination of which employees' inboxes are likely to contain responsive documents, and may not rely solely on your input.

[3] DGS's response to this appeal indicates that the search included the "From, To, CC" fields, which suggests that every email from a "dccouncil.us" domain to one of the searched email inboxes would have returned as responsive, regardless of subject matter.

DGS did here. Instead of taking your August 6, 2017 request at face value – limited to an identified survey at an identified park by an identified architect – DGS instead required you to provide additional search terms which produced a voluminous number of records. Your request here adequately described documents you were seeking; it was DGS's role to find them.

While your request was broad in the type of documents that it sought (i.e., "all communications") between DGS and various entities, the request was limited to a particular subject matter. By not conducting a search equally focused in subject matter, and by shifting the burden to you to determine the search terms, DGS did not fulfill its responsibilities to search the repositories likely to contain responsive material. Each part of your original request was related to Hearst Park. We find that, by not in turn limiting the email search to Hearst Park through appropriate Boolean operators reasonably calculated to avoid returning a large number of nonresponsive documents, DGS did not adequately search the repositories likely to contain responsive records.

Conclusion

Based on the foregoing, we remand this matter to DGS. Within 10 business days, DGS shall submit to the Office of the Chief Technology Officer ("OCTO") new search requests in accordance with the guidance in this decision. DGS may use the terms it used to conduct the previous search, but, importantly, for terms that are likely to retrieve voluminous results (e.g., "survey," "dccouncil," and "Cheh"[4]), DGS should specify that these words be searched in conjunction with "Hearst."[5] In fact, it may be prudent to search all terms in conjunction with the word "Hearst." When DGS receives search results from OCTO, it should contact you with a fee estimate and, upon your agreement, review and produce the records on a rolling basis.

Your appeal is hereby dismissed, but you are free to 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)

[4] The term "Cheh" is likely to retrieve voluminous messages because Hearst Park is located in the ward she represents on the Council of the District of Columbia and because she is chairperson of the Committee on Transportation of the Environment, which has oversight of DGS.

[5] For example, one of the searches would be for all emails in the given time period with the terms "survey AND Hearst."