

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-019**

December 6, 2019

VIA U.S. MAIL

Ms. Loretta Neumann:

RE: FOIA Appeal 2020-019

Dear Ms. Neumann:

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 assert that some of the records you requested pertaining to the District’s development plans for the Walter Reed Historic District were not provided to you by the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”).

Background

On September 5, 2019, you requested a number of records regarding the development activities for the Walter Reed Historic District. On October 6, 2019, DMPED responded to your request and provided records regarding that property. On October 31, 2019, you filed an appeal challenging the FOIA production by DMPED. You indicated that the response was inadequate because the response “did not include any emails, meeting minutes, memoranda, calendar appointments, or correspondence or any reference to them.” In addition, the response did not include the “costs of repairing, restoring and/or moving Buildings 81 and 34” to another location of the Walter Reed District. On November 4, 2019, DMPED responded to your appeal.<sup>1</sup> In the appeal response, DMPED noted that it had provided you with a substantial number of documents but had not located other records you requested after a diligent search. DMPED also acknowledged that at the time of its response, DMPED had not conducted an email search and would do so after the agency received a response from you regarding the scope of the email search. DMPED subsequently informed this Office that the email search was discussed with you and an email search commenced subsequently. In addition, DMPED indicated that it withheld a cost estimates document because it was subject to the deliberative process privilege under D.C. Official Code § 2-534(a)(4) (“Exemption 4”).

Discussion

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<sup>1</sup> A copy of DMPED’s response is attached.

It is the public policy of the District of Columbia government 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, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

### *Adequacy of Search*

In determining whether an agency conducted an adequate search in response to a records request, 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: (1) make a reasonable determination as to the locations of records requested; and (2) 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 includes determining 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.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

In this instance, DMPED maintains that the remaining records requested do not yet exist. In an effort to be overly inclusive and identify any additional documents that may be responsive to Ms. Neumann’s request, DMPED states that it sent you a letter via e-mail on Monday, November 4, 2019 seeking clarification as to the date range for a search of DMPED’s email addresses.

## Exemption 4- Deliberative Process Privilege

In its response to your appeal, DMPED acknowledges that it withheld one responsive draft document under D.C. Official Code § 2-534(a)(4). Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” This exemption has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). As a result, Exemption 4 encompasses the deliberative process privilege. *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). The deliberative process privilege protects agency documents that are both pre-decisional and deliberative. *Coastal States Gas Corp., v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it was generated before the adoption of an agency policy and it is deliberative if it “reflects the give-and-take of the consultative process.” *Id.*

DMPED has provided this Office with a copy of the document prepared by a contractor with proposed cost estimates that are dependent on a number of factors that have not been resolved. As such, DMPED maintains that the document is deliberative and pre-decisional. Although the document is from an outside entity, Exemption 4 can apply to communications between the District and an outside entity even though the communication is not “inter-agency or intra agency”. This is often referred to as the consultant corollary. The consultant corollary applies when the government has hired a consultant to effectively function as a government employee. In these instances, documents exchanged between the government and the consultants do not lose the protections available under Exemption 4. *See, e.g., Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11 (2001). The consultant relationship does not require a formal contract, and can apply to voluntary consultants when the agency has sought outside advice. *Nat’l Inst. of Military Justice v. DOD*, 512 F.3d 677, 681 (D.C. Cir. 2008) (protecting advice provided by individuals whose counsel Army had solicited); *Wu v. Nat’l Endowment for the Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (protecting recommendations of volunteer consultants). Under *Klamath*, “the communications of a third-party consultant or contractor, hired to provide expert advice to an agency, may be considered inter-agency or intra-agency for the purposes of Exemption [4].” Since the cost estimates are only proposed costs and are dependent on decisions that have not yet been made, this record was properly withheld by DMPED.

## Conclusion

Based on the foregoing, we affirm DMPED’s decision in part and remand it in part. On remand, DMPED should complete the email search, if it has not done so already, and provide any responsive documents to you and/ or explain why any newly discovered responsive documents have been withheld pursuant to one or more exemptions recognized by DC FOIA. You may file an appeal in response to DMPED’s production (or non-production) of documents on remand. 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.

Respectfully,

Mayor's Office of Legal Counsel

cc: Erica Satterlee,  
DMPED; FOIA Officer (via email)