GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeals: 2020-077 & 2020-152

April 3, 2020

VIA ELECTRONIC MAIL

Mr. Gianluca Pivato

RE: FOIA Appeals 2020-077 and 2020-152

Dear Mr. Pivato:

This letter responds to the administrative appeals you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA").[1] In your appeals, you assert that the Department of Consumer and Regulatory Affairs ("DCRA") failed to properly respond to your FOIA request.

Background

You submitted a FOIA request to DCRA's FOIA Officer for "access to (or a copy of) all records (including all types of documents and emails) pertaining to all review steps of permit B1712424." The date range for the search was January 1, 2018 to October 24, 2018. After DCRA responded to your FOIA request, you filed this appeal. In your appeal, you indicate that certain documents were missing from the production of records by DCRA. You also indicate that the permit review sheet for the project was missing. Instead, you only received a permit review sheet for an old permit filed in 2017. You also clarified your request to include "any zoning review documentation, zoning code applied, zoning determination related to new reinforced shotcrete structural retaining wall along West property line to support neighbor's existing retaining wall deemed in failure." "I need to know exactly according to which zoning provision was the zoning review approved, if it was approved at all." On January 31, 2020, DCRA responded. [2] In the response, DCRA describes in great detail the search that was conducted noting that the date range in your request was different from the date range in your appeal. DCRA indicates that extensive responsive documents were located and produced to you. However, some documents were redacted under D.C. Code § 2-534(a)(2) ("Exemption 2") and D.C. Code § 2-534(a)(4) ("Exemption 4"). No documents were withheld in their entirety.

Discussion

[1] Those appeals include your original appeal with respect to this request (2020-077) and an identical appeal that you subsequently filed (2020-152). We have consolidated those appeals and our decision in this letter.
[2] A copy of DCRA's response to your appeal is attached to this decision.

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 stature 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 the Search

In DCRA's appeal, the agency states that you challenged the adequacy of the search because you claimed certain items had not been provided to you. Although you do not specifically clam that the search was inadequate, your identification of items you believe are missing suggest that the search for records was inadequate. Therefore, we believe that this decision should address the adequacy of the search overall.

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. *See 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, DCRA's response describes in detail how the search was conducted and which offices and programs were involved in the search. The response also indicates that OCTO conducted a search of the relevant email accounts. The email search produced 507 emails and after a responsiveness and privilege review 474 emails were provided to you. In addition, DCRA's search included the DCRA file management databases, Accela and Project Dox. For example, DCRA maintains that a detailed search of Project Dox was done. This database stores the drawings and supporting documents, both approved an unapproved, for the permit in question. You were provided with all approved drawings (27 documents) and approved supporting documents (6 documents). In addition, DCRA provided you with prescreen comments and workflow data for the permit in question. These records were provided because you asked for records relating to all of the review steps for the permit in question. Based on this information, we conclude that DCRA conducted an adequate search for documents in response to your FOIA request.

We now turn our attention to the actual document production. DCRA states that it produced extensive records and hundreds of emails to you. No documents were withheld in their entirety. However, some of the documents produced were redacted pursuant to Exemptions 2 and 4. We will now address these two exemptions.

Exemption 2 – Personal Privacy

Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). DCRA characterizes the records as containing personal information (including telephone numbers), the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of agency employees and private citizens. The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id*.

> The privacy interest in the FOIA balancing analysis "encompasses the individual's control of information concerning his or her person," including names, addresses, and other identifying information. *Padou*, *supra*, 29 A.3d at 982. Moreover, individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature. *U.S. Dep't of State v. Washington Post Co*., 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).

District of Columbia v. FOP, 75 A.3d 259, 265-66 (D.C. 2013).

Based on the DCRA response, and our review of the documents that were redacted and the Vaughn Index, we conclude that DCRA appropriately redacted the personally identifying

information in the agency emails and non-email records. We find that there is a privacy interest as to these individuals who were identified in the records that DCRA produced to you.

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of "public interest" if it would shed light on an agency's conduct. *Beck v. Department of Justice, et al*., 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

> This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee,* 489 U.S. at 773; *see also Ray,* 112 S. Ct. at 549. Information that "reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee,* 489 U.S. at 773.

Id. at 1492-93.

Although the emails were redacted to eliminate personally identifying information, no information that is redacted text sheds light on the agency's conduct. Therefore, we conclude that the public has no cognizable interest in the release of such information that outweighs the privacy rights of the persons who are named in the emails and other records that have been redacted.

Exemption 4- Deliberative Process Privilege

DCRA also indicated that it redacted records 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.* And, under D.C. Official Code § 2-534(e), the deliberative process privilege, attorney work product privilege and attorney-client privilege are expressly incorporated under the inter-agency memorandum exemption in § 2-534(a)(4).

DCRA maintains that under Exemption 4 it only redacted the text of emails that contained personal opinions and legal advice exchanged between agency counsel and program officials. This information is identified in the Vaughn Index and the redacted and the unredacted emails provided to this office. Based on our review of the Exemption 4 redactions and the Vaughn

Index, only the information protected by the attorney-client and work product privileges were redacted. We find that these redactions were appropriate under Exemption 4.

Segregability

Under D.C. Official Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). The phrase "reasonably segregable" is not defined under the DC FOIA, and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009).
We note that segregability is not an issue in the FOIA production to you because no responsive documents were withheld in their entirety.

We therefore conclude that DCRA has conducted an adequate search, and produced the responsive documents with redactions under Exemptions 2 and 4. To the extent you intended in your appeal to modify the date range for the search that was sought in the request, you may submit a new request seeking records for this new additional time period.

This is the final decision on your appeal. 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 Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Erin J. Roberts, FOIA Officer
DCRA (via email)