

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-229**

April 7, 2022

VIA ELECTRONIC MAIL

Anthony R. Van Vuren

RE: FOIA Appeal 2020-229

Dear Mr. Van Vuren:

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 the Department of General Services (“DGS”) did not adequately search for records pertaining to lead on District of Columbia Public School grounds.

Background

On February 10, 2020, you submitted a request to DGS for the following categories of documents relating to lead levels and related testing performed at playgrounds and athletic fields located on District of Columbia public school property:

1. All communications with and all documents provided by employees of Soil and Land Use Technology, Inc. (SaLUT) from May 1, 2019 to the present related to lead levels at any playground or athletic field located at any District of Columbia public school.
2. All communications with and all documents provided by employees of EMSL Analytical, Inc. (EMSL) from May 1, 2019 to the present related to lead levels at any playground or athletic field located at any District of Columbia public school.
3. All communications with and all documents provided by employees of Sport Surface Specialties LLC or Playcore Holdings, Inc. (Playcore) from May 1, 2019 to the present related to lead levels at any playground or athletic field located at any District of Columbia public school.
4. All documents, including but not limited to promotional materials, warranties, products descriptions, care and maintenance instructions, or other statements from manufacturers, sellers, suppliers, or maintenance/service contractors, relating to the presence or absence of lead in any artificial surface installed at any playground or athletic field located at any District of Columbia public school.
5. All test results, screening results, lab reports, data, observations, analyses, findings, and conclusions, whether raw, preliminary, interim, initial, or final in nature, and regardless of the source thereof, relating in any way to the

presence or absence of lead at any playground or athletic field located at any District of Columbia public school, including but not limited to the data associated with any raw, preliminary, interim, initial, or final results of any X-ray fluorescence (XRF) testing, atomic absorption testing, or Inductively Coupled Plasma – Mass Spectrometry (ICP-MS) testing performed on any playground or athletic field located at any District of Columbia public school.

6. All public statements from May 1, 2019 to the present from the District of Columbia or any of its employees or agents, relating to the presence or absence of lead at any playground or athletic field located at any District of Columbia public school.
7. Copies of any and all whistleblower complaints filed with the District of Columbia government relating to the presence of lead at any playground or athletic field located at any District of Columbia public school.
8. All documents and communications, including but not limited to letters, email, filings, expressions of concern, complaints, from District of Columbia residents, home owners associations, community groups, environmental organizations or nonprofit organizations, relating to the presence or absence of lead at any playground or athletic field located at any District of Columbia public school.
9. All documents reflecting legal or administrative complaints filed by District of Columbia residents or employees of the District of Columbia government, and any responses thereto, relating to injuries resulting from or harm caused by exposure to lead or other toxic substances at any playground or athletic field located at any District of Columbia public school.
10. All documents or communications reflecting an assessment or consideration of the potential risk regarding the use of any artificial surface at any playground or athletic field located at any District of Columbia public school, including any assessment or consideration of the potential risk from exposure to lead or other toxins from such artificial surfaces.

On March 5, 2020, DGS informed you that it would respond to your request no later than March 19, 2020. On March 10, 2020, DGS produced one document and two links to its website, informing you that it was still processing your request. On March 11, 2020, DGS updated you that it had located 395 emails with attachments and would need until April 8, 2020 to review them. On March 20, 2020, DGS notified you that it was unable to locate any responsive records for Requests 1 through 3. On July 6, 2020, DGS provided a status update that it found no responsive records for Requests 1 through 4, 7, and 9, had produced responsive records for Requests 5 and 6, and would need 4 weeks to review the 394 emails with attachments located for Request 8.

On August 13, 2020, you appealed to this office. You were skeptical of DGS's position that it had no responsive documents for Requests 1 through 4, 7, and 9 and argued that the agency did not conduct an adequate search for responsive documents. You also claimed DGS provided "incomplete and inadequate information in response to Requests 5 and 6 without

justification and has provided no documents or communications in response to Request 8.” In arguing that the DGS likely has responsive records, you pointed to documents on DGS’ website, and testimony of DGS Director Keith Anderson and DGS Chief Operating Officer Yohance Fuller before the DC Council Committee on Facilities and Procurement.

On December 22, 2020, DGS responded to your appeal.¹ DGS asserted that by assigning your request to the Facilities and Capital Construction Divisions and submitting an email search request to the Office of the Chief Technology Officer (“OCTO”) with search terms, it conducted an adequate search. DGS noted that it released emails responsive to Request 8. DGS also asserted that its delay in responding was justified because most agency staff are working remotely and “do not have daily hands on access to records that may not be in electronic form.”

Discussion

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

¹ A copy of DGS’s response to your appeal is attached.

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).

Here, we reject DGS’s contention that it conducted a reasonable and adequate search. DGS identified the Facilities and Capital Construction Divisions as the locations where responsive records would be held but has not provided an explanation of their searches or why other units such as the Office of the General Counsel or Office of the Director were not consulted. DGS also has not explained why an OCTO email search request was only submitted for Request 8 when multiple requests sought communications. Additionally, DGS has not given an explanation as to how it has no responsive records for categories of documents that are on its own website.

Conclusion

Based on the foregoing, we remand this matter to DGS to conduct an adequate search. Within ten business days from the date of this decision, DGS shall identify the relevant locations for responsive records and describe the results of its search. If DGS’s forthcoming search results in retrieving responsive records, DGS shall disclose to you non-exempt portions or provide a reasonable explanation of the basis for withholding in accordance with DC FOIA.

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: Victoria Black Johnson, FOIA Specialist
DGS (via email)