VOL. 65 – NO. 53 DECEMBER 28, 2018

District of Columbia REGISTER

HIGHLIGHTS

- D.C. Council recognizes DC Vote's 20th Anniversary (ACR 22-440)
- D.C. Commission on the Arts and Humanities announces funding availability for the Fiscal Year 2020 General Operating Support Grants
- Department of Health Care Finance extends supplemental payments to eligible hospitals participating in the Medicaid program for outpatient hospital services
- Department of Human Services proposes standards for administering the District's Flexible Rent Subsidy Pilot Program
- Department of Energy and Environment proposes new requirements for underground storage tanks
- Public Service Commission solicits public comments on Washington Gas Light Company's application for approval of a revised Accelerated Pipe Replacement Program

DISTRICT OF COLUMBIA REGISTER

Publication Authority and Policy

The District of Columbia Office of Documents and Administrative Issuances publishes the *District of Columbia Register* (ISSN 0419-439X) every Friday under the authority of the *District of Columbia Documents Act*, D.C. Law 2-153, effective March 6, 1979, D.C. Official Code § 611 et *seq*. (2012 Repl.). The policies which govern the publication of the *Register* are set forth in the Rules of the Office of Documents and Administrative· Issuances (1 DCMR §§300, *et seq.*). The Rules of the Office of Documents and Administrative Issuances are available online at dcregs.dc.gov. Rulemaking documents are also subject to the requirements of the *D.C. Administrative Procedure Act*, D.C. Official Code §§2-50l et *seq.* (2012 Repl.).

All documents published in the *District of Columbia Register (Register)* must be submitted in accordance with the applicable provisions of the Rules of the Office of Documents and Administrative Issuances. Documents which are published in the *Register* include (1) Acts and resolutions of the Council of the District of Columbia; (2) Notices of proposed Council legislation, Council hearings, and other Council actions; (3) Notices of public hearings; (4) Notices of final, proposed, and emergency rulemaking; (5) Mayor's Orders and information on changes in the structure of the D.C. government (6) Notices, Opinions, and Orders of D.C. Boards, Commissions and Agencies; (7) Documents having general applicability and notices and information of general public interest.

Deadlines for Submission of Documents for Publication

The Office of Documents and Administrative Issuances accepts electronic documents for publication using a Web-based portal. To submit documents for publication, agency heads, or their representatives, may obtain a username and password by email at dcdocuments@dc.gov. For guidelines on how to format and submit documents for publication, email dcdocuments@dc.gov.

The deadline for filing documents for publication for District of Columbia Agencies, Boards, Commissions, and Public Charter schools is THUSDAY, NOON of the previous week before publication. The deadline for filing documents for publication for the Council of the District of Columbia is WEDNESDAY, NOON of the week of publication. If an official District of Columbia government holiday falls on Thursday, the deadline for filing documents is Wednesday. Email the Office of Documents and Administrative Issuances at dcdocuments@dc.gov to request the *District of Columbia Register* publication schedule.

Viewing the DC Register

The Office of Documents and Administrative Issuances publishes the *D.C. Register* ONLINE every Friday at www.dcregs.dc.gov. The Office of Documents does not offer paid subscriptions to the *D.C. Register*. Copies of the *Register* from April 2003 through July 2010 are also available online in the *D.C. Register* Archive on the website for the Office of the Secretary at www.os.dc.gov. Hardcopies of the Register from 1954 to September 2009 are available at the Martin Luther King, Jr. Memorial Library's Washingtonian Division, 901 G Street, NW, Washington, DC 20001. There are no restrictions on the republication of any portion of the *Register*. News services are encouraged to publish all or part of the *Register*.

Legal Effect of Publication - Certification

Except in the case of emergency rules, no rule or document of general applicability and legal effect shall become effective until it is published in the *Register*. Publication creates a rebuttable legal presumption that a document has been duly issued, prescribed, adopted, or enacted and that the document complies with the requirements of the *District of Columbia Documents Act* and the *District of Columbia Administrative Procedure Act.* The Administrator of the Office of Documents and Administrative Issuances hereby certifies that this issue of the *Register* contains all documents required to be published under the provisions of the *District of Columbia Documents Act.*

DISTRICT OF COLUMBIA
OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES

ROOM 520S – 441 4th STREET, ONE JUDICIARY SQUARE - WASHINGTON, D.C. 20001 - (202) 727-5090

MURIEL E. BOWSER
MAYOR

VICTOR L. REID, ESQ.
ADMINISTRATOR

CONTENTS

ACTIONS OF THE COUNCIL OF THE DISTRICT OF COLUMBIA CONT'D

ADOPTED CEREMONIAL RESOLUTIONS CONT'D

ACTIONS OF THE COUNCIL OF THE DISTRICT OF COLUMBIA CONT'D

ADOPTED CEREMONIAL RESOLUTIONS CONT'D

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES

PUBLIC HEARINGS

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

FINAL RULEMAKING

PROPOSED RULEMAKING

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

EMERGENCY RULEMAKING

EMERGENCY AND PROPOSED RULEMAKING

NOTICES, OPINIONS, AND ORDERS
MAYOR'S ORDERS

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

Legal Counsel, Mayor's Office of - Freedom of Information Act Appeals - cont'd

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

ACTIONS OF THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES CONT'D

NOTICES, OPINIONS, AND ORDERS CONT'D
BOARDS, COMMISSIONS, AND AGENCIES CONT'D

ENROLLED ORIGINAL

A RESOLUTION

22-715

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 18, 2018

To declare the existence of an emergency with respect to the need to amend Title 47 of the District of Columbia Official Code to provide for triggers to lower the commercial property tax rate for real property with an assessed value of greater than $10 million, to provide that for a certain period specified revenue shall be directed to the Commission on the Arts and Humanities, to clarify that a person or a retailer without a physical presence in the District are vendors required to collect and pay sales tax on retail sales, to expand the definition of retailer to include marketplace facilitators and marketplace sellers, to clarify that the sale of electronically delivered products is a retail sale subject to sales tax, to make conforming changes to the use tax regarding electronically delivered products, to clarify that electronically delivered products subject to sales or use tax are not subject to the gross receipts tax; and to repeal Chapter 39A.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Internet Sales Tax Emergency Declaration Resolution of 2018".

Sec. 2. (a) In June 2018, the United States Supreme Court, in *South Dakota v. Wayfair, Inc.* (138 S. Ct. 2080; 201 L. Ed. 2d 403 (2018)), upheld a South Dakota law that imposed sales tax collection and reporting requirements on large out-of-state retailers that did not have a physical presence in the jurisdiction.

(b) As a result of the Court's decision that jurisdictions may tax remote sales even if the seller does not have a physical presence in the jurisdiction, the Council passed the Internet Sales Tax Amendment Act of 2018, passed on 2nd reading on December 4, 2018 (Enrolled version of Bill 22-914) ("permanent legislation").

(c) The permanent legislation, which has an applicability date of January 1, 2019, will not be law by January 1, 2019.

(d) It is important that the provisions of the permanent legislation become law as soon as possible so that they apply by January 1, 2019.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Internet Sales Tax Emergency Amendment Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-417

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To celebrate Pamela Wilhoite Stroman on the occasion of her 99th birthday and to recognize and honor her for her contributions to the District of Columbia.

WHEREAS, Pamela Wilhoite Stroman was born in Rapidan, Virginia, on October 22, 1919;

WHEREAS, Pamela Wilhoite Stroman moved to the District of Columbia in her early teens;

WHEREAS, Pamela Wilhoite Stroman attended Garnett Patterson Junior High School and graduated from Armstrong High School in 1935;

WHEREAS, Pamela Wilhoite Stroman passed the government worker's entrance exam, which launched her 32-year career with the Federal Bureau of Engraving and Printing;

WHEREAS, Pamela Wilhoite Stroman retired from the Federal Bureau of Engraving and Printing in 1972;

WHEREAS, Pamela Wilhoite Stroman and David Stroman married on December 19, 1949;

WHEREAS, Pamela Wilhoite Stroman is a loving and proud mother to daughters Tayloria and India;

WHEREAS, Pamela Wilhoite Stroman is a respected member of the Ward 5 Stronghold community and was one of the 15 original residents of the "White Hat Patrol";

WHEREAS, Pamela Wilhoite Stroman is one of the oldest residents in the Stronghold community; and

ENROLLED ORIGINAL

WHEREAS, Pamela Wilhoite Stroman has a green thumb for gardening and a love of sports, especially her favorite sports, football and golf.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Pamela Wilhoite Stroman's 99th Birthday Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes and honors Pamela Wilhoite Stroman and celebrates her 99th birthday.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-418

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize the benefits of the George Washington University Medical Faculty Associates Mobile Mammography Program and to declare October 17, 2018, as "GW Blush Day" in the District of Columbia in honor of the GW Mammovan.

WHEREAS, the George Washington University ("GW") Medical Faculty Associates Mobile Mammography Program, known as the "GW Mammovan," makes early detection of breast cancer accessible to underserved women across the metropolitan Washington, D.C. region;

WHEREAS, the GW Mammovan has provided thousands of breast screenings to women living and working in the District of Columbia regardless of ability to pay;

WHEREAS, the GW Mammovan is handicap accessible and accessible to underserved neighborhoods, offering one-stop screenings in a comfortable, convenient, state-of-the-art environment;

WHEAREAS, the GW Mammovan has raised awareness about the benefits of early detection in the District of Columbia, which has the highest incidence of breast cancer in the United States, higher than in any of the 50 states; and

WHEREAS, the Mobile Mammography Program provides women with resources, access and navigation following a breast care diagnosis and has become synonymous with prevention and a pathway to a cure in the Washington, D.C. community.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "GW Mammovan Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia declares October 17, 2018, as "GW Blush Day" in the District of Columbia in honor of the GW Mammovan.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-419

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize and honor both Raymond J. Wilson, Sr. and Mignon J. Wilson, residents of Ward 5, on 65 years of marriage.

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson were married on October 19, 1953;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson are native Washingtonians, and are lifelong District of Columbia residents;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson attended Cardozo Senior High School and Armstrong Adult Education Center, respectively;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson lived in the North Michigan community of Ward 5 for more than 48 years;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson presently reside at the Wesley House, a senior living community in Ward 5;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson have been members of Union Wesley African Methodist Episcopal Zion Church for more than 47 years and they are active participants in several ministries;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson are committed to the District, having volunteered their time and compassion for many years with the Coalition for the Homeless;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson are the proud parents of 5 children, Reginald, Eric (deceased), Stephanie, LaShawn, and Raymond;

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson are grandparents to 8 grandchildren and 9 great-grandchildren;

ENROLLED ORIGINAL

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson enjoy traveling; and

WHEREAS, Raymond J. Wilson, Sr. and Mignon J. Wilson appreciate time surrounded by family and friends.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Raymond J. Wilson, Sr. and Mignon J. Wilson Marriage Anniversary Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes and honors both Raymond J. Wilson, Sr. and Mignon J. Wilson, residents of Ward 5, on 65 years of matrimony.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-420

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To celebrate 20 years of the Elsie Whitlow Stokes Community Freedom Public Charter School preparing culturally diverse elementary school students to be leaders, scholars, and responsible citizens committed to social justice.

WHEREAS, in 1998, Linda Moore established a creative learning center in the basement of a District church, serving 35 kindergarten and first grade students;

WHEREAS, founder Linda Moore named the school in honor of her late mother, Elsie Whitlow Stokes, who taught elementary school in Arkansas for 36 years;

WHEREAS, in 2008, having outgrown 2 previous locations, Elsie Whitlow Stokes Community Freedom Public Charter School ("Elsie Whitlow Stokes") purchased its very own building in Ward 5's Brookland neighborhood, expanding enrollment from 250 students to 350 students;

WHEREAS, the new Elsie Whitlow Stokes campus, designed to enrich student character, included music and art rooms, a library, a turf field, 2 playgrounds, and an outdoor garden;

WHEREAS, Elsie Whitlow Stokes uniquely fosters young global citizens, offering 2 dual immersion programs, in English and French and English and Spanish;

WHEREAS, in 2011, the Unites States Department of Agriculture presented Elsie Whitlow Stokes with the *HealthierUS School Challenge* Gold Award of Distinction for building and encouraging a foundation of wholesome habits in physical education, nutrition, and health;

WHEREAS, Elsie Whitlow Stokes partnered with the National Park Trust in alignment with the school's philosophy of classrooms without boundaries, to introduce youth to the District's ecosystems and waterways;

WHEREAS, The National Alliance for Public Charter Schools inducted the founder of Elsie Whitlow Stokes in its national hall of fame in 2013, in recognition of the school's values, its innovated curriculum, and its public service commitment to local communities;

ENROLLED ORIGINAL

WHEREAS, Elsie Whitlow Stokes, with a dual focus on academic excellence and community service, accomplishes its mission by creating an environment of achievement, respect, inclusiveness, and non-violence;

WHEREAS, 2012 marked the inaugural Family Engagement Partnership between Elise Whitlow Stokes and the Flamboyan Foundation, an impact-driven, whole-school strategy where educators and families collaborate to improve student learning, build relationships, and address systems of inequity that hinder academic development; and

WHEREAS, in the fall of 2018, Elsie Whitlow Stokes expanded its vision and reach by opening an additional campus in the District's East End.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "20th Anniversary of Elsie Whitlow Stokes Community Freedom Public Charter School Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia honors the 20-plus progressive years of the Elsie Whitlow Stokes Freedom Community Public Charter School in the model cultivation of District youth.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-421

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize Rev. Dr. Kendrick E. Curry on his 15th anniversary as pastor of the Pennsylvania Avenue Baptist Church.

WHEREAS, Rev. Dr. Kendrick E. Curry is a long-time public servant who has made extraordinary contributions to the Ward 7 community and throughout the District of Columbia, both as a religious leader remarkably endeavoring to advance faith-based leadership and as a civic leader exhibiting valuable vision;

WHEREAS, Rev. Dr. Kendrick E. Curry currently serves as the pastor of Pennsylvania Avenue Baptist Church, a cornerstone of the Ward 7 community and an inspiration to District residents with over 20 ministries and activities designed to meet the needs of seniors, women, men, young adults, youth, and the community;

WHEREAS, Rev. Dr. Kendrick E. Curry has provided service to others beyond the faith community, extending to his active roles on the Board of Directors for the Marshall Heights Community Development Organization, Inc. and as Economic Development Committee Chair for the Ward 7 Democrats, among other roles and positions;

WHEREAS, Rev. Dr. Kendrick E. Curry demonstrates an ongoing devotion and service, positively affecting the lives of countless Ward 7 residents and those in the surrounding communities; and

WHEREAS, Rev. Dr. Kendrick E. Curry and the Pennsylvania Avenue Baptist Church are celebrating his historic 15th pastoral anniversary as the longest-serving pastor in the church's history.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Rev. Dr. Kendrick E. Curry 15th Pastoral Anniversary Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia congratulates Rev. Dr. Kendrick E. Curry and Pennsylvania Avenue Baptist Church on his 15th pastoral anniversary and wishes continued success in advancing the spiritual transformation of the congregation and the community.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-422

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To honor and recognize the work of Mary's Center on the occasion of its 30th anniversary.

WHEREAS, Maria S. Gomez opened Mary's Center in an Adams Morgan basement in 1988;

WHEREAS, in 1994, Mary's Center moved to its current headquarters at 2333 Ontario Road, N.W.;

WHEREAS, in 2008, Mary's Center opened a location in Silver Spring, its first Maryland location;

WHEREAS, in 2011, Mary's Center opened a new site, at 3912 Georgia Avenue, N.W. in the Petworth neighborhood of Ward 4, and began managing the Bernice Fonteneau Senior Wellness Center at 3531 Georgia Avenue, N.W.;

WHEREAS, in 2011, the National Council of La Raza ("NCLR") presented Mary's Center with the 2011 Affiliate of the Year Award, which is the highest honor bestowed on an NCLR Affiliate in recognition of exemplary work in serving its community and supporting NCLR's policy and programmatic initiatives;

WHEREAS, in 2012, Mary's Center opened its first location in Prince George's County, Maryland;

WHEREAS, in 2012, Maria S. Gomez was named a recipient of the 2012 Presidential Citizens Medal, the nation's second-highest civilian honor;

WHEREAS, in 2015, Mary's Center opened Sonography Clinic at its Ontario Road location and a Home Visiting/Healthy Start site at 4302 Georgia Avenue, N.W.;

WHERAS, in 2016, Mary's Center opened a new site, at 100 Gallatin Street, N.E., in partnership with Briya and Bridges Public Charter Schools;

ENROLLED ORIGINAL

WHEREAS, in 2016, Mary's Center was named a "2016 Top-Rated Nonprofit" by GreatNonprofits, the leading provider of user reviews of charities and nonprofits;

WHEREAS, in 2017, Mary's Center assumed management of Hattie Holmes Senior Wellness Center at 324 Kennedy Street, N.W., opened a dedicated behavioral health center, and opened Mary's Center Pharmacy at its Georgia Avenue location;

WHEREAS, in 2017, Mary's Center provided over $6.7 million in free care to 12,801 individuals throughout the Washington, D.C. region;

WHEREAS, in 2018, Mary's Center opened a new medical center in Montgomery County to replace its existing site in Silver Spring;

WHEREAS, in February 2018, the Health Resources and Services Administration recognized Mary's Center as having the best overall clinical performance measures among 1,400 community health centers in the nation;

WHEREAS, in June 2018, Mary's Center was awarded the gold medal in the Oral Health category of the third annual Henry Schein Cares Medal program;

WHEREAS, under the leadership of Maria S. Gomez, Mary's Center has grown into a nationally recognized humanitarian organization with a staff of over 600 employees and an annual operating budget over $59 million; and

WHEREAS, Mary's Center continues to provide comprehensive healthcare, social services, education, and workforce development to under-resourced, uninsured, and underserved individuals in the Washington, D.C. metropolitan region and the District values and appreciates Mary's Center's services.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Mary's Center 30th Anniversary Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes and thanks Maria S. Gomez for her contributions and commitment to the District of Columbia and congratulates Mary's Center on its 30th anniversary.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-423

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To celebrate the 30th anniversary of Milton Gottesman Jewish Day School of the Nation's Capital and recognize the school for its many accomplishments and achievements.

WHEREAS, the Milton Gottesman Jewish Day School of the Nation's Capital was founded in 1988 as the Jewish Primary Day School;

WHEREAS, the Jewish Primary Day School was established at Adas Israel Congregation by a committed group of parents who wanted to provide their children with a pluralistic Jewish education in the District of Columbia;

WHEREAS, in 1999, the school became an independent institution and in 2002, Milton Gottesman, a District lawyer and philanthropist, purchased a building on 16th Street to serve as the school's permanent home;

WHEREAS, in 2013, to accommodate the school's population growth, Milton Gottesman purchased a second building on 16th Street;

WHEREAS, the school's North and South Campuses are the Kay and Robert Schattner Center, named in honor of Dr. and Mrs. Schattner in recognition of their extraordinary support;

WHEREAS, in 2014, the school's Board of Trustees decided to expand the school to add Grades 7 and 8 and to create a middle school;

WHEREAS, in the spring of 2017, the school officially became known as the Milton Gottesman Jewish Day School of the Nation's Capital, to honor the late Milton Gottesman for his commitment to education and his support for the school;

WHEREAS, the Milton Gottesman Jewish Day School of the Nation's Capital, under the leadership of Head of School Naomi Reem, continues to grow, prosper, and promote academic excellence and Jewish values; and

ENROLLED ORIGINAL

WHEREAS, the Milton Gottesman Jewish Day School of the Nation's Capital remains a trusted and valuable member of the District's education community and Ward 4.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "30th Anniversary of Milton Gottesman Jewish Day School of the Nation's Capital Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes and honors the Milton Gottesman Jewish Day School of the Nation's Capital for 30 years of excellence in education.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-424

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize the District of Columbia Health Benefit Exchange Authority for its determined efforts to expand access to health insurance for all Washingtonians.

WHEREAS, the District of Columbia Health Benefit Exchange Authority ("DCHBX") was established as a requirement of section 3 of the Health Benefit Exchange Authority Establishment Act of 2011, effective March 3, 2012 (D.C. Law 19-94);

WHEREAS, DCHBX is a public-private partnership established to create and operate the District's state-based, online health insurance marketplace called DC Health Link;

WHEREAS, the mission of the DCHBX is to implement a health care exchange program in the District of Columbia in accordance with the Patient Protection and Affordable Care Act ("ACA"), thereby ensuring access to quality and affordable health care to all District of Columbia residents;

WHEREAS, DCHBX is locally managed, operated, and funded, reflecting local priorities and needs, and advocates for the lowest-possible premiums for District residents and small businesses;

WHEREAS, DCHBX was built from the ground up by the District of Columbia community, including health plans, brokers, community health centers, hospitals and physicians, the business community, and patient and consumer advocacy groups, with strong support of policymakers;

WHEREAS, District of Columbia policymakers, including the U.S. Congresswoman representing the District of Columbia, the Mayor of the District of Columbia, and the Council of the District Columbia, supported the successful implementation of the exchange with key policy decisions, including legislation to create a quasi-government agency, budget and financing, streamlined procurement, and public policies affecting consumer protections;

ENROLLED ORIGINAL

WHEREAS, District of Columbia government agencies were also crucial to the successful implementation of the exchange, including the Department of Health Care Finance, the Department of Human Services, the Department of Health, and the Department Insurance, Securities, and Banking;

WHEREAS, reaching and educating District residents about the ACA and DC Health Link involved engaging myriad stakeholders, community partners, and organizations as trusted voices with a wealth of skills, contacts, and resources to support and boost outreach efforts, including faith-based institutions, public libraries, professional associations, embassies, public and charter schools, universities, and colleges;

WHEREAS, DCHBX's development was guided and is continually led by an Executive Board comprised of District residents with benefits expertise and who are locally and nationally recognized health policy experts;

WHEREAS, DCHealthLink.com assists District residents in shopping for, comparing, and enrolling in affordable, high-quality health insurance;

WHEREAS, when many ACA marketplaces around the country struggled and despite being the last state to begin building its online marketplace, DC Health Link was one of 4 that opened for business on time;

WHEREAS, since DC Health Link opened for business in 2013, the District's uninsured rate decreased by half, and approximately 18,000 residents are covered through the DC Health Link individual marketplace and more than 76,000 people are covered through its small business marketplace;

WHEREAS, in 2015, DCHBX received national recognition by PR Week for innovative techniques used to reach District residents with creative "outside-the-box" enrollment events, "Reaching People Where They Live, Work, Play, and Pray," including at popular bars and late-night diners, ice skating venues, laundromats, and places of worship;

WHEREAS, in 2016 and again 2018, HBX was awarded a Best Practices in Innovation Award by Amazon Web Services;

WHEREAS, in 2017, DC Health Link was ranked No. 1 among public marketplaces for our online consumer decision support tools;

WHEREAS, in 2017, DC Health Link was ranked No. 1 among all state-based marketplaces and the federal market for its online consumer decision support tools by the Clear Choice Campaign by the Council for Affordable Health Coverage;

ENROLLED ORIGINAL

WHEREAS, in 2017, DCHBX communications and outreach strategy is included as a chapter in the Health Industry Communication college textbook for communications students as well as students of health administration and public health;

WHEREAS, in 2017, DCHBX and the Massachusetts Health Connector created the first-in-the-nation state marketplace partnership through which DCHBX replaced the technology platform using DC Health Link technology and now provides operational support for its small business marketplace;

WHEREAS, in 2018, DCHBX won 2 national awards for best Community Relations and best Event Marketing campaigns by PR News Healthcare Communications, and was awarded honorable mention in 2 other categories, Cause Related Marketing and WOW! (out-of-the-box) marketing campaigns;

WHEREAS, in 2018, DCHBX won honorable mention in the PR News' Platinum Awards category for its Multicultural Campaign that focused on "Enrollment Weeks of Action" for engaging the Latino, African American, Asian-Pacific Islander, and LGBTQ communities;

WHEREAS, according to a Spring 2018 U.S. Centers for Medicare and Medicaid Services report, the District has the second-lowest health insurance premiums for residents among all states;

WHEREAS, in 2018, the District is ranked No. 2 in the country for the lowest uninsured rate, second only to Massachusetts; and

WHEREAS, the District has one of the lowest uninsured rates in the country with more than 96% of District residents insured, and under the leadership of Executive Director Mila Kofman, the DCHBX remains a national leader in expanding access to health insurance.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "DC Health Benefit Exchange Authority Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes the District of Columbia Health Benefit Exchange Authority on its commitment to expanding access to health insurance for all Washingtonians.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-425

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize and honor Annie's Paramount Steakhouse in celebration of its 70th anniversary.

WHEREAS, Annie Kaylor presided over Annie's Paramount Steakhouse for more than 50 years, making the restaurant an unofficial social club for Washington, D.C.'s gay community;

WHEREAS, born in 1927 in Washington, D.C., Annie Kaylor passed on July 24, 2013, at 85 years of age;

WHEREAS, Annie's Paramount Steakhouse opened in 1948 by Annie Kaylor's brother, George Katinas;

WHEREAS, Annie Kaylor began working in the restaurant in 1952 and her name went up on the front of the Paramount Steakhouse in the early 1960s;

WHEREAS, in 1985, Annie's Paramount Steakhouse moved from 17th Street and Church Street, N.W., to its current spot at 1609 17th Street, N.W; and

WHEREAS, Annie's Paramount Steakhouse was an early sponsor of the Gay Men's Chorus of Washington, has had a presence at the Gay Pride parade, and since 2010, after gay marriage became legal in the District, has been the site of numerous weddings.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Annie's Paramount Steakhouse Restaurant 70th Anniversary Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes and honors Annie's Paramount Steakhouse for its many contributions to the citizens and city of Washington, D.C.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-426

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize the Washington Area Women's Foundation and to declare October 30, 2018, as "Washington Area Women's Foundation Day" in the District of Columbia.

WHEREAS, the Washington Area Women's Foundation mobilizes communities in the District to ensure that women and girls of color who are economically vulnerable have the resources they need to thrive;

WHEREAS, for 20 years the Washington Area Women's Foundation has worked across the District to provide stability through research, grant-making, and advocacy for women and girls of color;

WHEREAS, the Washington Area Women's Foundation is the region's only donor-supported foundation focused exclusively on investing in women and girls of color;

WHEREAS, the Washington Area Women's Foundation helps build pathways out of poverty through economic opportunities for women and their families;

WHEREAS, the Washington Area Women's Foundation has helped more than 16,000 women increase their income and assets by $53 million through higher wages, decreased debt, tax credits, and access to homeownership; and

WHEREAS, the Washington Area Women's Foundation raises more than $860,000 annually at its Leadership Luncheon and this year celebrates 20 years of service and commitment to women and girls of color in the District.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Area Women's Foundation Day Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia recognizes and honors the Washington Area Women's Foundation and declares October 30, 2018, as "Washington Area Women's Foundation Day" in the District of Columbia.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-427

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize Henry F. Schuelke, III, Esq. for his outstanding service of 36 years as Special Counsel to the District of Columbia Commission on Judicial Disabilities and Tenure.

WHEREAS, Mr. Schuelke, a distinguished member of the D.C. Bar, was appointed Special Counsel to the District of Columbia Commission on Judicial Disabilities and Tenure ("Commission") in 1982 and served in that capacity through 2018;

WHEREAS, Mr. Schuelke, proved to be a most trusted advisor to the Commission through his wise and thoughtful counsel particularly when the Commission was faced with the resolution of difficult issues concerning judicial ethics and the misconduct of judges;

WHEREAS, Mr. Schuelke, was always meticulous and thorough in his preparation for monthly Commission meetings, and conducted the Commission's investigations and proceedings not only with exceptional skill, but also with an uncompromising belief that judges must maintain the highest standards of judicial and personal conduct;

WHEREAS, Mr. Schuelke, on numerous occasions provided an invaluable service to the judges of the District of Columbia courts through his informal advice to judicial officers who sought his counsel on a variety of ethical issues;

WHEREAS, the Commission also is indebted to Mr. Schuelke for providing his legal and investigative services to the Commission on a virtual pro bono basis, requesting meager compensation over the past 36 years that barely covered his administrative costs; and

WHEREAS, Mr. Schuelke, has earned the respect and admiration from current and former Commission members and judges of the District of Columbia courts for the superb job he has done and for consistently maintaining the highest ethical standards.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Henry F. Schuelke, III, Esq. Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia recognizes and honors Henry F. Schuelke, III, Esq. for his significant contributions to the administration of justice in the District of Columbia, and for the 36 years of outstanding service he has given to the District of Columbia Commission on Judicial Disabilities and Tenure and the District of Columbia courts.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-428

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To posthumously recognize and honor the full and vibrant life of Helen Geneva Williams Lee Bell.

WHEREAS, Helen Geneva Williams Lee Bell, a third-generation Washingtonian, was born in the District on September 24, 1918;

WHEREAS, Helen Geneva Williams Lee Bell attended Randall Junior High School, Cardozo Senior High School, and Miner Teachers College;

WHEREAS, Helen Geneva Williams Lee Bell was a committed public servant of the District and federal governments, and was affiliated with the United Brotherhood of Carpenters Union;

WHEREAS, Helen Geneva Williams Lee Bell was a resident of the Morton and Florence Bahr Towers for more than 30 years, and organized many community activities for the residents of the Petworth neighborhood senior building;

WHEREAS, Helen Geneva Williams Lee Bell was the oldest living member of the First Baptist Church, located at 712 Randolph Street, N.W., which she joined in 1937 when it was located in Southwest Washington;

WHEREAS, Helen Geneva Williams Lee Bell led several church ministries, including the Tribe of Reuben, Happy Warriors Senior Citizens Club, Senior and Second Choirs, and Senior Ushers;

WHEREAS, Helen Geneva Williams Lee Bell honored her son, a Vietnam veteran, as an active member of the American War Mothers, a patriotic non-partisan organization of mothers celebrating their children's service during times of conflict;

WHEREAS, Helen Geneva Williams Bell was a standout contestant in the Ms. Senior District of Columbia Pageant, sharing not only her beauty, but her poetic talent;

ENROLLED ORIGINAL

WHEREAS, Helen Geneva Williams Lee Bell enjoyed visiting Ocean City, Maryland, tuning into the Oprah Winfrey Network, cheering on Washington's National Football League team, and fellowshipping with family, especially on her birthday;

WHEREAS, Helen Geneva Williams Lee Bell was celebrated by loved ones and District leaders at her centennial birthday event on September 29, 2018, at the historic Prince Hall Masonic Temple located on U Street, N.W.;

WHEREAS, Helen Geneva Williams Lee Bell was the mother of Sandra Thomas (Donald), Frances Bell (Victoria), and Beverly Brooks (Ronald), and the late Jennie Nelson (Irving), Dr. Shelvie A. Lee McCoy (Samuel, surviving); grandmother to 15; great-grandmother to 37; great-great-grandmother to 17; and great-great-great-grandmother of one;

WHEREAS, Helen Geneva Williams Lee Bell passed away peacefully on October 27, 2018; and

WHEREAS, Helen Geneva Williams Lee Bell leaves a legacy of faith, love, and generosity, and will be dearly missed by family and friends.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Helen Geneva Williams Lee Bell Posthumous Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia posthumously recognizes and honors Helen Geneva Williams Lee Bell for her life of generosity and abundance.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-429

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize and congratulate Circle of Friends on the occasion of its 10th anniversary.

WHEREAS, Circle of Friends was founded in 2008 by Joigie Tolson, Montina Anderson, Curtis Lewis, Brett Greene, Tony Powell, and David Boyd with the purpose of bringing together an extended network of contemporaries for an annual celebration of fellowship;

WHEREAS, Circle of Friends has become the premier social gathering of African American professionals in the District of Columbia and its reach includes an expansive network of more than 1,000 professionals from every industry;

WHEREAS, Circle of Friends' philanthropic mission is to educate and empower underserved youth in the District of Columbia;

WHEREAS, Circle of Friends hosts an annual 2-part event over the Thanksgiving holiday weekend that has been featured in Washington Life Magazine, The Washington Post, The Root, and Social Sightings of DC; and

WHEREAS, Circle of Friends will celebrate its 10th anniversary on November 23, 2018, at La Vie Restaurant at the Wharf DC and November 24, 2018, at the historic Takoma Station Tavern.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Circle of Friends 10th Anniversary Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia congratulates Circle of Friends on its 10th anniversary.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-430

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To honor the extraordinary life of Dr. Janette Hoston Harris who dedicated her life to education, public service, and the District of Columbia.

WHEREAS, Dr. Janette Hoston Harris was born on September 7, 1939, in Monroe, Louisiana;

WHEREAS, Dr. Harris earned her high school diploma from Carroll High School in Monroe, Louisiana;

WHEREAS, Dr. Harris attended Southern University from 1956-1960 where she was active in the Methodist club and captain of the drill team;

WHEREAS, in 1960, during her senior year of college, Dr. Harris and 6 other students were arrested for attempting to desegregate an all-white lunch counter;

WHEREAS, the arrest resulted in her expulsion from Southern University and, by order of the governor, she was prohibited from attending any college in the state of Louisiana;

WHEREAS, Dr. Harris completed her undergraduate education in 1962 at Central State University in Ohio, where she earned her B.A. degree in psychology in 1962;

WHEREAS, Dr. Harris earned her master's degree in history in 1972 from Howard University, and her Ph.D. degree from Howard University in 1975;

WHEREAS, from 1964 until 1970, Dr. Harris taught second, fourth, fifth, and sixth grades in the District of Columbia public schools;

WHEREAS, from 1970 until 1972, Dr. Harris worked as a research associate for the Association for the Study of Afro-American Life and History;

ENROLLED ORIGINAL

WHEREAS, in 1975, Dr. Harris began teaching history at Federal City College, now known as the University of the District of Columbia;

WHERAS, also in 1975, Dr. Harris established a consulting firm, JOR Associates;

WHEREAS, in 1977, the District of Columbia chapter of the National Hook-Up of Black Women, Inc., was founded at the All Souls Unitarian Church under the leadership of Dr. Harris;

WHEREAS, from 1979 until 1980, Dr. Harris served as campaign manager for the Carter/Mondale Re-election Campaign;

WHEREAS, in 1980, Dr. Harris became the first African-American woman to serve on the Board of the Roothbert Foundation, which awards scholarships to District of Columbia high school students;

WHEREAS, in 1991, Dr. Harris was appointed Director of Educational Affairs for the District of Columbia;

WHEREAS, from 1992 until 1995, Dr. Harris served as Director of the Office of Intergovernmental Relations in the Executive Office of the Mayor for the District of Columbia, as well as the National President for the Association for the Study of African American Life and History;

WHEREAS, Dr. Harris was appointed as the first City Historian for the District of Columbia by former Mayor Marion Barry in 1998;

WHEREAS, in 1998, Dr. Harris founded the D.C. Hall of Fame Society to honor and showcase the rich history of Washington through its citizens;

WHEREAS, in 2004, Harris, along with her fellow sit-in students, was invited back to Southern University to receive an honorary undergraduate degree as well as the Governor of Louisiana Recognition Award;

WHEREAS, in July 2018, Dr. Harris received a Southern University Alumni Federation Lifetime Achievement Award at its National Alumni Conference on the Baton Rouge campus;

WHEREAS, Dr. Harris was an active member of numerous local and national organizations, including the 16th Street Heights Neighborhood Association, the National Hook-Up for Black Women, Inc., Continental Societies, Inc., Links, Inc., and Alpha Kappa Alpha Sorority, Inc.;

ENROLLED ORIGINAL

WHEREAS, Dr. Harris was an accomplished author, whose writings include “Black crusaders in History, Congress and Government: Teacher's Guide” and “The History of Sisterhood and Service”;

WHEREAS, Dr. Harris, a resident of Ward 4, was loved by the entire community;

WHEREAS, Dr. Harris is survived by her husband, Rudolph Harris; their daughter, Junie Harris; and their son, Rylan Harris; and

WHEREAS, Dr. Janette Hoston Harris has contributed greatly to the District of Columbia as a professor, artist, author, activist, public servant, and historian.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the “Dr. Janette Hoston Harris Posthumous Recognition Resolution of 2018”.

Sec. 2. The Council of the District of Columbia posthumously recognizes the extraordinary life of Dr. Janette Hoston Harris and celebrates her achievements, unyielding dedication to public service and the District of Columbia, and unconditional devotion to her family.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-431

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize and honor the D.C. United on their opening of Audi Field, stellar regular season, and advancement to the MLS Playoffs.

WHEREAS, D.C. United, under the ownership of Jason Levien and the coaching of Ben Olsen, have brought action and excitement to Washington, D.C. and the metropolitan area for the 2018 season;

WHEREAS, Wayne Rooney is a finalist for both the Landon Donovan MLS MVLP Award and the MLS Newcomer of the Year Award;

WHEREAS, D.C. United returned to the playoffs after a one-year absence by finishing fourth in the Eastern Conference with a 14-11-9 record and 51 points;

WHEREAS, D.C. United hosted the First Round of the Eastern Conference Playoffs and lost in penalty kicks to the Columbus Crew;

WHEREAS, D.C. United have helped in the transformation of the SW Waterfront neighborhood into an exciting destination for the entire metropolitan area;

WHEREAS, D.C. United contribute to the good of the community through their partnership with D.C. Scores and a variety of fundraising efforts and donations; and

WHEREAS, Washington, D.C. and the entire metropolitan area looks forward to "Uniting the District" and supporting and rooting for D.C. United for many years to come.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "D.C. United's 2018 Season Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia salutes D.C. United for their spirit and countless achievements in advancing sporting excellence in Washington, D.C. and recognizes and congratulates D.C. United's players, coaches, and staff for their individual achievements during this stellar season.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-432

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize the Transgender Day of Remembrance, to celebrate the resilience of transgender individuals, and to declare November 20, 2018, as "Transgender Day of Remembrance" in the District of Columbia.

WHEREAS, transgender individuals face disproportionately high rates and severity of violence, and the vast majority of transgender women murdered and attacked each year are African American or Latina, requiring that the continued commitment to fight racism be a critical component of efforts to protect transgender lives;

WHEREAS, 2017 and 2018 to date have been characterized by a dramatic increase in violence against transgender, lesbian, gay, and bisexual individuals, part of a national trend of increased bias-motivated violence;

WHEREAS, the District of Columbia has a particularly alarming history of violence against transgender individuals including the murders of Deeniquia Dodds, Deoni Jones, Lashai Mclean, Tyli'a Mack, Elexius Woodland, Bella Evangelista, Emonie Spaulding, Stephanie Thomas, Ukea Davis, and too many others;

WHEREAS, countless transgender individuals experienced violence and harassment this past year in the District of Columbia and the metropolitan area;

WHEREAS, the national political climate of recent years has demonized transgender people, including efforts to legalize discrimination against and remove protections for transgender individuals;

WHEREAS, the District of Columbia strives to be a city that is welcoming and safe for all residents and visitors, including transgender people;

ENROLLED ORIGINAL

WHEREAS, the Transgender Day of Remembrance is held on November 20 around the world to memorialize those killed due to anti-transgender hatred or prejudice;

WHEREAS, Transgender Day of Remembrance is also a time to recognize the resilience of transgender communities and individuals, and to celebrate those who are living and fighting against hatred; and

WHEREAS, the D.C. transgender community and allies have commemorated Transgender Day of Remembrance since 2001, growing from a small group of activists to an event that attracts hundreds of participants and attendance from government officials.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Transgender Day of Remembrance Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes the contributions of the transgender community, its vulnerability to violence, and the resilience of transgender individuals, and declares November 20, 2018, as "Transgender Day of Remembrance" in the District of Columbia.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-434

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To honor and recognize the work of Kelly Harper, the District of Columbia's 2019 Teacher of the Year, for her commitment to education and preparing the students of the District of Columbia to succeed.

WHEREAS, Kelly Harper, a native of Washington, D.C., has dedicated the previous 7 years of her life to the profession of teaching.

WHEREAS, since 2014, Ms. Harper has taught third grade at Amidon-Bowen Elementary School in Ward 6 and contributed to the development of hundreds of District of Columbia students, setting them up for academic achievement and future success;

WHEREAS, Ms. Harper is further committed to the civic and societal development of her students, seeking to empower them to become leaders and voices for their community;

WHEREAS, Ms. Harper has shown a commitment to the Amidon-Bowen Elementary School community through her participation in the Flamboyan Foundation Family Engagement Leadership Team;

WHEREAS, Ms. Harper serves as a role model to her colleagues and imparts her experience and knowledge to her fellow teachers through conducting development trainings for District of Columbia Public Schools; and

WHEREAS, this year, in 2018, the Office of the State Superintendent of Education named Ms. Harper the District of Columbia Teacher of the Year in 2019 in recognition of her commitment to the profession of teaching, the development of her colleagues, and achievement of her students.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Kelly Harper Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia honors and recognizes the educational contributions of Kelly Harper in the instruction and development of the students of Washington, D.C. and congratulates her on being named the 2019 D.C. Teacher of the Year.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-435

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize and congratulate the Washington, D.C. Alumnae Foundation, Inc. on the occasion of its 30th Annual Breakfast, Fashion Show and Auction.

WHEREAS, the Washington, D.C. Alumnae Foundation, Inc. ("Foundation") was established in 1985 by the Washington DC Alumnae Chapter, Delta Sigma Theta Sorority, Inc. for charitable, religious, educational, and scientific purposes, and incorporated on August 15, 1985;

WHEREAS, the Foundation was initiated during the presidency of Olivia V. Aiken, established during the presidency of E. Jean Christian, and Beulah T. Sutherland was elected the first chairman of the Foundation in March 1985;

WHEREAS, the Foundation has maintained its prominence in the District of Columbia thanks to the leadership provided by its current Board of Directors, which includes:

Audrey M. Doman, President
Venida Y. Hamilton, Vice President
Michelle Guthrie, Recording Secretary
Tracey Tolbert Jones, Corresponding Secretary
Michelle L. Young, Treasurer
Hazel Kennedy, Financial Secretary
Mary Q. Grant
Robyn Cohen Hudson
Phyllis Epps
Denise P. Kimbrough
Michelle Milam
Francis P. Nelson
Christopher McKnight
Deborah Singleton

ENROLLED ORIGINAL

WHEREAS, the Foundation raises funds through its Annual Breakfast Fashion Show & Auction;

WHEREAS, the Foundation has awarded over $400,000 in grants to numerous nonprofits in the District of Columbia;

WHEREAS, the Foundation continues to uphold its mission and vision to support and promote charitable, educational, cultural, technological, economical, and scientific development programs and projects of nonprofit organizations in the District of Columbia through annual grants, donations, and scholarship awards; and

WHEREAS, on December 1, 2018, the 30th Annual Breakfast, Fashion Show and Auction will take place at the Hyatt Regency Washington.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington, D.C. Alumnae Foundation, Inc. 30th Annual Breakfast, Fashion Show and Auction Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia congratulates the Washington, D.C. Alumnae Foundation, Inc. on the occasion of its 30th Annual Breakfast, Fashion Show and Auction.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-436

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize Mary's Center on its 30th anniversary of service to the Ward 1 and District community, and to recognize Founder, President, and CEO Maria S. Gomez for her role in building Mary's Center into a visionary institution.

WHEREAS, Maria S. Gomez was born in Colombia and immigrated to the United States with her mother at 13 years of age;

WHEREAS, Ms. Gomez attended District of Columbia public schools and earned degrees in Nursing and Public Health from Georgetown University and the University of California, Berkeley;

WHEREAS, Ms. Gomez was working as a nurse with the District of Columbia's Department of Health when she witnessed a large increase in the number of Latin American women who required maternal healthcare after migrating to the United States to escape dangerous conditions in their home countries;

WHEREAS, Ms. Gomez and healthcare advocates founded Mary's Center in 1988 to better meet the needs of mothers;

WHEREAS, Mary's Center originally operated out of a basement clinic on Columbia Road, N.W., in Ward 1 before moving to its current headquarters at 2333 Ontario Road, N.W.;

WHEREAS, since its founding in 1988, Mary's Center has grown from serving 200 women annually to providing health care, family literacy, and social services to 50,000 men, women, and children from 50 different countries at 8 locations each year;

WHEREAS, Mary's Center has committed to a social change model centered around the provision of integrated healthcare, social services, and education—regardless of participants' ability to pay;

WHEREAS, Mary's Center serves as an invaluable resource for the neighborhood surrounding its headquarters in Ward 1 and the healthcare system of the entire Washington, D.C. metropolitan area;

ENROLLED ORIGINAL

WHEREAS, Ms. Gomez's hard work and dedication led First Lady Michelle Obama to choose Mary's Center as the site of her first official visit to a nonprofit organization in February 2009;

WHEREAS, Ms. Gomez currently serves as a board member of the DC Primary Care Association, the Primary Care Coalition of Montgomery County, the Meyer Foundation, and the Washington Area Women's Foundation;

WHEREAS, Ms. Gomez has been frequently recognized by the Mayor and the Council for her work in strengthening the District's health care system; and

WHEREAS, 2018 marks 30 years of Mary's Center's contributions to the community with Founder, President, and CEO Maria S. Gomez at the helm.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Maria S. Gomez and Mary's Center Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes Mary's Center for its accomplishments over 30 years of transformative work and honors Maria S. Gomez for her important leadership in advancing the health and well-being of mothers and the District's immigrant community.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-437

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To recognize David C. "Sonny" Bailey for decades of hard work and service to the District of Columbia and to the H Street, N.E., corridor.

WHEREAS, David C. Bailey, known to the H Street community as Sonny, moved from North Carolina to Ward 6 in the late 1940s, along with his mother and 2 younger sisters;

WHEREAS, Mr. Bailey graduated from Phelps Vocational School in 1964, where he studied auto mechanics and found his passion for plumbing, heating, and HVAC work;

WHEREAS, Mr. Bailey, inspired by his mother's work ethic, worked to become a Master Plumber, and in 1985 he purchased 1000 H Street, N.E., where he opened Sonny's Do It Yourself Plumbing;

WHEREAS, Mr. Bailey became known as "the most honest plumber in D.C.," working with landmark H Street businesses like Horace and Dickie's, Mason's Barber, George's Men's Clothing, and the Atlas Theater;

WHEREAS, Mr. Bailey provided training and mentoring for many young men who later became plumbers, hosted holiday parties to support the less fortunate, and built strong relationships throughout the community; and

WHEREAS, Mr. Bailey, through his hard work and commitment to his neighborhood, made the corner of 10th Street, N.E., and H Street, N.E., a place that connected business and community.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "David C. "Sonny" Bailey Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia expresses its deepest appreciation for the decades of hard work and community building that David C. "Sonny" Bailey contributed to the

ENROLLED ORIGINAL

H Street, N.E., community and extends its best wishes to Mr. Bailey and his family as he steps away from his long-standing business.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-438

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To declare the week of November 12 through November 18, 2018, as "Apprenticeship Week" in the District of Columbia, in celebration of the benefits of apprenticeships in preparing a highly skilled workforce to meet the talent needs of employers across diverse industries.

WHEREAS, National Apprenticeship Week is a national celebration commissioned by the U.S. Department of Labor during the week of November 12 through November 18, 2018;

WHEREAS, the national registered apprenticeship system enables residents to earn a paycheck while they learn workplace skills, reducing their need to take on student debt and helping employers build a talented workforce by ensuring high-quality, on-the-job training;

WHEREAS, there are over 545,000 apprentices nationwide who are developing skills in more than 1,000 occupations and are on the path toward long-term, living wage employment;

WHEREAS, nearly 9 out of 10 apprentices nationwide are employed after completing their apprenticeship, securing an average wage of approximately $60,000 annually;

WHEREAS, workers who complete an apprenticeship program earn approximately $300,000 more in wages over the span of their careers than non-apprenticeship participants;

WHEREAS, apprenticeship programs have been shown to be highly cost-effective methods of developing workplace skills with potential to also reduce youth unemployment, raise wages for working adults, ease transitions after graduation from school to the workforce, and use limited federal resources more effectively;

WHEREAS, apprenticeship programs have also been shown to produce high returns for employers through benefits that include highly skilled employees, reduced turnover costs, lower investment in recruitment, higher productivity, and a more diverse workforce;

WHEREAS, the vast majority of current apprentices are men, there is a need to ensure that apprenticeship opportunities are also available and accessible to women;

ENROLLED ORIGINAL

WHEREAS, the vast majority of registered apprenticeship programs in the District are in the construction trades, and there is a need to expand apprenticeships into other high-demand industries in the District;

WHEREAS, newly passed District law, the Pathways to District Government Careers Act of 2018, establishes a public-sector apprenticeship initiative that requires District government to create apprenticeship programs in 5 high-demand occupations, including one in healthcare and one in information technology, in order that the District government lead by example and provide the benefits of apprenticeships to its agencies and employees; and

WHEREAS, by contacting the Department of Employment Services, District residents can learn how apprenticeships provide an avenue toward long-term, living wage careers and District businesses can learn how apprenticeships can address long-term hiring needs.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Apprenticeship Week Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes the week of November 12 through November 18, 2018, as "Apprenticeship Week" in the District of Columbia.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-439

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 13, 2018

To celebrate the outstanding leadership, selfless service, and ongoing devotion of Sig and Susan Cohen to the Hill Havurah, Capitol Hill, and wider Washington, D.C. communities.

WHEREAS, Sig and Susan Cohen settled in Washington, D.C. over 30 years ago after spending their earlier years serving around the world, with Sig working as an American diplomat and Susan volunteering with local causes in such places as East Pakistan (now Bangladesh), India, West Germany, and England;

WHEREAS, Sig and Susan built their lives on Capitol Hill and dedicated much of their time in the District to fostering a thriving Jewish community in their neighborhood;

WHEREAS, after being unable to find a natural fit within other Jewish communities, Sig and Susan started a new community on Capitol Hill called Hill Havurah, initially opening their home and then other Capitol Hill living rooms to provide their growing community a space to convene;

WHEREAS, through their leadership and the can-do spirit they have instilled in Hill Havurah members, Sig and Susan have sustained Hill Havurah's presence on Capitol Hill and its growth to now offer a Hebrew school, early childhood education program, and Sage community group for empty nesters;

WHEREAS, Susan has remained committed to staying civically engaged and has taught the renowned Alexander Technique across Washington, D.C. at such places as Shakespeare Theatre Company, Arena Stage, Studio Theatre, Howard University, and The Catholic University of America;

WHEREAS, Sig has continued to devote significant time and energy toward bettering Capitol Hill and its surrounding communities through his work helping to start a free community mediation service in the District, working to build connections between church prison ministries and re-entry service providers, serving Capitol Hill Group Ministry as both a member of the Board of Directors and a past chair of their Housing Advocacy Committee, and serving as a

ENROLLED ORIGINAL

founding member of the South Washington/West-of-the-River Family Strengthening Collaborative; and

WHEREAS, Sig and Susan remain dedicated public servants and continue to be the backbone of many Hill Havurah community activities—Susan regularly blows the shofar during the High Holidays and, together, she and Sig ensure that food is plentiful at the end of the Yom Kippur fast.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sig and Susan Cohen Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes Sig and Susan Cohen for their ongoing commitments to serving diverse communities across the District, creating a multi-faceted, faith-based community for District residents in Hill Havurah, and fostering inclusivity on Capitol Hill and its surrounding neighborhoods.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-440

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 20, 2018

To recognize and congratulate DC Vote on the occasion of its 20th anniversary.

WHEREAS, DC Vote was founded in 1998, and is a national citizen engagement and advocacy organization dedicated to strengthening democracy and securing equality for all in the District of Columbia;

WHEREAS, DC Vote envisions a fairer America where residents of the nation's capital are first-class citizens, which will be evidenced by the District of Columbia gaining the freedom to control its own budget, pass its own laws without congressional interference, and having its citizens enjoy equal representation in the U.S. House of Representatives and the U.S. Senate through Statehood for the District of Columbia;

WHEREAS, DC Vote was formed to develop and coordinate solution-oriented proposals that aim to achieve full democratic equality for residents of the District of Columbia;

WHEREAS, under DC Vote's umbrella, creative proposals are incubated and vetted to determine possibilities for consensus and advancement into the policy arena;

WHEREAS, DC Vote welcomes citizens, advocates, thought leaders, scholars, and policy-makers seeking to advance our cause;

WHEREAS, under the leadership of Executive Director Bo Shuff, a dedicated staff, and committed Board of Directors, DC Vote is the largest national organization dedicated to strengthening democracy and securing equality for all in the District of Columbia; and

WHEREAS, DC Vote has fought for and still fights for full and equal representation for District of Columbia residents.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "DC Vote 20th Anniversary Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia recognizes and thanks Bo Shuff for his contributions and commitment to the District of Columbia and congratulates DC Vote on its 20th anniversary.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-441

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To recognize and congratulate the Xi Omega Chapter of Alpha Kappa Alpha Sorority, Incorporated on the occasion of its 95th anniversary.

WHEREAS, Alpha Kappa Alpha Sorority, Incorporated ("AKA") is an international service organization that was founded on the campus of Howard University in Washington, D.C. in 1908;

WHEREAS, AKA is the oldest Greek-letter organization established by African-American college-educated women and is comprised of nearly 300,000 members;

WHEREAS, founded in 1923, Xi Omega Chapter ("Xi Omega") of AKA was the first AKA graduate chapter established in the District of Columbia and was chartered under the leadership of AKA Founder and Incorporator, Norma E. Boyd;

WHEREAS, Xi Omega's commitment to health care dates back to the 1930s when Xi Omega members traveled to the Mississippi Delta, along with Alpha Kappa Alpha women from around the country, to set up mobile clinics to inoculate children against diphtheria and smallpox;

WHEREAS, in the 1940s the Surgeon General of the United States recognized the Mississippi Delta Health Project as the first volunteer health project in the rural South;

WHEREAS, Norma Elizabeth Boyd, a founder of Alpha Kappa Alpha Sorority, charter member and a President of Xi Omega, established the Non-Partisan Council on Public Affairs to assure decent living conditions for people of color and in 1938 the first goals of the council were to eliminate police brutality in the District of Columbia and to establish home rule;

WHEREAS, in 1946, the Non-Partisan Council on Public Affairs was accredited at the United Nations as a nongovernmental-participating organization, and under the Non-Partisan Council on Public Affairs' auspices, 20 students, teachers, and other school officials from the District of Columbia traveled to the United Nations General Assembly;

ENROLLED ORIGINAL

WHEREAS, in 1988, the Pearl and Ivy Education Foundation ("PIEF") was established as the fundraising arm of Xi Omega;

WHEREAS, PIEF's primary mission is to provide scholarships to deserving and exemplary college-bound high school seniors and continuing college students in the District of Columbia and to date has awarded more than $500,000 in scholarships;

WHEREAS, Xi Omega's civic activism includes voter registration drives, voter forums, and transporting voters to the polls;

WHEREAS, Xi Omega has continued to address health disparities in the African American community with specific programs targeting children, working adults, and seniors, and the chapter has conducted health fairs and child wellness screenings;

WHEREAS, under the leadership of President April Gaines-Jernigan, Xi Omega continues to provide meaningful service in the areas of education, health, and human rights;

WHEREAS, on December 15, 2018, the Xi Omega Chapter will celebrate its 95th anniversary at the Renaissance Hotel in Washington, D.C.; and

WHEREAS, after 95 years of service to the District of Columbia, the Xi Omega Chapter of Alpha Kappa Alpha Sorority, Incorporated remains committed to sisterhood, leadership, and service.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Xi Omega Chapter of Alpha Kappa Alpha Sorority, Incorporated 95th Anniversary Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia congratulates the Xi Omega Chapter of Alpha Kappa Alpha Sorority, Incorporated for 95 years of sisterhood and service and recognizes the chapter for its outstanding contributions to the District of Columbia.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-442

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To posthumously recognize and honor J. Patricia Wilson Smoot for her years of exemplary service to the District of Columbia and federal governments and the residents of the District of Columbia.

WHEREAS, J. Patricia Wilson Smoot was born in Brooklyn, New York, in 1964;

WHEREAS, J. Patricia Wilson Smoot earned a Bachelor of Arts in English and Sociology from Bucknell University and a Juris Doctorate from The Catholic University of America, Columbus School of Law;

WHEREAS, J. Patricia Wilson Smoot began her legal career as a judicial law clerk for the Honorable Susan R. Holmes Winfield on the Superior Court of the District of Columbia;

WHEREAS, from 1990 to 1994, J. Patricia Wilson Smoot served as a public defender in Prince George's County, Maryland;

WHEREAS, from 1994 to 2002, J. Patricia Wilson Smoot served as an Assistant United States Attorney in the Office of the United States Attorney for the District of Columbia, where she was first a trial attorney and then the Director of Professional Development;

WHEREAS, in her time at the Office of the United States Attorney, J. Patricia Wilson Smoot received the Department of Justice Special Achievement and the Victims of Crime Awards;

WHEREAS, from 2002 to 2010, J. Patricia Wilson Smoot served as Deputy State's Attorney for Prince George's County, Maryland, where she oversaw the Sex Offense and Child Abuse Unit, the Domestic Violence Unit, the Juvenile Division, and the District Court Division;

ENROLLED ORIGINAL

WHEREAS, J. Patricia Wilson Smoot was appointed as a Commissioner to the United States Parole Commission ("USPC") by President Barack Obama and confirmed by the United States Senate on September 16, 2010;

WHEREAS, J. Patricia Wilson Smoot was a Commissioner on the USPC from 2010 to 2015, where she spearheaded the Mental Health Docket, an alternative to incarceration for low-risk, non-violent offenders with mental health disorders or co-occurring disorders;

WHEREAS, while on the USPC, J. Patricia Wilson Smoot also served as the USPC's Acting General Counsel;

WHEREAS, in 2015, President Obama designated J. Patricia Wilson Smoot as the Chairperson of the USPC, and she served in that role until 2018;

WHEREAS, J. Patricia Wilson Smoot subsequently served as the Deputy Director of the Pretrial Services Agency for the District of Columbia;

WHEREAS, J. Patricia Wilson Smoot was also active on a number of boards and committees, including the National Black Prosecutors Association, the National African American Drug Policy Coalition, the Maryland Coalition Against Sexual Abuse, the Prince George's County Criminal Coordination Council, the Prince George's County Domestic Fatality Review Team, the Governor's Sex Offender Advisory Board, and Community Advocates for Families and Youth;

WHEREAS, J. Patricia Wilson Smoot received a number of awards, accolades, and recognitions, including being named one of Maryland's Top 100 Women by the *Daily Record* in 2008 and 2011; being recognized by the PEERS Coalition for Innovative Leadership in Public Service in the District of Columbia, and receiving the Distinguished Service Award from the Community Advocates for Families and Youth in Prince George's County, Maryland; and

WHEREAS, J. Patricia Wilson Smoot is survived by her husband, Gregory, and children, Nicole and Thomas.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "J. Patricia Wilson Smoot Posthumous Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia posthumously recognizes and honors J. Patricia Wilson Smoot for her years of exemplary service to the District of Columbia and federal governments and the residents of the District of Columbia.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-443

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To honor Doris L. Brooks, a lifelong Washingtonian and dedicated public servant, who promoted authentic engagement between her community and District agencies.

WHEREAS, Doris L. Brooks was born in Freedman's Hospital in Washington, D.C. on November 24, 1934, to the late Robert Emory Corbin and Edith Louise Ruffner Corbin;

WHEREAS, Doris L. Brooks was a graduate of District of Columbia Public Schools as a child, and proudly earned a certification in social work from Federal City College as a young adult;

WHEREAS, Doris L. Brooks worked for the District government for over 40 years at the Child and Family Services Agency and the Department of Human Services;

WHEREAS, in 1975, Doris L. Brooks collaborated with neighbor and friend, the late Marion Barry, to form the first neighborhood round table, a grassroots network for change;

WHEREAS, Doris L. Brooks was the elected Advisory Neighborhood Commissioner of Advisory Neighborhood Commission 6A from 1984 to 1988;

WHEREAS, after moving to Shaw, Doris L. Brooks campaigned for the Advisory Neighborhood Commissioner of Advisory Neighborhood Commission 2C, was elected, and remained a dutiful Commissioner throughout redistricting, from 1990 to 2012;

WHEREAS, Doris L. Brooks retired as one of the longest-serving Advisory Neighborhood Commissioners in the history of Washington, D.C.;

WHEREAS, Doris L. Brooks, a decade-long Advisory Board member of the Convention Center, took pride in the progress and development of the District's new modern convention center;

WHEREAS, Doris L. Brooks has served the local community for nearly 50 years with organizations such as Christ Child Society Settlement House, Friendship Community House of South East, E Street Block Club, and Send the Kids to Camp Programs;

ENROLLED ORIGINAL

WHEREAS, Doris L. Brooks engendered compassionate and effective relationships that would prove transformative for the District for years to come; and

WHEREAS, on November 14, 2018, Doris L. Brooks departed this life in loving memory, leaving a legacy of 8 children (one deceased daughter), 19 grandchildren, 13 great grandchildren, 2 daughters-in-law, one sister-in-law, one special niece and nephew, and a host of beloved family and friends.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Doris L. Brooks Posthumous Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia posthumously honors the life and legacy of Doris L. Brooks.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-444

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To honor and recognize the work of Thomas Pavlick, Jen Richer, and Kelly Collis, collectively the *Tommy Show*, for their radio success and many contributions to civic and community life across the region.

WHEREAS, the *Tommy Show*, a popular morning show on 94.7 Fresh FM, aired for 7 years, transforming the medium by socializing, celebrating, and grieving directly with their listeners.

WHEREAS, Thomas "Tommy McFly" Pavlick, Jen Richer, and Kelly Collis frequently participated in community events, concerts, and sporting events to build and deepen their relationship with fans throughout the region;

WHEREAS, the *Tommy Show* prioritized giving back, supporting many local initiatives, including the Best Buddies program, which helps children with intellectual and developmental disabilities make positive connections by pairing them with other students as their buddy;

WHEREAS, Thomas Pavlick serves as the Chairman of the Best Buddies program, helping it to expand by adding an adult friendship program;

WHEREAS, the *Tommy Show* delivered thousands of Georgetown Cupcakes to District of Columbia teachers in all 8 wards, and hosted innumerable charity events across the city; and

WHEREAS, the *Tommy Show* transcended the radio show format, choosing to directly invest in people and organizations across the region and taking seriously the responsibility of entertaining residents during the most intimate parts of their day.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the “Tommy Show Recognition Resolution of 2018”.

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia recognizes and commends the *Tommy Show* for its many civic and community contributions throughout the region.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-445

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To recognize the International Day to End Violence Against Sex Workers, and to declare December 17, 2017, as "International Day to End Violence Against Sex Workers" in the District of Columbia.

WHEREAS, sex workers, or people who offer sexual services in exchange for something of value, are disproportionately targeted for violence around the globe and in the District of Columbia;

WHEREAS, criminalization of sex work and the accompanying stigma lead to sex workers being viewed as less worthy of having their human rights respected and protected, as exemplified by the comments of Gary Ridgeway, the Green River Killer, after admitting to the murders of over 70 women in Washington State: "I picked prostitutes because I thought I could kill as many of them as I wanted without getting caught";

WHEREAS, sex workers organized the first International Day to End Violence Against Sex Workers on the date of Ridgeway's conviction, to draw attention to the impunity with which people commit violence against sex workers, and the obstacles sex workers face when attempting to report violence;

WHEREAS, studies in the U.S. have revealed that as many as 80% of street-based sex workers have faced violence in the course of their work;

WHEREAS, research in the District of Columbia has found that more than half of sex workers who reached out to police for help received negative reactions, and one in 10 had been subject to physical or sexual violence at the hands of law enforcement;

WHEREAS, this violence disproportionately affects people involved in commercial sex who are marginalized in other ways, such as women, people of color, transgender individuals, migrants, and young people;

ENROLLED ORIGINAL

WHEREAS, the District of Columbia strives to be a city that is welcoming and safe for all residents and visitors, and ending violence in our communities is a high priority;

WHEREAS, the International Day to End Violence Against Sex Workers is commemorated on December 17 around the world; and

WHEREAS, in the District of Columbia, a memorial event has been planned by community members and organizations to recognize International Day to End Violence Against Sex Workers.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "International Day to End Violence Against Sex Workers Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia recognizes the human rights of sex workers, including their right to be free from violence, and declares December 17, 2017, as "International Day to End Violence Against Sex Workers" in the District of Columbia.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-447

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To recognize and honor Karen V. Scipio-Skinner, MSN, RN for her outstanding service to the District of Columbia government.

WHEREAS, Karen V. Scipio-Skinner, MSN, RN received a Bachelor of Science in Nursing Degree from North Carolina Agricultural & Technical University in Greensboro, North Carolina in 1970;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN received a Master of Science in Nursing Degree from The Catholic University of America in Washington, D.C. in 1978;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN received a Registered Nurse Certification in 1993 and is certified by the American Nurses Credentialing Center in Nursing Continuing Education/Staff Development;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN has been Executive Director to the District of Columbia Board of Nursing at DC Health since 2002;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was the Nursing Practice and Policy Associate for the District of Columbia Nurses Association in Washington, D.C., where she served from 1990 to 2002 and managed the Continuing Education Division;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN served as Training Supervisor and Psychiatric Review Specialist for the American Psychiatric Association in Washington, D.C. in 1986 and 1987;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was the Director of Staff Development for the Psychiatric Institute of Washington, D.C. from 1985 to 1986;

ENROLLED ORIGINAL

WHEREAS, Karen V. Scipio-Skinner, MSN, RN worked at St. Elizabeths Hospital in Washington D.C. as a Nurse Educator from 1974 to 1985, as a Supervisory Psychiatric Nurse from 1972 to 1974, and as a Psychiatric Staff Nurse from 1970 to 1972;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN completed 31 years of employment service with the District of Columbia government;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was recognized by the Washington Business Journal as one of the District's Top Ten Lobbyists;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a mayoral appointment to be a member of the District of Columbia Board of Nursing;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a mayoral appointment to the Metropolitan Washington Regional HIV Health Services Planning Council;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was the Chairperson of the District of Columbia Consortium on Nursing Education & Practice, a Robert Woods Funded Project;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was selected by the American Society of Association Executives for the Diversity Career Development Program;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was honored by Sigma Theta Tau, Gamma Beta as one of 100 Extra-Ordinary Nurses;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a mayoral appointment to the Task Force on Health Care Reform;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was selected by the American Society of Association Executives for the Future Leaders Program;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a mayoral appointment to the Blue Ribbon Panel on Health Care Reform Implementation;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN served on the Federal City Council DC Agenda Project, Blueprint for Action Health Care Focus Group;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN served on the American Society of Association Executives Diversity Committee;

ENROLLED ORIGINAL

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a member of the Catholic University of America's Advanced Practice Psychiatric-Mental Health Program Advisory Board;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a mayoral appointment to the District of Columbia Mayor's Health Policy Council;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was a member of the DC Insurance Commissioner's Health Care Industry Taskforce;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was honored with the Nurse Practice Award by the District of Columbia Nurses Association;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN is a member of the American Nurses Association/District of Columbia Nurses Association;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN is a member of Sigma Theta Tau, Nurse Honor Society;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN is a member of the Black Nurses Association of the Greater Washington, D.C. Area;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN had published in 1983 an Experiential Model for Nursing Students, "Psychotherapy, Psychodrama & Sociometry";

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was consultant for an article published in 1984: A Descriptive Study, "Nursing Clinics and North America";

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was consultant for an article published in 1985, Clinical Nursing: "Pathophysiology, Nursing Diagnosis and Practice";

WHEREAS, Karen V. Scipio-Skinner, MSN, RN served as a Director-at-Large for the Journal of Nursing Regulation, the NCSBN National Nursing Guidelines for Medical Marijuana, since 2016;

WHEREAS, Karen V. Scipio-Skinner, MSN, RN was named as a nationally recognized authority on nursing regulation to serve as Client Engagement Regional Director by the Commission on Graduates or Foreign Nursing Schools in 2018; and

WHEREAS, this resolution shall stand forever in the hearts of those helped by Karen V. Scipio-Skinner, MSN, RN to secure a place of community in this the city of Washington, D.C.

ENROLLED ORIGINAL

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Karen V. Scipio-Skinner, MSN, RN Recognition Resolution of 2018".

Sec. 2. The Council of the District of Columbia hereby recognizes and honors Karen V. Scipio-Skinner, MSN, RN for her untiring dedication to the citizens of the District of Columbia and to the government of the District of Columbia.

Sec 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

22-448

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

December 4, 2018

To recognize and honor the all-female softball team and the coaches who represented the District of Columbia at the 2018 MLB Jenny Finch Classic during the MLB All-Star Game, which was hosted by the Washington Nationals, the Major League Baseball association's Ripken Collegiate Baseball League , and the Philadelphia Phillies baseball team.

WHEREAS, a team of young women athletes, ages 17 years and under, from the District of Columbia were selected at open tryouts, alongside members of the DC Elite Senators Softball team and DC Grays collegiate baseball league, to represent the District of Columbia in the 2018 Jennie Finch Classic, the first-ever competitive youth softball tournament of the Major League Baseball's youth academies from across the United States;

WHEREAS, the Jennie Finch Classic comprises a series of games and activities that take place during the MLB All-Star weekend and provides a platform on which players, coaches, and fans of various academies have the opportunity to share their passions for sports;

WHEREAS, the players of Team D.C. (Aseyah Alexander, Raye Thomas, Taylor Harrison, Kennedy Thomas, Alexis Roberson, Ashleigh Fultz, Heaven Glass, Marakah Dennis, Taylor Ivy, Haile Proctor, Benita Lukos, Samara Johnson, Kennedy Collins, and Courtney Parker; coached by Leanne Cardwell, Gabriela Elvina, and Sade Estes) are all participants of the DC Elite Senators and DC Grays RBI Programs, and official community partners of the Washington Nationals Youth Academy, where they provide mentorship, skills development assistance, and other support;

WHEREAS, Team D.C. hosted and placed 2nd in the DC Elite Senators and DC Grays RBI Program championship game, ending the tournament with a 5-2 record;

WHEREAS, Team D.C. also represented the DC Grays RBI program in the RBI Softball regionals, placing 2nd with a 4-2 record in the 2018 RBI Mid-Atlantic Regionals;

ENROLLED ORIGINAL

WHEREAS, the members of Team D.C., having all overcome challenges and triumphed in the face of adversity, are role models for the residents of the District of Columbia and serve as softball ambassadors, mentoring youth at the Washington Nationals Youth Academy, the Community Services Foundation, Mammie Johnson Little League, USA Softball, and various other youth programs;

WHEREAS, the 2018 DC Elite Senator and DC Grays RBI softball players, as members of the Washington Nationals Academy Jenny Finch softball team, served as softball ambassadors representing softball players from the Washington D.C. community during the 2018 MLB All-Star weekend;

WHEREAS, Team D.C. has publicly advocated for increased support of softball and other women's sports programming generally in the Washington, D.C. area and believe that these programs help players excel on the field and in the classroom;

WHEREAS, the members of Team DC strive to be the most competitive team representing the Washington, D.C. area on various stages and have gone on to attend and play for the likes of Bowie State University, Brandeis University, Clark Atlanta University, Hampton University, Howard University, Delaware State University, The George Washington University, and Towson University;

WHEREAS, the members of Team DC are registered as "USA Softball Players" and are participants of the MLB Softball Breakthrough Series, a program that identifies next-level softball players, and The Elite Development Invitational, a joint effort on the part of Major League Baseball, former United States National Team players and coaches, and USA Softball to promote the development and exposure of the youth in the game of softball; and

WHEREAS, the members of Team D.C. promote Statehood at all events and continue to bring honor to the District of Columbia and the entire nation on and off the field.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "DC Elite Senators Softball, DC Grays RBI, Washington Nationals Youth Academy Jenny Finch Team Recognition Resolution of 2018".

ENROLLED ORIGINAL

Sec. 2. The Council of the District of Columbia recognizes and honors the team of young women and their coaches, who honorably represented the District of Columbia at the regional and national levels.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	December 28, 2018
Protest Petition Deadline:	February 11, 2019
Roll Call Hearing Date:	February 25, 2019
Protest Hearing Date:	April 24, 2019

License No.:	ABRA-112405
Licensee:	La Jambe UM, LLC
Trade Name:	La Jambe
License Class:	Retailer's Class "C" Tavern
Address:	1309 5th Street, N.E.
Contact:	Sidon Yohannes, Esq.: (202) 686-7600

WARD 5 ANC 5D SMD 5D01

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on February 25, 2019 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petitions and/or requests to appear before the ABC Board must be filed on or before the Petition Deadline. The **Protest Hearing date** is scheduled on **April 24, 2019 at 1:30 p.m.**

NATURE OF OPERATION

New Class "C" Tavern with a wine bar featuring cheeses, charcuteries, sandwiches, and other small plates. Total Occupancy Load of 18 with seating for 13 patrons.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION

Sunday through Saturday 11 am – 12 am

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FOR-HIRE VEHICLES

NOTICE OF PUBLIC HEARING

Notice of Consideration of Proposed Amendments to
Title 31 (Taxicabs and Public Vehicles for Hire)
of the District of Columbia Municipal Regulations

Tuesday, January 15, 2019
6:30 PM

Wednesday, January 16, 2019
10:00 AM

The Department of For-Hire Vehicles announces two public hearings seeking stakeholder input on the Notice of Proposed Rulemaking to amend the District of Columbia Municipal Regulations (DCMR) by adding a new Title 31 (Vehicles for-Hire), which was published in the *D.C. Register* on November 16, 2018 at 65 DCR 012649. The rules, which are available on our website, revise the entire Title 31. The Department of For-Hire Vehicles ("DFHV") has scheduled two Public Hearings at 6:30pm on Tuesday, January 15, 2019; and 10:00am on Wednesday, January 16, 2019, at 2235 Shannon Place, SE, Washington, DC 20020, inside the Hearing Room, Suite 2032.

Those interested in speaking at the hearing should register by calling 202-645-6002 not later than Monday, January 14 at 5:00 pm. Testimony will be limited to the specific subject matter of this public hearing. Each participant will be allotted up to five (5) minutes to present. Participants must submit ten (10) copies of their written testimony to the Secretary of the Department of For-Hire Vehicles, 2235 Shannon Place SE, Suite 3001, Washington, D.C. 20020, in advance of the hearing. All speakers should be prepared to answer questions that may be posed by the Department during the hearing.

The public hearing will take place at the following times and location:

TUESDAY, JANUARY 15, 2019 AT 6:30 PM

WEDNESDAY, JANUARY 16, 2019 AT 10:00 AM

2235 SHANNON PLACE, S.E.
WASHINGTON, DC 20020
HEARING ROOM, SUITE 2032

DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD

NOTIFICATION OF CHARTER AMENDMENT

SUMMARY: The District of Columbia Public Charter School Board (DC PCSB) announces an opportunity for the public to submit comment on a written request submitted by The Next Step Public Charter School/El Proximo Paso (Next Step PCS) on December 13, 2018 to expand the ages served at its program, from 16-24 to 16-30, effective for school year (SY) 2019-20.

The Next Step PCS is currently in its twenty third year of operation educating adult students ages 16-24. The school is a single campus local education agency that currently operates in Ward 1. Effective for SY 2019-20, the school proposes to increase the ages served at its adult program from 16-24 to 16-30. Next Step PCS currently offers three academic tracks—GED in English; GED in Spanish; and English as a Second Language—which it offers during both day and evening programs. If approved, the school proposes to offer the day program strictly to students aged 16-24, but the night school will educate students through age 30. As part of its amendment application, the school provided a detailed letter stating that Next Step surveyed its existing staff to determine their level of support for this amendment. Based on the feedback, the school determined the night program was the best option for serving students above age 24.

Pursuant to the School Reform Act, D.C. Code 38-1802 et seq., a charter school must submit a petition to revise its charter, which includes its ages/grades served.

DATES:

- Comments must be submitted on or before January 28, 2019.
- Public hearing will be held on January 28, 2019, at 6:30 pm. For location, please check www.dcpcsb.org.
- Vote will be held on February 25, 2019, at 6:30 pm. For location, please check www.dcpcsb.org.

ADDRESSES: You may submit comments, identified by "Next Step PCS - Notice of Petition to Amend Charter – Ages Served," by any of the following methods:

1. Submit a written comment via:
   (a) E-mail*: public.comment@dcpcsb.org
   (b) Postal mail*: Attn: Public Comment, DC Public Charter School Board, 3333 14th ST.
   NW., Suite 210, Washington, DC 20010
   (c) Hand Delivery/Courier*: Same as postal address above

2. Sign up to testify in-person at the public hearing on January 28, by emailing a request to public.comment@dcpcsb.org by no later than 4 p.m. on Thursday, January 24, 2019.

DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD

NOTIFICATION OF NEW SCHOOL LOCATION

SUMMARY: The District of Columbia Public Charter School Board (DC PCSB) announces an opportunity for the public to submit comment on a written request submitted by Early Childhood Academy Public Charter School (Early Childhood Academy PCS) on December 7, 2018 to relocate to a new facility in Ward 8, effective for school year (SY) 2019-20.

Early Childhood Academy PCS is currently in its fourteenth year of operation educating students in grades prekindergarten-3 through third. The school is a single campus local education agency that currently operates in two small facilities in Ward 8. Effective for SY 2019-20, the school has procured funding and begun construction on a new 38,000 square foot facility that is large enough to hold its entire student population. The new address is 885 Barnaby Street SE, which is located behind one of Early Childhood Academy's current facilities, and is just steps away from where students already attend its program. Construction for the new facility will be completed by July 2019.

Pursuant to the School Reform Act, D.C. Code 38-1802 et seq., a charter school must submit a petition to revise its charter, which includes its Location.

DATES:

- Comments must be submitted on or before January 28, 2019.
- Public hearing will be held on January 28, 2019, at 6:30 pm. For location, please check www.dcpcsb.org.
- Vote will be held on February 25, 2019, at 6:30 pm. For location, please check www.dcpcsb.org.

ADDRESSES: You may submit comments, identified by "Early Childhood Academy PCS - Notice of Petition to Amend Charter – New Location," by any of the following methods:

1. Submit a written comment via:
   (a) E-mail*: public.comment@dcpcsb.org
   (b) Postal mail*: Attn: Public Comment, DC Public Charter School Board, 3333 14th ST.
   NW., Suite 210, Washington, DC 20010
   (c) Hand Delivery/Courier*: Same as postal address above

2. Sign up to testify in-person at the public hearing on January 28, by emailing a request to public.comment@dcpcsb.org by no later than 4 p.m. on Thursday, January 24, 2019.

How to Submit Public Comment:

1. Submit written comment one of the following ways:
   a. E-mail:public.comment@dcpcsb.org

b. Postal mail: Attn: Public Comment, *DC Public Charter School Board, 3333 14th ST. NW., Suite 210, Washington, DC 20010
c. Hand Delivery/Courier*: Same as postal address above

2. Sign up to testify in-person at the public hearing on March 19, 2018 to public.comment@dcpcsb.org no later than 4 p.m. on Thursday, March 15, 2018. Each person testifying is given two minutes to present testimony.

BOARD OF ZONING ADJUSTMENT
PUBLIC HEARING NOTICE
WEDNESDAY, FEBRUARY 27, 2019
441 4TH STREET, N.W.
JERRILY R. KRESS MEMORIAL HEARING ROOM, SUITE 220-SOUTH
WASHINGTON, D.C. 20001

TO CONSIDER THE FOLLOWING: The Board of Zoning Adjustment will adhere to the following schedule, but reserves the right to hear items on the agenda out of turn.

TIME: 9:30 A.M.

WARD TWO

19610A
ANC 2B

Application of Granite LLC, pursuant to 11 DCMR Subtitle Y § 704, for a modification of significance to the plans approved in BZA Order No. 19610, and pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception from the penthouse regulations of Subtitle C § 1500.3(c) to include a nightclub, bar, cocktail lounge, or restaurant use in the penthouse of an existing ten-story office building in the D-6 Zone at premises 730 15th Street N.W. (Square 221, Lots 800 and 809).

WARD TWO

19912
ANC 2E

Application of Stephen Lewis, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the accessory apartment regulations of Subtitle U § 253.4, to add an accessory apartment to an existing, attached principal dwelling unit in the R-20 Zone at premises 1920 35th Street N.W. (Square 1296E, Lot 848).

WARD SEVEN

19920
ANC 7F

Application of District of Columbia Public Schools ("DCPS"), pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1(b) and (c), to renovate and expand an existing elementary school in the RA-1 Zone at premises 3375 Minnesota Avenue S.E. (Square 5441, Lot 806).

WARD TWO

19923
ANC 2B

Application of John Hancock Life Insurance Company, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle C § 1504 from the penthouse enclosure requirements of Subtitle C § 1500.9(b), to construct new penthouse structures on an existing 12-story office building in the D-6 Zone at premises 750 17th Street N.W. (Square 166, Lot 862).

WARD FOUR

19925
ANC 4B

Application of Darryl Wiggins, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1, to construct a new rooftop deck and access stair on an existing commercial building in the MU-4 Zone at premises 7331 Georgia Ave NW. (Square 2964, Lot 40).

WARD SIX

19926
ANC 6C

Application of VBR Brewing Corporation, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the use regulations of Subtitle U § 802.1(b), to permit live performances in an eating and drinking establishment in the PDR-1 Zone at premises 209 M Street N.W. (Square 748, Lot 81).

WARD FIVE

19927
ANC 5C

Application of Catholic Charities of the Archdiocese of Washington, Inc., pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle U § 203.1(p), to construct a solar array in the R-1-B Zone at premises 2800 Otis Street N.E. (Square PAR 167, Lots 67 and 68).

PLEASE NOTE:

Failure of an applicant or appellant to appear at the public hearing will subject the application or appeal to dismissal at the discretion of the Board.

Failure of an applicant or appellant to be adequately prepared to present the application or appeal to the Board, and address the required standards of proof for the application or appeal, may subject the application or appeal to postponement, dismissal or denial. The public hearing in these cases will be conducted in accordance with the provisions of Subtitles X and Y of the District of Columbia Municipal Regulations, Title 11. Pursuant to Subtitle Y, Chapter 2 of the Regulations, the Board will impose time limits on the testimony of all individuals. Individuals and organizations interested in any application may testify at the public hearing or submit written comments to the Board.
Except for the affected ANC, any person who desires to participate as a party in this case must clearly demonstrate that the person's interests would likely be more significantly, distinctly, or uniquely affected by the proposed zoning action than other persons in the general public. **Persons seeking party status shall file with the Board, not less than 14 days prior to the date set for the hearing, a Form 140 – Party Status Application Form**.* This form may be obtained from the Office of Zoning at the address stated below or downloaded from the Office of Zoning's website at: www.dcoz.dc.gov. All requests and comments should be submitted to the Board through the Director, Office of Zoning,

441 4th Street, NW, Suite 210, Washington, D.C. 20001. Please include the case number on all correspondence.

**Note that party status is not permitted in Foreign Missions cases.*

Do you need assistance to participate?

Amharic
ለመሳተፍ ዕርዳታ ያስፈልግዎታል?
የተለየ እርዳታ ካስፈለገ ዎት ወይም የ ቋንቋ እርዳታ አገ ልግሎቶች (ትርጉም ወይም ማስተርጎ ም) ካስፈለገ ዎት እባክዎን ከስብሰባው አምስት ቀናት በፊት ዚ ሂልን በስልክ ቁጥር (202) 727-0312 **ወይም በኤሜል** Zelalem.Hill@dc.gov **ይገ ናኙ። እነ ኚህ አገ ልግሎቶች የሚሰጡ በት ጻ ነ ው።**

Chinese
您需要有人帮助参加活动吗？
如果您需要特殊便利设施或语言协助服务（翻译或口译），请在见面之前提前五天与 Zee Hill 联系，电话号码 (202) 727-0312，电子邮件 Zelalem.Hill@dc.gov。这些是免费提供的服务。

French
Avez-vous besoin d'assistance pour pouvoir participer ? Si vous avez besoin d'aménagements spéciaux ou d'une aide linguistique (traduction ou interprétation), veuillez contacter Zee Hill au (202) 727-0312 ou à Zelalem.Hill@dc.gov cinq jours avant la réunion. Ces services vous seront fournis gratuitement.

Korean
참여하시는데 도움이 필요하세요?
특별한 편의를 제공해 드려야 하거나, 언어 지원 서비스(번역 또는 통역)가 필요하시면, 회의 5일 전에 Zee Hill 씨께 (202) 727-0312로 전화 하시거나 Zelalem.Hill@dc.gov 로 이메일을 주시기 바랍니다. 이와 같은 서비스는 무료로 제공됩니다.

Spanish
¿Necesita ayuda para participar?
Si tiene necesidades especiales o si necesita servicios de ayuda en su idioma (de traducción o interpretación), por favor comuníquese con Zee Hill llamando al (202) 727-0312 o escribiendo a Zelalem.Hill@dc.gov cinco días antes de la sesión. Estos servicios serán proporcionados sin costo alguno.

Vietnamese
Quí vị có cần trợ giúp gì để tham gia không?
Nếu quí vị cần thu xếp đặc biệt hoặc trợ giúp về ngôn ngữ (biên dịch hoặc thông dịch) xin vui lòng liên hệ với Zee Hill tại (202) 727-0312 hoặc Zelalem.Hill@dc.gov trước năm ngày. Các dịch vụ này hoàn toàn miễn phí.

FOR FURTHER INFORMATION, CONTACT THE OFFICE OF ZONING AT (202) 727-6311.

FREDERICK L. HILL, CHAIRPERSON
LESYLLEÉ M. WHITE, MEMBER
LORNA L. JOHN, MEMBER
CARLTON HART, VICE-CHAIRPERSON,
NATIONAL CAPITAL PLANNING COMMISSION
A PARTICIPATING MEMBER OF THE ZONING COMMISSION
CLIFFORD W. MOY, SECRETARY TO THE BZA
SARA A. BARDIN, DIRECTOR, OFFICE OF ZONING

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2016 Repl. & 2018 Supp.)) and the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2013 Repl.)), hereby gives notice of the adoption of an amendment to Section 903 (Outpatient and Emergency Room Services) of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

The purpose of these final rules is to extend the provision of supplemental payments to eligible hospitals located within the District of Columbia that participate in the Medicaid program for outpatient hospital services rendered from October 1, 2018 through September 30, 2019. The estimated annual increase in aggregate expenditures associated with the extension of the supplemental payments through the end of Fiscal Year 2019 is $12,499,344.

These rules correspond to a related State Plan Amendment (SPA), which was approved by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) on November 2, 2018 with an effective date of October 1, 2018. The corresponding SPA has been added to the District's Medicaid State Plan, which can be found on DHCF's website at https://dhcf.dc.gov/page/medicaid-state-plan.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on September 28, 2018 – Part 1 at 65 DCR 009999. DHCF received no comments and made no changes to these rules.

These final rules were adopted on December 18, 2018 and shall become effective upon publication of this notice in the *D.C. Register*.

Chapter 9, MEDICAID PROGRAM, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Subsection 903.31 of Section 903, OUTPATIENT AND EMERGENCY ROOM SERVICES, is amended to read as follows:

903.31 Beginning FY 2019, each eligible hospital shall receive a supplemental hospital access payment calculated as set forth below:

(a) For visits and services beginning October 1, 2018 and ending on September 30, 2019, quarterly access payments shall be made to each eligible private hospital. Each payment shall be an amount equal to each hospital's District Fiscal Year (DFY) 2016 outpatient Medicaid payments

divided by the total in District private hospital DFY 2016 outpatient Medicaid payments multiplied by one quarter (1/4) of the total outpatient private hospital access payment pool. The total outpatient private hospital access payment pool shall be equal to the total available spending room under the private hospital outpatient Medicaid upper payment limit for DFY 2019;

(b) For visits and services beginning October 1, 2018 and ending on September 30, 2019, quarterly access payments shall be made to the United Medical Center as follows: Each payment shall be equal to one quarter (1/4) of the total outpatient public hospital access payment pool. The total outpatient public hospital access payment pool shall be equal to the total available spending room under the District-operated hospital outpatient Medicaid upper payment limit for DFY 2019;

(c) Payments shall be made fifteen (15) business days after the end of the quarter for the Medicaid visits and services rendered during that quarter; and

(d) For purposes of this section, the term District Fiscal Year shall mean dates beginning on October 1st and ending on September 30th.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

NOTICE OF FINAL RULEMAKING

The Board of Directors (Board) of the District of Columbia Water and Sewer Authority (DC Water), pursuant to the authority set forth in Sections 203(3) and (11) and 216 of the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, effective April 18, 1996 (D.C. Law 11-111, §§ 203(3), (11) and 216; D.C. Official Code §§ 34-2202.03(3) and (11) and § 34-2202.16 (2012 Repl. & 2018 Supp.)); Section 6(a) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(a) (2016 Repl.)); and in accordance with Chapter 40 (Retail Ratemaking) of Title 21 (Water and Sanitation) of the District of Columbia Municipal Regulations (DCMR); hereby gives notice of the adoption of amendments to Section 4102 (Customer Assistance Program) of Chapter 41 (Retail Water and Sewer Rates and Charges), of Title 21 DCMR.

At its regularly scheduled meeting on December 6, 2018, the Board adopted Resolution #18-80 to amend the Customer Assistance Program (CAP) revising the rules for the CAP Program, and establishing rules for the new CAP2 Program and rules to implement the District funded CAP3 Program. At its 16th Special Meeting on December 19, 2018, the Board adopted Resolution #18-84 to further amend the Customer Assistance Program to establish rules to implement the District funded Clean Rivers Impervious Area Charge (CRIAC) Nonprofit Relief Program for publication with the rules for CAP, CAP2 and District funded CAP3 Program.

Pursuant to Board Resolution #18-68, dated October 4, 2018, DC Water's Notice of Proposed Rulemaking was published in the *District of Columbia Register* (*D.C. Register* or DCR) at 65 DCR 11766 on October 19, 2018 to receive comments on the proposed rulemaking. Further, a Notice of Public Hearing was published in the *D.C. Register* on October 19, 2018 at 65 DCR 11656 for a public hearing on October 30, 2018. On October 30, 2018, the Board received comments at the public hearing on the proposed rulemaking to expand DC Water's Customer Assistance Program.

On November 29, 2018, the DC Retail Water and Sewer Rates Committee met to consider the comments offered during the public comment period and the public hearing, and recommendations from the General Manager. At that meeting, the DC Retail Water and Sewer Rates Committee recommended that the Board adopt amendments to the Customer Assistance Program for the CAP, CAP2, and the District funded CAP3 Program, and recommended the postponement (reservation) of final consideration of the rules to implement the District funded CRIAC Nonprofit Relief Program until the District promulgated regulations and until such regulation's eligibility criteria were evaluated for conformance with applicable laws and regulations.

On December 6, 2018, the Board, through Resolution #18-80, after consideration of all the comments received, the report from the DC Retail Water and Sewer Rates Committee, and recommendations from the General Manager, voted to amend the Customer Assistance Program rules in the DCMR to amend the rules for the CAP Program, establish rules for the CAP2 Program and rules to implement the District's CAP3 Program.

On December 18, 2018, the DC Retail Water and Sewer Rates Committee met to consider the District's revisions to the draft Notice of Emergency and Proposed Rulemaking (NOEPR) for the CRIAC Nonprofit Relief Program, the District's Office of Attorney General Legal Sufficiency Review for the District's draft NOEPR for the CRIAC Relief Programs, and recommendations from the General Manager, and recommended that the Board adopt DC Water's proposed regulations to implement the District funded CRIAC Nonprofit Relief Program with the rules for CAP, CAP2 and the rules to implement the District funded CAP3 Program.

On December 19, 2018, the Board, through Resolution #18-84, after consideration of all the comments received, the report from the DC Retail Water and Sewer Rates Committee, the report from the District Department of Energy and Environment, and recommendations from the General Manager, voted to amend the DCMR to revise the Customer Assistance Program regulations to establish the rules to implement the District funded CRIAC Nonprofit Relief Program with the rules for CAP, CAP2, and the rules to implement the District funded CAP3 Program.

No substantive changes were made to the proposed regulations.

These rules were adopted as final on December 6 and 19, 2018 by resolution, and will become effective on January 1, 2019, after publication of this notice in the *D.C. Register*.

Chapter 41, RETAIL WATER AND SEWER RATES AND CHARGES, of Title 21 DCMR, WATER AND SANITATION, is amended as follows:

Section 4102, CUSTOMER ASSISTANCE PROGRAM, is amended to read as follows:

4102 CUSTOMER ASSISTANCE PROGRAMS

4102.1 CUSTOMER ASSISTANCE PROGRAM (CAP)

(a) Participation in the Customer Assistance Program (CAP) shall be limited to a single-family or individually-metered Residential Customer that meets the following eligibility requirements:

(1) The applicant is responsible for paying for water and sewer services and/or the Clean Rivers Impervious Surface Area Charge (CRIAC); and

(2) The Department of Energy & Environment (DOEE) has determined that the CAP applicant's annual household income meets the household income-eligibility requirements for the District's Low Income Home Energy Assistance Program (LIHEAP), below sixty percent (60%) of the State Median Income (SMI) for the District of Columbia.

(b) An approved CAP customer shall receive the following benefits:

(1) Exemption from water service charges, sewer service charges, Payment-in-Lieu of Taxes (PILOT) fees and Right-of-Way (ROW) fees for the first Four Hundred Cubic Feet (4 Ccf) per month of water used. If the customer uses less than Four Hundred Cubic Feet (4 Ccf) of water in any month, the exemption will apply based on the amount of that month's billed water usage;

(2) Credit of one hundred percent (100%) off of the monthly billed Water System Replacement Fee; and

(3) Credit of fifty percent (50%) off of the monthly billed CRIAC.

(c) Upon DC Water's receipt of notice from DOEE that the CAP applicant meets the financial eligibility requirements, DC Water shall provide the CAP discounts to the CAP customer's account from the date that DOEE accepts a completed CAP application to the end of the fiscal year in which the application was submitted.

(d) To continue receiving CAP benefits without interruptions, the CAP customer must submit a renewal CAP application to DOEE in accordance with the Utility Discount Program renewal deadline. A CAP customer that submits their renewal CAP application after this period, and is subsequently approved by DOEE, will receive CAP benefits as of the date of the application.

4102.2 CUSTOMER ASSISTANCE PROGRAM II (CAP2)

(a) Participation in the CAP2 Program shall be limited to a single-family or individually-metered Residential Customer that meets the following eligibility requirements:

(1) The applicant maintains an active DC Water account and is responsible for paying for water and sewer services and/or the CRIAC; and

(2) DOEE has determined that the CAP2 applicant's annual household income is equal to or above the household income-eligibility limits for the District's LIHEAP, sixty percent (60%) of the SMI for the District of Columbia and below eighty percent (80%) of the Area Median Income (AMI) for the District of Columbia, not capped by the United States median low-income limit.

(b) An approved CAP2 customer shall receive the following benefits, subject to the availability of funds:

(1) Exemption from water service charges and sewer service charges for the first three Hundred Cubic Feet (3 Ccf) per month of water used. If the customer uses less than three Hundred Cubic Feet (3 Ccf) of water in any month, the exemption will apply based on the amount of that month's billed water usage; and

(2) Credit of fifty percent (50%) off of the monthly billed CRIAC.

(c) Upon DC Water's receipt of notice from DOEE that the CAP2 customer meets the financial eligibility requirements, DC Water shall provide the CAP2 benefits for not more than the entire Fiscal Year 2019, beginning October 1, 2018 and terminating on September 30, 2019, subject to the availability of budgeted funds.

(1) CAP2 customers that submit a complete application to DOEE before March 1, 2019, shall receive CAP2 benefits retroactive to October 1, 2018 and terminating on September 30, 2019.

(2) CAP2 customer that submit a complete application on or after March 1, 2019, shall receive CAP2 benefits as of the date of submittal and terminating on September 30, 2019.

(d) If DC Water determines that the remaining budgeted funds are insufficient to provide CAP2 benefits, DC Water may:

(1) Suspend the process for accepting CAP2 applicants; or

(2) Suspend or adjust providing CAP2 benefits to CAP2 recipients.

(e) The CAP2 Program shall terminate on September 30, 2019.

4102.3 Eligibility for the CAP and CAP2 Programs shall be determined by DOEE based on the income eligibility criteria provided in § 4102.1(a)(2) and § 4102.2(a)(2).

4102.4 DOEE CUSTOMER ASSISTANCE PROGRAM III FOR SINGLE-FAMILY AND INDIVIDUALLY METERED HOUSEHOLDS

(a) DC Water shall apply DOEE Customer Assistance Program III (CAP3) benefits to an eligible single-family or individually-metered Residential Customer's account in accordance with the following:

(1) The applicant maintains an active DC Water account and is responsible for paying for water and sewer services and/or the CRIAC;

(2) DOEE has notified DC Water that the customer has met the requirements of applicable laws and regulations and is eligible to receive the CAP3 benefits;

(3) DOEE has notified DC Water of the amount of the CAP3 benefits to be applied to the CAP3 customer's account; and

(4) DOEE has transferred funds to DC Water for the benefits applied to the customer's account.

(b) DC Water shall stop applying CAP3 benefits to a CAP3 customer's account upon receipt of notice from DOEE that the customer is no longer eligible for the CAP3 benefits, or receipt of notice from DOEE regarding the unavailability of funds.

(c) If DC Water determines that the remaining budgeted funds are insufficient to provide CAP3 benefits, DC Water may:

(1) Suspend the process for accepting CAP3 applicants; or

(2) Suspend providing CAP3 benefits to CAP3 recipients.

4102.5 DOEE CLEAN RIVERS IMPERVIOUS SURFACE AREA CHARGE RELIEF PROGRAM FOR NONPROFIT ORGANIZATIONS

(a) DC Water shall apply DOEE CRIAC Relief Program for Nonprofit Organizations (CRIAC Nonprofit Relief Program) benefits to an eligible non-profit organization's account in accordance with the following:

(1) The applicant maintains an active DC Water account and is responsible for paying for the CRIAC charges;

(2) DOEE has notified DC Water that the customer has met the requirements of applicable laws and regulations and is eligible to receive CRIAC Nonprofit Relief Program benefits;

(3) DOEE has notified DC Water of the amount of the benefits to be applied to the nonprofit organization's account each billing period; and

(4) DOEE has transferred funds to DC Water for the CRIAC Nonprofit Relief Program benefits applied to the customer's account.

(b) DC Water shall stop applying CRIAC Nonprofit Relief Program benefits to a customer's account upon notice from DOEE that the customer is no longer eligible for the CRIAC Nonprofit Relief Program benefits.

(c) If DC Water determines that the remaining budgeted funds are insufficient to provide CRIAC Nonprofit Relief Program benefits, DC Water may:

(1) Suspend the process for accepting CRIAC Nonprofit Relief Program applicants; or

(2) Suspend or adjust providing CRIAC Nonprofit Relief Program benefits to CRIAC Nonprofit Relief Program recipients.

4102.6 Nothing in this section shall be interpreted to mean that the benefits provided through DC Water's CAP or CAP2 Programs or DOEE's CAP3 or CRIAC Nonprofit Relief Programs are an entitlement, continuing or otherwise.

4102.7 For the purposes of this section, the term "SMI" means the state median income as determined on an annual basis by the U.S. Department of Health and Human Services (HHS).

4102.8 For the purposes of this section, the term "AMI" means the Area Median Income (AMI), alternately referred to as the HUD Area Median Family Income (HAMFI), determined on an annual basis by the U.S. Department of Housing and Urban Development (HUD).

DEPARTMENT OF ENERGY AND ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

Underground Storage Tank Regulations

The Director of the Department of Energy and Environment (Department), pursuant to the authority set forth in Section 107 of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.07 (2013 Repl. & 2018 Supp.)); the District of Columbia Underground Storage Tank Management Act of 1990, effective March 8, 1991 (D.C. Law 8-242; D.C. Official Code §§ 8-113.01 *et seq.* (2013 Repl.)); Sections 11 and 21 of the Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.10 & 8-103.20 (2013 Repl.)); and Mayor's Order 2006-61, dated June 14, 2006, hereby gives notice of intent to amend Chapters 55-67 and 70 of Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR).

The primary purpose of the proposed rulemaking is to incorporate new requirements of the 2015 amendments to the federal underground storage tank regulations at 40 CFR Part 280 so that the District can maintain state program approval under 40 CFR Part 281. The new requirements include regulation of previously deferred field-constructed underground storage tanks and airport hydrant systems, testing of spill prevention and leak detection equipment, containment sump testing, and periodic walkthrough inspections. The rulemaking also updates the requirements for corrective action after releases from underground storage tanks, consolidates and updates fee requirements, and makes clarifying amendments and corrections to the regulations.

The Department gives notice of the intent to take final rulemaking action to adopt these amendments in no less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Title 20 DCMR, ENVIRONMENT, is amended by repealing and replacing Chapters 55 to 67 and 70 to read as follows:

CHAPTER 55 UNDERGROUND STORAGE TANKS - GENERAL PROVISIONS

CHAPTER 60 UNDERGROUND STORAGE TANKS - RELEASE DETECTION

6000 RELEASE DETECTION – GENERAL PROVISIONS
6001 RELEASE DETECTION RECORDKEEPING
6002 RELEASE DETECTION FOR HAZARDOUS SUBSTANCE UST SYSTEMS
6003 RELEASE DETECTION FOR PETROLEUM UST SYSTEM TANKS
6004 RELEASE DETECTION FOR PETROLEUM UST SYSTEM PIPING
6005 INVENTORY CONTROL AND STATISTICAL INVENTORY RECONCILIATION
6006 MANUAL TANK GAUGING
6007 TANK TIGHTNESS TESTING
6008 AUTOMATIC TANK GAUGING
6009 VAPOR MONITORING
6010 GROUNDWATER MONITORING
6011 INTERSTITIAL MONITORING
6012 STATISTICAL INVENTORY RECONCILIATION
6013 OTHER METHODS OF RELEASE DETECTION

CHAPTER 61 UNDERGROUND STORAGE TANKS – CLOSURE

6100 TEMPORARY CLOSURE
6101 PERMANENT CLOSURE AND CHANGE-IN-SERVICE
6102 PREVIOUSLY CLOSED UST SYSTEMS
6103 CLOSURE RECORDS

CHAPTER 62 UNDERGROUND STORAGE TANKS – REPORTING OF RELEASES, INVESTIGATION, CONFIRMATION, ASSESSMENT, AND CORRECTIVE ACTION

6200 OBLIGATIONS OF RESPONSIBLE PARTIES - RELEASES, SPILLS, AND OVERFILLS
6201 REPORTING AND CLEANUP OF SPILLS AND OVERFILLS
6202 REPORTING OF RELEASES OF REGULATED SUBSTANCES
6203 SITE INVESTIGATION, CONFIRMATION OF RELEASE, INITIAL ABATEMENT, AND INITIAL SITE ASSESSMENT
6204 REMOVAL OF FREE PRODUCT
6205 COMPREHENSIVE SITE ASSESSMENT
6206 RISK-BASED CORRECTIVE ACTION (RBCA) PROCESS
6207 CORRECTIVE ACTION PLAN AND ITS IMPLEMENTATION
6208 TIER 0 STANDARDS
6209 TIER 1 AND 2 STANDARDS
6210 NO FURTHER ACTION AND CASE CLOSURE REQUIREMENTS
6211 PUBLIC PARTICIPATION IN CORRECTIVE ACTION
6212 VOLUNTARY REMEDIATION ACTION PROGRAM (VRAP)

CHAPTER 55 UNDERGROUND STORAGE TANKS – GENERAL PROVISIONS

5500 COMPLIANCE WITH DISTRICT LAWS

5500.1 In addition to these regulations, each owner and operator of an underground storage tank (UST) shall comply with the following:

(a) The District of Columbia Underground Storage Tank Management Act of 1990, effective March 8, 1991 (D.C. Law 8-242; D.C. Official Code §§ 8-113.01 *et seq*.);

(b) The Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.01 *et seq*.);

(c) The provisions of the District of Columbia Fire Code, Title 12, Subtitle H (Fire Code Supplement) of the District of Columbia Municipal Regulations, pertaining to USTs;

(d) The provisions of the District Construction Codes and Construction Code Supplements, available at https://dcra.dc.gov/page/district-columbia-construction-codes, that pertain to permits for construction activities (such as excavation, installation, repair, closure-in-place, or removal) related to USTs; and

(e) All other applicable federal and District laws and regulations.

5500.2 The owner or operator of each UST shall obtain all appropriate District permits for construction activities required for the repair or upgrade of a leaking UST (LUST) or remediation of a site contaminated by a LUST.

5500.3 Each owner and operator of an UST on a federal facility shall comply with the requirements of the UST Regulations.

5500.4 All notices, reports, and documents required in this regulation may be submitted by mail or delivery to the UST Branch, Department of Energy and Environment, 1200 First Street, N.E., 5th Floor, Washington, DC 20002, by e-mail to ust.doee@dc.gov, or by file transfer protocol (ftp) after requesting access to the Department's ftp site via e-mail. A telephone report shall be made to the UST Branch at (202) 535-2600.

5500.5 When the UST Regulations allow for the use of an alternative material or method upon approval by the Department, or other approval of the Department needs to be obtained, the person seeking to use the alternative material or method, or to otherwise obtain Departmental approval shall:

(a) Submit the request in writing to the Department by mail or delivery to the UST Branch, Department of Energy and Environment, 1200 First Street, N.E., 5th Floor, Washington, D.C. 20002, or by e-mail to ust.doee@dc.gov;

(b) If seeking to use an alternative material or method, explain how the use of the alternative material or method provides for an equivalent or higher level of safety or effectiveness as the material or method required by regulation;

(c) Provide any additional information requested by the Department; and

(d) Use the alternative material or method only after receiving approval in writing from the Department.

5500.6 When the UST regulations require a report or notification to the District Fire Chief, the report shall be made by mail or delivery to the District of Columbia Fire Marshal, Technical Inspections Plans and Permits Branch, Hazardous Materials Section, 1100 4th Street SW, Washington, D.C. 20024, or by phone at (202) 727-1614.

5501 APPLICABILITY OF UST REGULATIONS

5501.1 The UST Regulations apply to all USTs and UST systems located in the District of Columbia, except as otherwise provided in this chapter, and to each owner, operator, regulated substance delivery person or company, authorized representative of an owner or operator, and other responsible or remediating party as set forth in the UST Regulations.

5501.2 When the UST Regulations require an owner or operator to take an action, the owner or the operator or both may be held liable for a violation. Responsible

parties may be held jointly and severally liable for violations of the provisions governing LUSTs, for any penalties assessed for those violations, and for the costs of corrective actions.

5501.3 The following USTs are exempt from the requirements of the UST Regulations:

(a) Any UST holding hazardous wastes listed or identified under Subtitle C of the Solid Waste Disposal Act, as amended, 42 USC § 6921 *et seq.*, or a mixture of any of those hazardous wastes and other regulated substances;

(b) Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under §§ 307(b) or 402 of the Clean Water Act, 33 USC §§ 1317(b) or 1342;

(c) Any UST system that contains a de minimis concentration of regulated substances as determined by the Department;

(d) Any emergency spill or overflow containment UST system that is expeditiously emptied after use;

(e) A septic tank;

(f) A pipeline facility (including gathering lines) that:

(1) Is regulated under 49 USC Chapter 601; or

(2) Is an intrastate pipeline facility regulated under state laws as provided 49 USC Chapter 601, and which is determined by the Secretary of Transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

(g) A surface impoundment, pit, pond, or lagoon;

(h) A stormwater or wastewater collection system;

(i) A flow-through process tank;

(j) A liquid trap and associated gathering lines directly related to oil or gas production and gathering operations;

(k) A storage tank situated in an underground area (such as a basement, cellar, mine working, drift, shaft, or tunnel) if the storage tank is situated on or above the surface of the floor and is not covered by any earthen materials along its sides and bottom; and

(l) A farm or residential tank with a capacity of one thousand one hundred (1,100) gallons or less used for storing motor fuel for noncommercial purposes.

5502 PARTIAL APPLICABILITY OF UST REGULATIONS TO PARTICULAR UST SYSTEMS

5502.1 In addition to any requirements referenced below, the following USTs are required to comply only with the provisions of this section and with Chapters 62 and 67:

(a) Wastewater treatment tank systems not regulated under §§ 307(b) or 402 of the Clean Water Act, 33 USC §§ 1317(b) or 1342;

(b) UST systems containing any radioactive material that is regulated under the Atomic Energy Act of 1954, 42 USC §§ 2011 *et seq.*;

(c) UST systems that are part of any emergency generator system at nuclear power generation facilities licensed by the Nuclear Regulatory Commission and subject to Nuclear Regulatory Commission requirements regarding design and quality criteria, including but not limited to 10 CFR part 50; and

(d) Above ground storage tanks associated with:

(1) Airport hydrant fuel distribution systems regulated under § 5507; and

(2) UST systems with field-constructed tanks that are regulated under § 5507.

5502.2 A person may install an UST system identified in §§ 5502.1(a), (b), or (c) for the purpose of storing any regulated substance only if that UST system:

(a) Will prevent releases due to corrosion or structural failure for the operational life of the UST system;

(b) Is cathodically protected against corrosion, constructed of noncorrodible material, steel clad with a non-corrodible material, or designed to prevent the release or threatened release of any stored regulated substance; and

(c) Is constructed or lined with material that is compatible with the stored regulated substance.

5502.3 Notwithstanding the requirements of this section, a person may install an UST system without corrosion protection at a facility that is determined by a corrosion

expert to not be corrosive enough to cause the UST system to have a release due to corrosion during its operating life. The owner or operator shall maintain records that demonstrate compliance with the requirements of this subsection for the remaining life of the tank.

5502.4 In the event of a suspected or confirmed release from an UST system listed in § 5502.1, the owner or operator shall comply with §§ 5600, 5602, and 5603, except § 5600.6(d).

5502.5 The following codes of practice may be used to comply with the requirements for partially excluded UST systems in §§ 5502.2 and 5502.3:

(a) NACE International Standard Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection";

(b) NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems";

(c) American Petroleum Institute Recommended Practice RP 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; or

(d) Steel Tank Institute Recommended Practice R892, "Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems."

5503 PARTIAL APPLICABILITY OF UST REGULATIONS TO HEATING OIL TANKS

5503.1 The owner or operator of a heating oil tank having a capacity less than one thousand one hundred (1,100) gallons is exempt from the requirements of the UST Regulations with the following exceptions:

(a) In the event of a suspected or confirmed release from the UST, Chapter 56, except §§ 5600.6(d) and 5601;

(b) Chapter 61**,** except that the Department may waive or modify any requirements that are inappropriate or unduly burdensome; and

(c) Chapter 62, except that, after considering the nature of the release and the degree of contamination, the Department may waive or modify any requirements that are inappropriate or unduly burdensome.

5503.2 The owner or operator of each heating oil tank having a capacity of one thousand one hundred (1,100) gallons or more shall comply with the following:

(a) Chapter 56;

(b) Section 5700;

(c) For heating oil tanks installed after November 12, 1993, §§ 5703 through 5706;

(d) Chapter 59;

(e) The provisions of Chapter 60 pertaining to release detection for heating oil tanks;

(f) The provisions of Chapter 61 pertaining to closure of heating oil tanks; and

(g) Chapter 62, except that, after considering the nature of the release and the degree of contamination, the Department may waive or modify any requirements that are inappropriate or unduly burdensome.

5503.3 The owner or operator of each UST used to store heating oil for a purpose other than consumptive use on the premises where the UST is located shall comply with all requirements of the UST Regulations.

5504 PARTIAL APPLICABILITY OF UST REGULATIONS TO UST SYSTEMS OF 110 GALLONS OR LESS, HYDRAULIC LIFT TANKS, AND ELECTRICAL EQUIPMENT TANKS

5504.1 The following USTs are required to comply only with the provisions of this section:

(a) Any UST associated with equipment or machinery that contains regulated substances for operational purposes (such as hydraulic lift tanks and electrical equipment tanks); and

(b) Any UST system with a capacity of one hundred ten (110) gallons or less.

5504.2 When there is a suspected or confirmed release during operation, closure, or removal of the UST system, a responsible or remediating party shall comply with §§ 5600, 5602, and 5603, and Chapters 61 and 62, except compliance with § 5600.6(d) is not required, and the Department may waive or modify any requirements that are inappropriate or unduly burdensome.

5505 APPLICABILITY TO EMERGENCY GENERATOR UST SYSTEMS

5505.1 Any UST system that stores fuel for use by an emergency power generator shall comply with all requirements of the UST Regulations.

5506 INDUSTRY CODES AND STANDARDS

5506.1 An owner or operator of an UST system may use an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory to comply with a requirement of the UST Regulations if authorized by the UST Regulations or if the industry standard or code of practice is approved by the Department in accordance with § 5506.4.

5506.2 An owner or operator may request approval of an alternative industry standard or code of practice by submitting a written request to the Department by e-mail to ust.doee@dc.gov or by mail or delivery to the UST Branch, Department of Energy and Environment, 1200 First Street, N.E., 5th Floor, Washington, D.C. 20002.

5506.3 An owner or operator requesting approval of an alternative industry standard or code of practice shall provide a copy of the industry standard or code of practice to the Department, if requested by the Department.

5506.4 The Department may approve an alternative industry standard or code of practice only if the owner or operator demonstrates to the Department that the alternative industry standard or code of practice is at least as safe and as protective of health and the environment as the authorized or approved code or standard.

5506.5 When used in an industry standard or code of practice listed in the UST Regulations or approved under this section, the word "should" shall be construed to mean "shall" for the purpose of compliance with the UST Regulations.

5506.6 Unless otherwise specified in these regulations, an owner or operator shall use the most current version of the authorized or approved industry standard or code of practice.

5507 FIELD-CONSTRUCTED TANKS AND AIRPORT HYDRANT FUEL DISTRIBUTION SYSTEMS

5507.1 Except as specifically provided otherwise in this section, each owner and operator of an UST system with field-constructed tanks or airport hydrant system shall comply with the UST Regulations.

5507.2 For each UST system with field-constructed tanks or airport hydrant system installed on or before the date the regulations become effective, the requirements are effective according to the following schedule:

(a) Requirements regarding UST system upgrades, general operating requirements, operator training, and release detection shall be effective October 13, 2021; and

(b) Requirements regarding release reporting, response, investigation, closure, financial responsibility and notification, except the one-time notification requirement under § 5507.4, shall be effective on the date the regulations become effective.

5507.3 For each UST system with field-constructed tanks or airport hydrant system installed after the date the regulations become effective, the requirements apply at installation.

5507.4 Not later than October 13, 2021, each owner of an UST system with field-constructed tanks or airport hydrant system shall notify the Department of the system using an UST facility notification form described in § 5600 and shall demonstrate compliance with Chapter 67.

5507.5 In addition to the codes of practice listed in § 5701.10, each owner or operator may use military construction criteria, such as Unified Facilities Criteria (UFC) 3-460-01, *Petroleum Fuel Facilities,* when designing, constructing, and installing UST systems with field-constructed tanks and airport hydrant systems.

5507.6 An owner or operator may use single-walled piping when installing or replacing piping associated with an airport hydrant system, or UST system with a field-constructed tank that has a capacity greater than fifty thousand (50,000) gallons. Piping associated with an UST system with a field-constructed tank with a capacity less than or equal to fifty thousand (50,000) gallons that is not part of an airport hydrant system shall meet the secondary containment requirements in Chapter 57 when installed or replaced.

5507.7 Not later than October 13, 2021, each owner or operator of an UST system with field-constructed tanks or airport hydrant system, installed on or before the date the regulations become effective, shall upgrade the UST system as follows, or permanently close the UST system pursuant to Chapter 61:

(a) UST system components in contact with the ground that routinely contain regulated substances shall:

(1) Comply with the UST performance standards for new tanks and piping in Chapter 57; or

(2) Be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory as specified in § 5507.8, and meet the following requirements:

(A) Cathodic protection shall meet the applicable requirements of Chapters 57 and 59; and

(B) Tanks greater than ten (10) years old without cathodic protection shall be assessed to ensure the tank is structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment shall be by internal inspection or another method approved by the Department, in accordance with § 5500.5, to adequately assess the tank for structural soundness and corrosion holes; and

(b) Each UST system shall comply with the spill and overfill prevention equipment requirements of Chapter 59.

5507.8 The following codes of practice may be used to comply with requirements of § 5507.7:

(a) NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection";

(b) NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems";

(c) National Leak Prevention Association Standard 631, Chapter C, "Internal Inspection of Steel Tanks for Retrofit of Cathodic Protection"; or

(d) American Society for Testing and Materials Standard G158, "Standard Guide for Three Methods of Assessing Buried Steel Tanks."

5507.9 In addition to the walkthrough inspection requirements in § 5904, each owner or operator of an airport hydrant system shall:

(a) Except as provided in paragraph (b) of this subsection, inspect the following areas at least once every thirty (30) days:

(1) Hydrant pits (visually check for any damage; remove any liquid or debris; and check for any leaks); and

(2) Hydrant piping vaults (check for any hydrant piping leaks);

(b) If confined space entry is required under Occupational Safety and Health Administration (OSHA) requirements in 29 CFR part 1910, inspect the areas in paragraph (a) at least annually; and

(c) Maintain documentation of the inspections required by this subsection in accordance with the requirements of § 5904.

5507.10 Not later than October 13, 2021, each owner or operator of an UST system with a field-constructed tank with a capacity less than or equal to fifty thousand (50,000) gallons shall meet the release detection requirements in Chapter 60.

5507.11 Not later than October 13, 2021, each owner or operator of an UST system with a field-constructed tank with a capacity greater than fifty thousand (50,000) gallons shall meet the requirements in Chapter 60 (except that groundwater or vapor monitoring release detection methods shall be used in combination with inventory control release detection methods) or use one or a combination of the following methods of release detection:

(a) Conduct an annual tank tightness test that can detect a one half gallon per hour (0.5 gal/hr) leak rate;

(b) Use an automatic tank gauging system to perform release detection that can detect a leak rate less than or equal to one gallon per hour (1 gal/hr) at least once every thirty (30) days, and perform a tank tightness test that can detect a leak rate of two tenths of a gallon per hour (0.2 gal/hr) at least once every three (3) years;

(c) Use an automatic tank gauging system to perform release detection that can detect a leak rate less than or equal to two gallons per hour (2 gal/hr) at least once every thirty (30) days, and perform a tank tightness test that can detect a leak rate of two tenths of a gallon per hour (0.2 gal/hr) at least once every two (2) years;

(d) Perform vapor monitoring (conducted in accordance with § 6009 for a tracer compound placed in the tank system) capable of detecting a one tenth of a gallon per hour (0.1 gal/hr) leak rate at least every two (2) years;

(e) Perform inventory control (conducted in accordance with Department of Defense Instruction 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or procedures approved by the Department as equivalent) at least every thirty (30) days that can detect a leak equal to or less than one half percent (0.5%) of flow-through; and

(1) Perform a tank tightness test that can detect a one half gallon per hour (0.5 gal/hr) leak rate at least every two (2) years; or

(2) Perform vapor monitoring or groundwater monitoring (conducted in accordance with Chapter 60) for the stored regulated substance at least every thirty (30) days; or

(f) Another method approved by the Department, if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in paragraphs (a) through (c) of this subsection. In

comparing methods, the Department shall consider the size of release that the method can detect and the frequency and reliability of detection.

5507.12 Not later than October 13, 2021, each owner or operator of underground piping associated with an airport hydrant system or a field-constructed tank with a capacity greater than 50,000 gallons shall meet the requirements in Chapter 60 (except that groundwater or vapor monitoring release detection methods shall be used in combination with inventory control release detection methods) or use one or a combination of the following methods of release detection:

(a) Perform semiannual or annual line tightness test at or above piping operating pressure in accordance with the following:

(1) If the test section volume is less than fifty thousand (50,000) gallons, the leak detection rate for a semiannual test shall not exceed one gallon per hour (1 gal/hr) and the leak detection rate for an annual test shall not exceed one half of a gallon per hour (0.5 gal/hr);

(2) If the test section volume is equal to or greater than fifty thousand (50,000) gallons and less than seventy-five thousand (75,000) gallons, the leak detection rate for a semiannual test shall not exceed one and one half gallons per hour (1.5 gal/hr) and the leak detection rate for an annual test shall not exceed seventy-five hundredths of a gallon per hour (0.75 gal/hr);

(3) If the test section volume is equal to or greater than seventy-five thousand (75,000) gallons and less than one hundred thousand (100,000) gallons, the leak detection rate for a semiannual test shall not exceed two gallons per hour (2 gal/hr) and the leak detection rate for an annual test shall not exceed one gallon per hour (1 gal/hr);

(4) If the test section volume is equal to or greater than one hundred thousand (100,000) gallons, the leak detection rate for a semiannual test shall not exceed three gallons per hour (3 gal/hr) and the leak detection rate for an annual test shall not exceed one and one half gallons per hour (1.5 gal/hr); and

(5) Piping segment volumes that are equal to or greater than one hundred thousand (100,000) gallons and not capable of meeting the maximum three gallon per hour (3 gal/hr) leak rate for the semiannual test may be tested at a leak rate up to six gallons per hour (6 gal/hr) according to the following schedule:

(A) The first test shall be performed not later than October 13, 2021 and may use up to a six gallons per hour (6 gal/hr) leak rate;

(B) The second test shall be performed between October 13, 2021 and October 13, 2024 and may use up to a six gallons per hour (6 gal/hr) leak rate;

(C) The third test shall be performed between October 13, 2024 and October 13, 2025 and shall use a three gallons per hour (3 gal/hr) leak rate; and

(D) Subsequent tests shall be performed annually or semi-annually in accordance with subparagraph (a)(4);

(b) Perform vapor monitoring (conducted in accordance with § 6009 for a tracer compound placed in the tank system) capable of detecting a one tenth of a gallon per hour (0.1 gal/hr) leak rate at least every two (2) years;

(c) Perform inventory control (conducted in accordance with Department of Defense Instruction 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or procedures approved by the Department as equivalent) at least every thirty (30) days that can detect a leak equal to or less than one half percent (0.5%) of flow-through; and

(1) Perform a line tightness test (conducted in accordance with paragraph (a) of this subsection using the leak rates for the semiannual test) at least every two (2) years; or

(2) Perform vapor monitoring or groundwater monitoring (conducted in accordance with Chapter 60) for the stored regulated substance at least every thirty (30) days; or

(d) An alternative method approved by the Department, if the owner and operator can demonstrate that the alternative method can detect a release as effectively as one of the methods allowed in paragraphs (a) through (c) of this subsection. In comparing methods, the Department shall consider the size of release that the method can detect and the frequency and reliability of detection.

5507.13 When directed by the Department, the owner or operator of an UST system with field-constructed tanks, or an airport hydrant system, that has been permanently closed before the date the regulations become effective, shall assess the excavation zone and close the UST in accordance with Chapter 61 if releases from the UST system may, in the judgment of the Department, pose a current or potential threat to human health and the environment.

CHAPTER 56 UNDERGROUND STORAGE TANKS - NOTIFICATION, REGISTRATION, RECORDKEEPING, AND PUBLIC INFORMATION

5600 NOTICE OF THE EXISTENCE, USE, PURCHASE, SALE, OR CHANGE-IN-SERVICE OF AN UST SYSTEM

5600.1 An owner of an UST system shall notify the Department by submitting an UST facility notification form, which is available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents, to the Department within thirty (30) days after the owner or operator:

(a) Begins using an UST system;

(b) Begins using a heating oil tank with a capacity of one thousand one hundred (1,100) or more gallons;

(c) Sells an UST system;

(d) Purchases or acquires an UST system that has not been permanently closed or any tank that is intended to be used as an UST;

(e) Changes the product stored in an UST system, even if the new product is unregulated; or

(f) Changes any required information on a previously submitted UST facility notification form.

5600.2 A responsible party who permanently closes an UST system shall file an UST facility notification form with the Department within thirty (30) days of permanent closure by removal or closure in-place.

5600.3 The responsible party shall complete the UST facility notification form in accordance with Department instructions and shall provide all required information.

5600.4 A responsible party who is required to submit an UST facility notification form may provide notice for several tanks using a single form if the tanks are located at the same facility and are being brought into use or closed at the same time.

5600.5 A responsible party who is required to submit an UST facility notification form for tanks located at more than one (1) facility shall file a separate UST facility notification form for each separate facility.

5600.6 Unless each tank is permanently closed, the owner shall sign the UST facility notification form and shall certify compliance with the following requirements:

(a) Subsection 5700.1;

(b) Subsections 5701.2, 5701.3, 5702.2, 5702.3, 5703.2, 5703.3, 5704.3, and 5704.4;

(c) Subsections 5706.2 and 5706.4 through 5706.6;

(d) Chapter 60; and

(e) Chapter 67.

5600.7 No person other than a responsible party is authorized to sign the UST facility notification form, except an UST System Technician may sign the certification of installation, upgrade, or repair resulting in a change in the information on the UST facility notification form.

5600.8 Any owner of real property who determines that there is an UST system (active or inactive) on the owner's property for which notification has not been provided to the Department shall file an UST facility notification form (or give notice to the Department if information is limited) within seven (7) days of the determination.

5600.9 Any person who deposits regulated substances into an UST, or who sells or leases a tank or piping intended for use as an UST or UST system, shall inform the owner, buyer, or lessee of the tanks of the notification requirements of this section.

5600.10 Each owner or operator of any UST system that has been upgraded or modified in any way shall ensure that the installer certifies, on the UST facility notification form required under this section, that the methods used to upgrade or modify the UST system comply with the requirements of § 5801.

5601 REGISTRATION

5601.1 Each owner of an UST containing a regulated substance, except for a heating oil tank with a capacity of less than one thousand one hundred (1,100) gallons, shall register and annually renew registration of the UST in accordance with this section.

5601.2 A new owner of an existing UST or an owner of a new UST shall initiate the registration process within thirty (30) days of the change in ownership or the installation of a new UST by filing an UST facility notification form for each UST facility pursuant to the requirements of § 5600. Upon receipt of a complete UST facility notification form, the Department will send a registration fee invoice to the registrant, and the registrant shall pay the required fee within the time period specified on the invoice.

5601.3 The Department may issue a registration certificate to the owner only after:

(a) The registration fee has been received;

(b) The owner has filed a properly completed UST facility notification form pursuant to the notification requirements of § 5600; and

(c) Either of the following has occurred as applicable:

(1) For a new UST, the owner has complied with the installation requirements of § 5706; or

(2) For an existing UST, the owner has complied with all the applicable requirements of the UST Regulations.

5601.4 The registration term is from January 1 to December 31 of each calendar year. The term for a registration certificate issued after January 1 is from the date of issuance until December 31 of the calendar year when the registration certificate is issued. Registration shall not be transferable from owner to owner.

5601.5 An owner shall renew the registration for each tank on or before November 30 of each calendar year unless:

(a) The UST has been permanently closed pursuant to § 6101;

(b) There has been a change-in-service to storage of a non-regulated substance pursuant to § 6101; or

(c) The owner has sold the UST and has informed the Department in writing of the date of sale and the identity of the purchaser.

5601.6 A copy of the current registration certificate shall be posted at the facility where the UST is located and it shall be visible to product delivery company personnel and government inspectors at all times.

5601.7 No person shall deposit a regulated substance into an UST without first confirming that the UST is currently registered and that the facility where the UST is located has not been found to be in violation of these regulations by ensuring that:

(a) A current certificate of registration is present at the facility; and

(b) The facility where the UST is located is not on the list of facilities prohibited by the Department from receiving regulated substances. The delivery prohibition list is posted on the Department's website at https://doee.dc.gov/publication/delivery-prohibition-guidance-usts.

5601.8 No owner or operator shall dispense, or permit the dispensing of, a regulated substance from an UST unless the owner has satisfied the registration requirements of this section.

5601.9 No owner or operator shall deposit or dispense, or permit the deposit or dispensing of, a regulated substance into an UST for which registration has been denied, unless deposit of a regulated substance is authorized for the purpose of testing the tank.

5601.10 Any person who sells an UST or a facility where an UST is located shall notify the new owner in writing that the new owner has notification and registration obligations under § 5600 and this section, and shall complete a seller's disclosure form prescribed by the Department, which is available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents.

5602 RECORDKEEPING AND REPORTS

5602.1 Each owner or operator shall submit the following information to the Department:

(a) UST facility notification forms for all USTs (§ 5600), including certification of installation and compliance with the manufacturer's checklist for new or upgraded USTs (§ 5706 or § 5801);

(b) Notices of installation, repair, removal, closure-in-place, upgrades, or testing (§ 5603);

(c) Reports of all spills and overfills (§ 6201);

(d) Reports of all releases, including suspected releases (§ 6202) and confirmed releases (§§ 6203.8(c) and (d));

(e) Corrective actions planned or taken, including initial abatement measures (§§ 6203.12(c) and (d)), free product removal (§ 6204), comprehensive site assessments (§ 6205), and corrective action plans (§ 6207);

(f) Notifications prior to permanent closure or change-in-service (§ 6101); and

(g) An UST facility notification form for any change in ownership, facility information, or tank data (§ 5600).

5602.2 Each owner or operator shall also provide the information required in §§ 5602.1(b), (c), (d), and (f) and the information specified in §§ 6204.7 and 6205.3 to the District Fire Chief.

5602.3 Except as provided in §§ 5602.4 through 5602.6, each owner or operator of an UST system shall maintain the following records and information at the facility where the UST system is located:

(a) Documentation of the operation of corrosion protection equipment (§ 5901.2);

(b) Documentation of the impressed cathodic protection system inspections (§ 5901.6);

(c) Documentation of UST system repairs (§ 5902);

(d) Documentation of compliance with release detection requirements (§ 6001);

(e) Results of the closure assessment conducted at permanent closure (§ 6101);

(f) Documentation of UST system compatibility (§ 5903);

(g) Documentation of operator training (§ 6503);

(h) Documentation of periodic walkthrough inspections (§ 5904)

(i) Documentation of compliance for spill and overfill prevention equipment and for containment sumps used for interstitial monitoring of piping (§§ 5900.12 through 5900.15); and

(j) A corrosion expert's analysis of corrosion potential if corrosion protection is not used (§ 5701.1(d)).

5602.4 Each owner or operator shall maintain the records required under §§ 5602.3(a), (c) and (f) for a period of ten (10) years, or the life of the UST system, whichever is longer. The records for the current and the previous registration year shall be kept at the facility where the UST is located and shall be immediately available for inspection when requested by the Department. For the remainder of the required retention period, the records may be kept at another location in the District, but shall be readily available for inspection when requested by the Department.

5602.5 Each owner or operator shall keep the records required under § 5602.3(d) either at the facility where the UST is located or at another location in the District. The records shall be immediately available for inspection by the Department at the facility where the UST is located, or if at another location, readily available for inspection by the Department.

5602.6 If an UST is permanently closed and the records cannot be kept at the facility where the UST was located or at an alternative location under §§ 5602.4 and 5602.5, the owner or operator shall deliver the permanent closure records required under § 6101 to the Department.

5602.7 Any records required to be maintained by an owner or operator shall be kept for the operating life of the UST unless another time period is specified by regulation.

5602.8 Each owner shall maintain documentation required in § 6502.11 at the facility where the UST is located.

5603 NOTICE OF INSTALLATION, REMOVAL, CLOSURE-IN-PLACE, REPAIR, UPGRADE, AND TESTING

5603.1 The owner, operator, or authorized representative of an owner or operator shall notify the Department at least five (5) business days before each installation, repair, or upgrade of an UST system and its related components, such as overfill equipment and secondary containment areas, except as provided in § 5603.3. The notice shall be provided on an UST/LUST activity notification form, which is available on the Department's website at https://doee.dc.gov/publication/ust-activity-notification-form. Each owner, operator, or authorized representative shall provide notice of a removal or closure-in-place in accordance with Chapter 61.

5603.2 In addition to the notice required under § 5603.1, the owner, operator, or authorized representative shall notify the Department orally or in writing of the exact date and time of the installation, repair, upgrade, removal, or closure-in-place of the UST system at least twenty-four (24) hours in advance to schedule an appointment for facility inspections, except as provided in § 5603.3.

5603.3 In the case of an emergency removal or repair, the owner or operator shall provide notice to the Department and the District Fire Chief within twenty-four (24) hours of learning of the emergency condition.

5603.4 Before installing or upgrading an UST, the owner or operator shall submit to the Department plans, engineering designs, and specifications prepared by a business licensed to perform UST installations in the District in accordance with § 6500.

5603.5 Each owner or operator of an UST, including an UST on a federal facility, shall obtain approval of the plans and specifications from the Department before applying for a construction permit from the District Department of Consumer and Regulatory Affairs.

5603.6 Each owner or operator shall inform the Department orally or on an UST/LUST activity notification form at least twenty-four (24) hours in advance of the exact date and time of any tank tightness test to be conducted on an UST. In the case of emergency testing, notice shall be provided to the Department within twenty-four (24) hours after emergency testing is conducted.

5603.7 In addition to the notice required by § 5603.6, if a tightness test is performed as a result of a suspected release, the owner or operator shall also inform the District Fire Chief orally or in writing at least forty-eight (48) hours in advance.

5604 NOTICE OF SALE OF REAL PROPERTY

5604.1 Before a seller may enter into a contract for the sale of real property in the District, the seller shall inform each prospective buyer of the existence or removal of any UST system at the property, that the seller has knowledge of, on a disclosure form approved by the Department or in a letter incorporating all of the information required in the form, except as provided in §§ 5604.3 and 5604.4. The disclosure form is available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents.

5604.2 The seller of real property is not required to perform a site assessment or other geological investigation to determine if there are USTs on the property, but shall:

(a) Inform prospective purchasers of any UST or any UST-related contamination of which the seller has actual knowledge; and

(b) For the sale of commercial property, inform prospective buyers of any prior use of the property of which seller has actual knowledge that may suggest the existence of USTs on the property.

5604.3 Notice pursuant to § 5604.1 is not required for the sale of an individual condominium or cooperative unit.

5604.4 A seller of a single family home shall use the disclosure form approved by the Department, which is available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents, or make the disclosure required by § 5604.1 in the sales contract if the purchaser signs an acknowledgement that the purchaser has read the disclosure prior to signing the contract.

5605 FEES

5605.1 The annual registration fee shall be eight hundred dollars ($800) for each tank with a capacity of over ten thousand (10,000) gallons; four hundred fifty dollars ($450) for each tank with a capacity of ten thousand (10,000) gallons or less; except the fee for a heating oil tank with a capacity of ten thousand (10,000) gallons or less shall be two hundred dollars ($200). The owner or operator of a heating oil tank with a capacity of more than ten thousand (10,000) gallons shall pay eight hundred dollars ($800).

5605.2 The annual registration fee shall be paid in full by January 1 of each year. Any annual registration fee not received by January 1 of each year shall be subject to a late fee of two hundred dollars ($200).

5605.3 The following fees will be charged for the listed Departmental activities:

(a) The fee for review of plans and specifications and performing facility inspections for UST installations is two hundred fifty dollars ($250) per tank;

(b) The fee for performing facility inspections and for review of reports related to UST closure-in-place is two hundred fifty dollars ($250) per tank, except that the fee for these activities for heating oil tanks with a capacity of less than one thousand one hundred (1,100) gallons is one hundred fifty dollars ($150) per tank;

(c) The fee for performing facility inspections and review of reports related to UST removal is two hundred fifty dollars ($250) per tank, except the fee for these activities for heating oil tanks with a capacity of less than one thousand one hundred (1,100) gallons is one hundred fifty dollars ($150) per tank; and

(d) The initial fee for participation in the Voluntary Remediation Action Program is five thousand dollars ($5000), except that the Department may waive the fee if the applicant is a neighboring property owner who is unable to obtain relief from the responsible party. The initial fee shall be reduced by twenty-five percent (25%) if the applicant demonstrates, to the satisfaction of the Department, that the corrective action plan will use green remediation. In addition, an annual fee of five hundred dollars

($500) to continue in the program will be charged and is payable on the one year anniversary date of Conditional Authorization Letter issued pursuant to § 6212.3.

5605.4 The following application fees will be charged for the licensing of any business and the certification of any individual who installs, upgrades, repairs, permanently closes, or tests UST systems under Chapter 65:

(a) The initial application fee to license a business is four hundred dollars ($400), and the annual renewal application fee is two hundred dollars ($200), except that the initial application fee for businesses certified by a neighboring state under § 6501 is three hundred dollars ($300); and

(b) The initial application fee to certify an individual is two hundred fifty dollars ($250), and the annual renewal application fee is one hundred fifty dollars ($150).

5605.5 The fees in this section may be increased for each calendar year by the percentage, if any, by which the Consumer Price Index as published by the Department of Labor increased between the last two calendar years. For example, the fees for 2019 would be based on the increase, if any, from 2017 to 2018.

5606 THIRD-PARTY CERTIFICATION

5606.1 In lieu of inspection by the Department, an owner or operator may request the Department to approve compliance inspections of UST system installations, upgrades, repairs, closures, release detection system(s), and manufacturer-required annual maintenance inspections performed by an independent third-party inspector who is a Department-certified UST System Technician.

5606.2 If the Department approves use of an independent third-party inspector, the Department will accept the third-party inspector's report and findings if the report contains all the compliance inspection information required by the Department.

5606.3 An independent third-party inspector may not certify an UST system if he or she has a financial interest in the UST system or the facility in which the UST is located.

5607 PUBLIC RECORD INFORMATION

5607.1 No later than December 31 of each year, information will be made available to the public regarding:

(a) Current numbers of USTs and facilities in the District, and Significant Operational Compliance (SOC) inspections conducted; and

(b) Confirmed releases from USTs within the District for the year, and the sources and causes of releases.

5607.2 The public record will be available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents. A person who does not have electronic access may request a copy of the information by writing to UST Branch, Department of Energy and Environment, 1200 First Street, N.E., 5th Floor, Washington, D.C. 20002.

CHAPTER 57 UNDERGROUND STORAGE TANKS - NEW TANK PERFORMANCE STANDARDS

5700 EXISTING AND NEW UST SYSTEMS - GENERAL PROVISIONS

5700.1 The owner or operator of each new or existing petroleum UST system, except for a heating oil tank, shall comply with this section and the following as applicable:

(a) For an UST system installed on or before December 22, 1988, the upgrade requirements in Chapter 58;

(b) For an UST system installed after December 22, 1988, and on or before November 12, 1993, the federal standards in 40 CFR § 280.20 (Performance Standards for New USTs); and

(c) For UST systems installed after November 12, 1993, the performance standards for new petroleum UST systems in §§ 5701, 5704, and 5705.

5700.2 Except as provided in § 5700.3, the owner or operator of each existing or new hazardous substance UST system shall comply with this section and the performance standards for new hazardous substance UST systems in §§ 5702, 5704, and 5705.

5700.3 A hazardous substance UST system that was installed on or before November 12, 1993, and that was upgraded before the date the regulations become effective to comply with the performance standards for new petroleum UST systems in § 5701, is exempt from the requirements of § 5700.2.

5700.4 The owner or operator of each heating oil tank with a capacity of one thousand one hundred (1,100) gallons or greater shall comply with the following as applicable:

(a) For UST systems installed on or before November 12, 1993, the requirements of this section; and

(b) For UST systems installed after November 12, 1993, the requirements of §§ 5703 through 5706.

5700.5 The owner or operator of an UST system that does not comply with §§ 5700.1 through 5700.4 shall comply with the permanent closure requirements in Chapter 61 and the applicable requirements for corrective action in Chapter 62.

5700.6 The owner or operator of each UST system shall ensure that the UST system satisfies the applicable release detection requirements in Chapter 60.

5700.7 In addition to meeting the requirements of this chapter, the owner or operator of each UST system located within one hundred feet (100 ft) of a subsurface transit structure, as measured horizontally from the outside wall, shall meet the requirements of the District of Columbia Fire Code, Title 12, Subtitle H (Fire Code Supplement) of the District of Columbia Municipal Regulations and the National Fire Protection Association (NFPA) Standard 130 (Standard for Fixed Guideway Transit and Passenger Rail Systems).

5700.8 Each metal tank, and the attached metal piping that is in contact with the ground and used to convey the regulated substance stored in the tank, shall be properly designed, constructed, and installed in a manner that will prevent corrosion in accordance with:

(a) A code of practice listed in § 5701.10;

(b) The District of Columbia Fire Code, Title 12, Subtitle H (Fire Code Supplement) of the District of Columbia Municipal Regulations; and

(c) The applicable requirements of this chapter.

5700.9 The Department may approve alternative tank construction and corrosion protection measures if the Department determines that the alternative tank construction and corrosion protection measures will prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements of this chapter.

5700.10 Each owner or operator of an UST that is more than thirty (30) years old shall remove the tank from the ground in accordance with Chapter 61 within five (5) years of the date the regulations become effective.

5700.11 Each owner or operator of an UST that is more than thirty (30) years old shall perform a tightness test within one (1) year of the date the regulations become effective, and if the UST fails, remove the UST within one (1) year of the date of the test failure.

5701 NEW PETROLEUM UST SYSTEMS

5701.1 Each new petroleum UST, except for a heating oil tank, shall be constructed of:

(a) Fiberglass-reinforced plastic with double-walled construction or other secondary containment system as set forth in §§ 5701.4 through 5701.6;

(b) Steel that is clad or jacketed with a non-corrodible material (such as fiberglass-reinforced plastic composite) with double-walled construction or other secondary containment system as set forth in §§ 5701.4 through 5701.6;

(c) Steel that is cathodically protected in accordance with §§ 5701.2 and 5701.3 with double-walled construction or other secondary containment system as set forth in §§ 5701.4 through 5701.6;

(d) Metal without additional corrosion protection measures; provided that:

(1) The tank is installed at a facility that is determined by a corrosion expert not to be corrosive enough to cause the tank to have a release due to corrosion during its operating life; and

(2) The owners and operators maintain records that demonstrate compliance with requirements of § 5701.1(d)(1) for the remaining life of the tank; or

(e) Other materials, if the tank's construction and corrosion protection are, as determined by the Department, in accordance with § 5500.5, designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the other provisions of this section.

5701.2 Each steel tank that is cathodically protected shall be coated with a suitable dielectric material, and:

(a) The field-installed cathodic protection systems shall be designed by a corrosion expert; and

(b) The impressed current cathodic protection systems shall be designed to allow determination of current operating status as required by § 5901.5.

5701.3 Each cathodic protection system shall be operated and maintained in accordance with § 5901.

5701.4 Secondary containment systems shall be designed, constructed, and installed to do the following:

(a) Contain regulated substances released from the tank system until they are detected and removed;

(b) Prevent the release of regulated substances to the environment at any time during the operational life of the UST; and

(c) Check for evidence of a release at least every thirty (30) days.

5701.5 If continuous monitoring methods are not used, each secondary containment system shall be tested every three (3) years to ensure that the interstitial area is liquid-tight.

5701.6 Double-walled tanks shall be designed, constructed, and installed in a manner that will:

(a) Contain a release from any portion of the inner tank within the outer wall; and

(b) Provide for the detection of the failure of the inner wall.

5701.7 External liner systems, including vaults, shall be designed, constructed, and installed in a manner that will:

(a) Contain one hundred ten percent (110%) of the capacity of the largest tank within its boundary;

(b) Prevent precipitation or groundwater intrusion from interfering with the ability to contain or detect a release of regulated substances; and

(c) Surround the tank completely and be capable of preventing both lateral and vertical migration of regulated substances.

5701.8 All new motor fuel dispenser systems shall be equipped with an under-dispenser **c**ontainment system that is designed, constructed, and installed in a manner that will prevent leaks from the dispenser from reaching soil or groundwater, and shall:

(a) Be liquid-tight on its sides, bottom, and at any penetrations;

(b) Be compatible with the substance conveyed by the piping; and

(c) Allow for visual inspection and access to the components in the containment system, or be monitored to detect a failure of the under-dispenser containment and any leaks from the dispenser.

5701. 9 A dispenser system is considered new when both the dispenser and the equipment needed to connect the dispenser to the UST system are installed. The equipment necessary to connect the dispenser to the UST system includes check valves, shear valves, unburied risers, flexible connectors, and other transitional components that are below the dispenser and connect the dispenser to the underground piping.

5701.10 The following codes of practice may be used to comply with § 5701.1:

(a) If the tank is constructed of fiberglass reinforced plastic:

(1) Underwriters Laboratories Standard 1316, "Glass- Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products Alcohols, and Alcohol-Gasoline Mixtures"; or

(2) Underwriter's Laboratories of Canada Standard CAN/ULC S615, "Standard for Reinforced Plastic Underground Tanks for Flammable and Combustible Liquids".

(b) If the tank is constructed of steel and cathodically protected:

(1) Steel Tank Institute STI-P3, "Specification and Manual for External Corrosion Protection of Underground Steel Storage Tanks";

(2) Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks";

(3) Underwriters Laboratories of Canada Standard CAN/ULC S603, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids," Standard CAN/ULC S603.1 "Standard for External Corrosion Protection Systems for Steel Underground Tanks for Flammable and Combustible Liquids," and Standard CAN/ULC S631, "Standard for Isolating Bushings for Steel Underground Tanks Protected with External Corrosion Protection Systems";

(4) Steel Tank Institute Standard F841, "Standard for Dual Wall Underground Steel Storage Tanks"; or

(5) NACE International Standard Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection," and Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids."

(c) If the tank is steel, and clad or jacketed with a non-corrodible material:

(1) Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks";

(2) Steel Tank Institute ACT-100® Specification F894, "Specification for External Corrosion Protection of FRP Composite Steel Underground Storage Tanks";

(3) Steel Tank Institute ACT-100-U® Specification F961-15, "Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks"; or

(4) Steel Tank Institute Specification F922, "Steel Tank Institute Specification for Permatank®."

5702 NEW HAZARDOUS SUBSTANCE UST SYSTEMS

5702.1 Each new hazardous substance UST shall be:

(a) Constructed of fiberglass-reinforced plastic, steel-fiberglass-reinforced plastic composite, or steel;

(b) If constructed of steel, cathodically protected in accordance with the requirements of § 5702.2; and

(c) Of three hundred sixty degree (360°) double-wall construction as set forth in § 5702.4.

5702.2 Each steel tank shall be cathodically protected by being coated with a suitable dielectric material, and:

(a) The field-installed cathodic protection systems shall be designed by a corrosion expert; and

(b) The impressed current cathodic protection systems shall be designed to allow determination of current operating status as required by § 5901.5.

5702.3 Each cathodic protection system shall be operated and maintained in accordance with § 5901.

5702.4 Double-walled tanks shall be designed, constructed, and installed in a manner that will:

(a) Contain a release from any portion of the inner tank within the outer wall until detected and removed;

(b) Detect the failure of the inner or outer wall;

(c) Prevent the release of regulated substances to the environment at any time during the operational life of the UST; and

(d) Check for evidence of a release at least every thirty (30) days.

5702.5 The codes of practice listed in §§ 5701.10(a) and (b) may be used to comply with § 5702.1

5703 NEW HEATING OIL UST SYSTEMS

5703.1 Each heating oil tank with a capacity of one thousand one hundred (1,100) gallons or more and was installed after November 12, 1993, whether of single or double-walled construction, shall be constructed of the following:

(a) Fiberglass-reinforced plastic;

(b) Steel-fiberglass-reinforced plastic composite; or

(c) Steel, which must be cathodically protected in accordance with the requirements of § 5703.2.

5703.2 Each steel tank shall be cathodically protected by being coated with a suitable dielectric material, and:

(a) The field-installed cathodic protection systems shall be designed by a corrosion expert; and

(b) The impressed current cathodic protection system shall be designed to allow determination of current operating status as required by § 5901.5.

5703.3 Each cathodic protection system shall be operated and maintained in accordance with the requirements of § 5901.

5703.4 Each heating oil tank with a capacity of one thousand one hundred (1,100) gallons or more, and installed after November 12, 1993, shall have a secondary containment system that is designed, constructed, and installed in a manner that will:

(a) Contain regulated substances released from the tank system until they are detected and removed;

(b) Prevent the release of regulated substances to the environment at any time during the operational life of the UST; and

(c) Check for evidence of a release at least every thirty (30) days.

5703.5 If continuous monitoring methods are not used, each secondary containment system shall be tested every three (3) years to ensure that the interstitial area is liquid-tight.

5703.6 A tank that is double-walled shall be designed, constructed, and installed in a manner that will:

(a) Contain a release from any portion of the inner tank within the outer wall; and

(b) Allow for the detection of the failure of the inner wall.

5703.7 External liner systems, including vaults, shall be designed, constructed, and installed in a manner that will:

(a) Contain one hundred ten percent (110%) of the capacity of the largest tank within its boundary;

(b) Prevent the interference of precipitation or ground water intrusion with the ability to contain or detect a release of regulated substances; and

(c) Surround the tank completely and be capable of preventing lateral as well as vertical migration of regulated substances.

5703.8 An upgrade of a heating oil tank is considered a new installation and shall conform to all new installation provisions in this chapter.

5704 NEW PIPING FOR UST SYSTEMS

5704.1 Piping that routinely contains regulated substances and is in contact with earthen materials shall be properly designed and constructed, and protected from corrosion, in accordance with the following codes of practice, or an alternative

industry standard or code of practice approved by the Department in accordance with § 5506:

(a) If the piping is non-corrodible material (such as fiberglass-reinforced plastic):

(1) Underwriters Laboratories Standard 971, "Nonmetallic Underground Piping for Flammable Liquids"; or

(2) Underwriters Laboratories of Canada Standard CAN/ULC S660, "Standard for Nonmetallic Underground Piping for Flammable and Combustible Liquids"; and

(b) If the piping is constructed of steel and cathodically protected:

(1) American Petroleum Institute Recommended Practice RP 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems";

(2) Underwriters Laboratories Subject 971A, "Outline of Investigation for Metallic Underground Fuel Pipe";

(3) Steel Tank Institute Recommended Practice R892, "Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems";

(4) NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems"; or

(5) NACE International Standard Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection."

5704.2 UST system piping shall be constructed of:

(a) Non-corrodible material (such as fiberglass-reinforced plastic);

(b) Steel, which shall be cathodically protected in accordance with the requirements of this section and § 5901;

(c) Metal without additional corrosion protection measures; provided that:

(1) The piping is installed at a facility that is determined by a corrosion expert not to be corrosive enough to cause the piping to have a release due to corrosion during its operating life; and

(2) The owner or operator maintains records that demonstrate compliance with requirements of § 5704.2(c)(1) for the remaining life of the piping; or

(d) Other materials approved by the Department in accordance with § 5704.7.

5704.3 Steel UST piping shall be cathodically protected by being coated with a suitable dielectric material, and:

(a) The field-installed cathodic protection system shall be designed by a corrosion expert; and

(b) The impressed current cathodic protection system shall be designed to allow determination of current operating status as required by § 5901.5.

5704.4 Each cathodic protection system shall be operated and maintained in accordance with the requirements of § 5901.

5704.5 Except as provided in § 5704.6, underground piping for hazardous substance USTs, and pressurized underground piping and non-safe suction piping for all petroleum USTs, shall be equipped with secondary containment features that are designed and constructed in accordance with the requirements of § 5701.4.

5704.6 Secondary containment is not required for vent pipes, Stage II vapor recovery pipes, or vertical fill pipes.

5704.7 Other materials and construction techniques may be used for UST piping if the piping construction and corrosion protection are determined by the Department, in accordance with § 5500.5, to be designed in a manner that is no less protective of human health and the environment than the other provisions of this section.

5705 SPILL AND OVERFILL PREVENTION EQUIPMENT FOR NEW AND UPGRADED UST SYSTEMS

5705.1 Except as provided in § 5705.3, in order to prevent spilling during the transfer of regulated substances to an UST, each owner or operator shall use spill prevention equipment (such as a spill catchment basin) that will prevent release of regulated substances when the transfer hose is detached from the fill pipe.

5705.2 Each owner or operator of a new or upgraded UST system shall prevent spills and overfills by ensuring that the space in the tank is sufficient to receive the volume of regulated substances to be transferred and that the transfer operation is constantly monitored in accordance with § 5900.3.

5705.3 Except as provided in §§ 5705.4 through 5705.6, in order to prevent overfilling during the transfer of regulated substances, each owner or operator shall use overfill prevention equipment that does one or more of the following:

(a) Automatically shuts off flow into the tank when the tank is no more than ninety-five percent (95%) full;

(b) Alerts the transfer operator when the tank is no more than ninety percent (90%) full by triggering a high-level audible and visible alarm that is labeled overfill alarm and is in full view of the delivery driver;

(c) Restricts flow thirty (30) minutes prior to overfilling;

(d) Alerts the transfer operator with a high level alarm one (1) minute before overfilling; or

(e) Automatically shuts off flow into the tank so that none of the fittings located on the top of the tank are exposed to product due to overfilling.

5705.4 No owner or operator shall use flow restrictors (ball float systems) in vent lines as the only method of overfill prevention when the overfill prevention is installed or replaced after the date the regulations become effective.

5705.5 Tanks that are susceptible to over-pressurization shall only use an automatic shutoff valve to comply with § 5705.3.

5705.6 An owner or operator is not required to provide and use the spill and overfill prevention equipment specified in this section if:

(a) Alternative equipment is used that is determined by the Department, in accordance with § 5500.5, to be no less protective of human health and the environment than the equipment specified in the other provisions of this section; or

(b) The UST is filled by transfers of no more than twenty-five (25) gallons at one time.

5705.7 The spill prevention equipment on new USTs shall have a minimum capacity of ten (10) gallons.

5706 INSTALLATION OF NEW UST SYSTEMS

5706.1 Each UST system, including all tanks and piping, shall be installed in accordance with the manufacturer's instructions; the District of Columbia Fire Code, Title 12, Subtitle H (Fire Code Supplement) of the District of Columbia Municipal

Regulations; and one of the following codes of practice or an alternative code approved by the Department in accordance with § 5506:

(a) American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage System";

(b) Petroleum Equipment Institute Recommended Practice RP100, "Recommended Practices for Installation of Underground Liquid Storage Systems"; or

(c) National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code" and Standard 30A, "Code for Motor Fuel Dispensing Facilities and Repair Garages."

5706.2 Each owner or operator shall ensure that each UST is installed by, or each installation is supervised by, a District-certified UST System Technician as required in Chapter 65.

5706.3 The owner or operator shall ensure that all work listed in the manufacturer's installation checklist is completed for each UST installation.

5706.4 The owner or operator shall sample the soil below the excavation and submit the soil sampling report to the Department before installation. The owner or operator may not place backfill in the excavation until the Department has inspected and approved the installation.

5706.5 After installing an UST, the owner or operator shall perform a tank tightness test before using the UST.

5706.6 The owner or operator shall ensure that the UST System Technician certifies compliance with §§ 5706.2 through 5706.4 on an UST facility notification form, available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents, and shall submit the form to the Department.

CHAPTER 58 UNDERGROUND STORAGE TANKS - UPGRADES OF EXISTING USTS

5800 EXISTING UST SYSTEM UPGRADES
5801 TANK UPGRADES
5802 EXISTING UST SYSTEM PIPING UPGRADES
5803 SPILL AND OVERFILL PREVENTION EQUIPMENT UPGRADES
5804 TANK TIGHTNESS TESTING UPON UPGRADE

5800 EXISTING UST SYSTEM UPGRADES

5800.1 The owner or operator of each existing petroleum UST, except a heating oil tank, shall ensure that the UST complies with the following as applicable, or permanently close the UST in accordance with Chapter 61 and applicable requirements for corrective action set forth in Chapter 62:

(a) For an UST system installed before December 22, 1988, the upgrade requirements set forth in this chapter;

(b) For an UST system installed after December 22, 1988, and prior to November 12, 1993, the federal standards set forth in 40 CFR § 280.20 (Performance Standards for New USTs); or

(c) The performance standards for new petroleum UST systems in Chapter 57.

5800.2 All components connected to an existing petroleum UST system, except a heating oil tank, shall be operating. Components of an UST system that are no longer functional or in use shall be removed.

5800.3 No person may deposit a regulated substance into an existing UST system, except a heating oil tank, unless the UST system complies with the new UST system performance standards in Chapter 57 or has been upgraded under this section.

5800.4 The owner or operator of each existing hazardous substance UST system shall ensure that the UST system complies with the new UST system performance standards in Chapter 57 for hazardous substance UST systems, or permanently close the UST system in accordance with Chapter 61 and applicable requirements for corrective action in Chapter 62.

5801 TANK UPGRADES

5801.1 Each owner or operator of an existing steel UST shall upgrade the tank in accordance with the manufacturer's specifications, one of the following codes of practice, or an alternative industry standard or code of practice approved by the Department in accordance with § 5506:

(a) American Petroleum Institute Recommended Practice RP 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks";

(b) National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection";

(c) National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems"; or

(d) American Petroleum Institute Recommended Practice RP 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems."

5801.2 An owner or operator that seeks to upgrade an existing tank to stage I vapor recovery shall submit plans to the Department by mail or delivery to UST Branch, Department of Energy and Environment, 1200 First Street, N.E., 5th Floor, Washington, D.C. 20002, or electronically in accordance with § 5500.4, and obtain the Department's approval before implementing the upgrades.

5801.3 The internal lining of an existing UST may be upgraded only if the following requirements are met:

(a) The interior of the tank was inspected and assessed to ensure that the tank is structurally sound prior to installing the internal lining in accordance with American Petroleum Institute Recommended Practice 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks"; and

(b) The lining was installed in accordance with the requirements of § 5902.

5801.4 Within ten (10) years after the lining of the tank is upgraded, and every five (5) years thereafter, the interior of the lined tank shall be inspected to ensure that:

(a) It is structurally sound;

(b) It is free of corrosion holes; and

(c) The lining is performing in accordance with the original design specifications.

5801.5 If internal lining is the sole method of corrosion protection for an UST, the owner or operator shall inspect the lining at least once each year for the conditions listed in § 5801.4(a) though (c).

5801.6 The following requirements apply to tank linings that have failed inspections:

(a) The tank lining shall be replaced, unless it can be repaired and restored to a level of performance equivalent to original design specifications using a code of practice specified in § 5801.1; and

(b) If an UST internal lining is the sole method of corrosion protection for an UST and the lining cannot be repaired in accordance with paragraph (a),

the owner or operator shall permanently close the tank in accordance with the requirements of Chapter 61.

5801.7 An existing tank may be upgraded by cathodic protection if the cathodic protection system meets the requirements of §§ 5701.2 and 5701.3, and the integrity of the tank is ensured using one of the following methods:

(a) The interior of the tank is inspected and assessed to ensure that the tank is structurally sound and free of corrosion holes prior to installing the cathodic protection system;

(b) If the tank had been installed for less than ten (10) years at the time of the upgrade, the tank is monitored monthly for releases in accordance with §§ 6008 through 6013;

(c) If the tank had been installed for less than ten (10) years at the time of the upgrade, the tank is assessed for corrosion holes by conducting two (2) tank tightness tests that meet the requirements of § 6007; the first tank tightness test shall be conducted before installing the cathodic protection system, and the second tank tightness test shall be conducted between three (3) and six (6) months after beginning operation of the cathodic protection system; or

(d) The tank is assessed for corrosion holes by a method that is determined by the Department, in accordance with § 5506, to prevent releases in a manner that is no less protective of human health and the environment than a system that complies with paragraphs (a) through (c) of this subsection.

5801.8 An existing tank may be upgraded by both internal lining and cathodic protection if the following requirements are met:

(a) The lining is installed in accordance with the requirements of § 5902; and

(b) The cathodic protection system meets the requirements of §§ 5701.2 and 5701.3.

5801.9 The following codes of practice may be used to comply with the periodic lining inspection requirements in §§ 5801.4 and 5801.5:

(a) American Petroleum Institute Recommended Practice RP 1631, “Interior Lining and Periodic Inspection of Underground Storage Tanks”;

(b) National Leak Prevention Association Standard 631, Chapter B “Future Internal Inspection Requirements for Lined Tanks”; or

(c) Ken Wilcox Associates Recommended Practice, "Recommended Practice for Inspecting Buried Lined Steel Tanks Using a Video Camera."

5802 EXISTING UST SYSTEM PIPING UPGRADES

5802.1 Metal piping that routinely contains regulated substances and is in contact with earthen materials shall be cathodically protected in accordance with a code of practice that is either listed in § 5704.1(b) or approved by the Department in accordance with § 5506.

5802.2 Metal piping that routinely contains regulated substances and is in contact with earthen materials shall meet the requirements of §§ 5704.3 and 5704.4.

5802.3 Metal piping that routinely contains regulated substances and is in contact with earthen materials but does not meet the requirements of §§ 5802.1 and 5802.2 shall be replaced with new piping and satisfy the requirements of § 5704.

5803 SPILL AND OVERFILL PREVENTION EQUIPMENT UPGRADES

5803.1 To prevent spilling and overfilling associated with product transfer to the UST, all existing UST systems shall comply with new UST spill and overfill prevention equipment requirements specified in § 5705.

5804 TANK TIGHTNESS TESTING UPON UPGRADE

5804.1 Before beginning to operate an upgraded UST system, the owner or operator shall have a tightness test performed in accordance with the requirements of § 6007, unless the tank is upgraded by cathodic protection and the owner or operator complies with § 5801.7(c).

CHAPTER 59 UNDERGROUND STORAGE TANKS - OPERATION AND MAINTENANCE OF USTS

5900 SPILL AND OVERFILL CONTROL

5900.1 Each owner, operator, or agent in charge shall ensure that releases due to spilling or overfilling do not occur. In complying with the requirements of this section, the owner, operator, or agent in charge shall follow one of the following codes of practice or an alternative industry standard or code of practice approved by the Department in accordance with § 5506:

(a) National Fire Protection Association Standard 385, "Standard for Tank Vehicles for Flammable and Combustible Liquids;" or

(b) American Petroleum Institute Recommended Practice RP 1007, "Loading and Unloading of MC 306/DOT 406 Cargo Tank Motor Vehicles."

5900.2 Before each transfer is made, the owner, operator, or agent in charge shall check that the volume available in the tank is greater than the volume of product to be transferred into the tank.

5900.3 The owner, operator, or agent in charge shall ensure that an individual, who may be the owner, operator, agent in charge, or a person designated by the owner in accordance with § 6502, constantly monitors each transfer operation to prevent overfilling and spilling, and that the transfer operation is performed in accordance with the UST manufacturer's specifications.

5900.4 When product is transferred by means of pressurized delivery, delivery nozzles shall be opened manually and observed by the individual transferring the product until closed.

5900.5 When product is transferred by means of pressurized delivery, a vent alarm device shall be installed and be visible and audible to the individual transferring the product.

5900.6 If the vent alarm indicates an obstruction to the vent, delivery shall be discontinued until the vent is cleared.

5900.7 The owner, operator, or agent in charge shall ensure that the spill prevention equipment is kept clean and dry.

5900.8 The owner or operator shall ensure that all fill lines for the UST are clearly marked to indicate the size of the tank and the type of regulated substance stored by:

(a) Installing a permanent tag or sign immediately adjacent to the fill pipes that indicates the size of the tank and the specific type of substance stored; or

(b) Applying a color code that conforms to the following requirements:

(1) Color markings that meet the requirements of American Petroleum Institute (API) Recommended Practice RP 1637 (Product Identification) shall be painted or placed around the fill or manhole cover in a manner that will readily identify the regulated substance in the storage tank;

(2) Regulated substances or products stored in USTs that are not listed in API Recommended Practice RP 1637 may be identified with an industry standard color code approved by the Department in accordance with § 5506; and

(3) The color code shall be painted on a sign not less than eight (8) by ten (10) inches with letters not less than five sixteenths (5/16) of an inch high, posted at the facility in a prominent location visible from the fill pipe area.

5900.9 Unless the pipes or openings are used for the transfer of a regulated substance stored at the facility, pipes or other openings may not be marked in any way that could be associated with that substance.

5900.10 The owner, operator, or other responsible party shall report, investigate, and clean up any spills and overfills in accordance with the requirements of Chapter 62.

5900.11 Each owner or operator shall comply with the requirements of §§ 5900.12 through 5900.15 in accordance with the following schedule:

(a) For UST systems in use on or before the date the regulations become effective, the initial spill prevention equipment test, containment sump test, and overfill prevention equipment inspection shall be conducted not later than October 13, 2021; and

(b) For UST systems brought into use after the date the regulations become effective, the requirements apply at installation.

5900.12 Except as provided in § 5900.13, all spill prevention equipment and containment sumps used for interstitial monitoring of piping shall be tested at least once every three (3) years for liquid tightness in accordance with § 5900.14. All water generated in the liquid tightness testing shall be disposed of at approved facilities.

5900.13 Spill prevention equipment and containment sumps that are double-walled with continuous interstitial monitoring are exempt from the testing requirement specified in § 5900.12, if the integrity of both walls is periodically monitored at least as frequently as the walkthrough inspection required in § 5904.

5900.14 Liquid tightness testing shall be conducted by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:

(a) Requirements developed by the manufacturer;

(b) Petroleum Equipment Institute Recommended Practice RP1200, "Recommended Practices for the Testing and Verification of Spill,

Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities"; or

(c) An alternative industry standard or code of practice approved by the Department in accordance with § 5506.

5900.15 Overfill prevention equipment shall be inspected at least once every three (3) years. At a minimum, the inspection shall ensure that overfill prevention equipment is set to activate at the level specified in § 5705.3 and will activate when the regulated substance reaches that level.

5901 TANK CORROSION PROTECTION

5901.1 Each owner or operator of a steel tank UST, or of a steel-fiberglass-reinforced plastic composite UST with corrosion protection, shall comply with the requirements of this section for as long as the UST is used to store regulated substances.

5901.2 Each owner or operator shall operate and maintain the corrosion protection system to continuously provide corrosion protection to the metal components of those portions of the tank and piping system of active and temporarily closed USTs that routinely contain regulated substances and are in contact with the ground.

5901.3 Within six (6) months of installation, and at least once every three (3) years thereafter, each UST equipped with a cathodic protection system shall be inspected by a cathodic protection tester to ensure the system is operating properly.

5901.4 Cathodic protection testing shall be done in accordance with one of the following codes of practice, or an alternative industry standard or code of practice approved by the Department in accordance with § 5506:

(a) NACE International Test Method TM0101, "Measurement Techniques Related to Criteria for Cathodic Protection of Underground Storage Tank Systems";

(b) NACE International Test Method TM0497, "Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems";

(c) Steel Tank Institute Recommended Practice R051, "Cathodic Protection Testing Procedures for STI-P3® USTs";

(d) NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; or

(e) NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems."

5901.5 Each UST with an impressed current cathodic protection system shall be inspected every sixty (60) days to ensure the system is operating properly.

5901.6 For each UST using cathodic protection, the owner or operator shall maintain records of the operation of the cathodic protection system in accordance with § 5602, including:

(a) The results of the last two (2) inspections required in § 5901.3;

(b) The results of the last three (3) inspections required in § 5901.5; and

(c) The name and qualifications of the cathodic protection tester who performed the inspections.

5901.7 Each owner or operator of an UST that uses internal lining as the sole method of corrosion protection shall conduct annual inspections in accordance with § 5801.5.

5901.8 USTs that fail the annual inspection required by § 5901.7 and cannot be repaired in accordance with § 5801.6 shall be permanently closed in accordance with § 6101.

5901.9 For purposes of this section, the term "cathodic protection tester" means a person who can demonstrate an understanding of the principles and measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. At a minimum, a cathodic protection tester has education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems.

5902 REPAIR OR REPLACEMENT OF UST SYSTEMS

5902.1 Each owner or operator of an UST shall ensure that repairs are made using the proper materials and techniques, and that repairs will prevent releases due to structural failure or corrosion as long as the UST is used to store regulated substances.

5902.2 Except as stated in §§ 5902.3 and 5902.4, in complying with the requirements of this section, each owner or operator shall follow one of the following codes of practice, or an alternative industry standard or code of practice approved by the Department in accordance with § 5506:

(a) National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code";

(b) American Petroleum Institute Recommended Practice RP 2200, "Repairing Crude Oil, Liquified Petroleum Gas, and Product Pipelines";

(c) American Petroleum Institute Recommended Practice RP 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks";

(d) National Fire Protection Association Standard 326, "Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair";

(e) National Leak Prevention Association Standard 631, Chapter A "Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks";

(f) Steel Tank Institute Recommended Practice R972, "Recommended Practice for the Addition of Supplemental Anodes to STI-P3® Tanks";

(g) NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; or

(h) Fiberglass Tank and Pipe Institute Recommended Practice T-95-02, "Remanufacturing of Fiberglass Reinforced Plastic (FRP) Underground Storage Tanks."

5902.3 Repairs to fiberglass-reinforced plastic tanks may be made by the manufacturer's authorized representatives or in accordance with § 5902.2.

5902.4 Repairs to or replacement of internal tank linings may be made by the manufacturer's authorized representatives or in accordance with § 5902.2.

5902.5 Metal pipe sections and fittings from which a release of a regulated substance has occurred as a result of corrosion or other damage, or that have incurred corrosion or other damage sufficient to constitute a threat of release, shall be replaced in accordance with § 5704.

5902.6 Non-corrodible or fiberglass pipes and fittings, or flexible pipes, from which a release of a regulated substance has occurred as a result of damage, or that have incurred damage sufficient to constitute a threat of a release, shall be replaced in accordance with § 5704 and the manufacturer's specifications.

5902.7 Within thirty (30) days of completing a repair to secondary containment areas of the tanks and piping used for interstitial monitoring, or a repair to containment sumps used for interstitial monitoring of piping, and before using the tank to store regulated substances, the owner or operator shall have the secondary containment tested for liquid-tightness according to the manufacturer's instructions, one of the

following codes of practice, or an alternative industry standard or code of practice approved by the Department in accordance with § 5506:

(a) Steel Tank Institute Recommended Practice R012, "Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Wall Steel Tanks";

(b) Fiberglass Tank and Pipe Institute Protocol, "Field Test Protocol for Testing the Annular Space of Installed Underground Fiberglass Double and Triple-Wall Tanks with Dry Annular Space"; or

(c) Petroleum Equipment Institute Recommended Practice RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities."

5902.8 Within thirty (30) days of completing a repair to a tank or piping, other than a repair specified in § 5902.7, and before using the tank to store regulated substances, the owner or operator shall have the tank or piping tested for liquid-tightness in accordance with § 6007, unless one or more of the following actions have been taken:

(a) The repaired tank has been internally inspected in accordance with American Petroleum Institute Recommended Practice 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks," or an alternative industry standard or code of practice approved by the Department in accordance with § 5506;

(b) The repaired portion of the UST system is monitored every thirty (30) days for releases in accordance with a method specified in §§ 6008 through 6013; or

(c) Another test method is used that is determined by the Department to be no less protective of human health and the environment than the other provisions of this subsection.

5902.9 Within six (6) months following the repair of any cathodically protected UST system, the cathodic protection system shall be tested in accordance with the applicable provisions of §§ 5901.3 through 5901.5 to ensure that it is operating properly.

5902.10 Each owner or operator shall maintain records of each repair for 10 years, or until the UST system is permanently closed, whichever is longer, in accordance with § 5602.4.

5902.11 Each owner or operator shall ensure that each UST system is repaired by, or that repairs are supervised by, an UST System Technician certified by the Department in accordance with Chapter 65.

5902.12 After the completion of any replacement or repair that results in a change in the information on the UST facility notification form, the owner or operator shall ensure that the certified UST System Technician completes the certification of compliance provided on the UST facility notification form required by § 5600.

5902.13 A repair that involves removing and replacing fifty percent (50%) or more of the piping, excluding connectors, connected to a single underground tank is considered to be a replacement and shall meet the new piping installation requirements in § 5704.

5902.14 Within thirty (30) days of any repair to spill or overfill prevention equipment, the repaired equipment shall be tested or inspected, as appropriate, in accordance with § 5900 to ensure it is operating properly.

5903 COMPATIBILITY

5903.1 Each owner and operator shall use an UST system that is made of, or lined with, materials that are compatible with the substance stored in the UST system.

5903.2 Each owner or operator shall notify the Department at least thirty (30) days prior to changing the product stored in an UST to a regulated substance containing greater than ten percent (10%) ethanol or greater than twenty percent (20%) biodiesel.

5903.3 Each owner or operator of an UST system storing a regulated substance identified in § 5903.2 shall demonstrate compatibility of the UST system (including the tank, piping, containment sumps, pumping equipment, release detection equipment, spill equipment, and overfill equipment) with the regulated substance by:

(a) Certification or listing of the UST system equipment or components for use with the regulated substance in American Petroleum Institute Recommended Practice RP 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Filling Stations," or an alternative industry standard or code of practice approved by the Department in accordance with § 5506;

(b) Equipment or component manufacturer approval in writing, affirmatively stating the equipment or component is compatible with the regulated substance stored and specifying the range of biofuel blends with which the equipment or component is compatible; or

(c) Another option determined by the Department to be no less protective of human health and the environment than the options listed in paragraphs (a) and (b) of this subsection.

5903.4 Each owner or operator shall maintain records documenting compliance with §§ 5903.2 and 5903.3 for as long as the UST system is used to store the regulated substance.

5904 WALKTHROUGH INSPECTIONS

5904.1 Each owner or operator shall conduct inspections and perform repairs as necessary in accordance with this section. The first inspection shall be performed no later than October 13, 2021 and subsequent inspections shall be performed in accordance with the schedule provided in this section.

5904.2 Every thirty (30) days, each owner or operator shall conduct a walkthrough inspection that, at a minimum, checks the following equipment as specified below, except that spill prevention equipment associated with UST systems receiving deliveries at intervals greater than every thirty (30) days may be checked prior to each delivery:

(a) For spill prevention equipment (such as a catchment basin, spill bucket, or other spill containment device): open and visually check for any damage, remove any liquid or debris, check for and remove obstructions in the fill pipe, check each fill cap to make sure it is securely on the fill pipe, and check for a leak in the interstitial area;

(b) For monitoring pipes or observation wells: check covers to make sure they are secured; and

(c) For release detection equipment: check to make sure the release detection equipment is operating with no alarms or other unusual operating conditions present, and ensure records of release detection testing are reviewed and are current, as specified in § 6000.

5904.3 Once a year, each owner or operator shall conduct a walkthrough inspection that, at a minimum, checks equipment as specified below:

(a) For containment sumps and under dispenser containment or dispenser cabinets: open and visually check for any damage, leaks to the containment area, or releases to the environment; remove any liquid (in contained areas) or debris; and check for a leak in the interstitial area; and

(b) For hand held release detection equipment: check devices such as tank gauge sticks or groundwater bailers for operability and serviceability.

5904. 4 Petroleum Equipment Institute Recommended Practice RP 900, "Recommended Practices for the Inspection and Maintenance of UST Systems" may be used to comply with the requirements of §§ 5904.2 and 5904.3.

5904.5 Owners and operators of heating oil tanks with a capacity of less than one thousand one hundred (1,100) gallons are exempt from the requirement to perform monthly walkthrough inspections.

5904.6 The owner and operator shall prepare a record following each inspection that includes a description of each area inspected, whether the area inspected was acceptable or needed to have some action taken, a description of any actions taken, and delivery records if spill prevention equipment is not checked at least every thirty (30) days.

5904.7 Owners and operators shall maintain records of inspections required by this section for a period of ten (10) years.

CHAPTER 60 UNDERGROUND STORAGE TANKS - RELEASE DETECTION

6000 RELEASE DETECTION – GENERAL PROVISIONS

6000.1 The owner or operator of each new or existing UST system shall utilize a method, or combination of methods, of release detection that meets the requirements of this section.

6000.2 The release detection method(s) utilized shall be suitable for the UST system according to the manufacturer's certification of performance.

6000.3 The owner or operator of each UST system shall comply with the release detection requirements for piping set forth in § 6004.

6000.4 If the owner or operator of any UST system cannot utilize a method of release detection that complies with the requirements of this chapter, the owner or operator shall close the UST in accordance with Chapter 61.

6000.5 Each release detection system shall be capable of detecting a release from any portion of the tank and also from the connected underground piping that contains or conveys a regulated substance.

6000.6 Each release detection system, including electronic and mechanical components, shall be installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition.

6000.7 Each release detection system shall meet the applicable performance requirements for the particular system in §§ 6004 through 6013.

6000.8 An owner or operator shall not install a release detection system unless the equipment manufacturer or installer provides written performance claims, including a description of the manner in which the claims were derived or tested.

6000.9 Each release detection method or system shall be capable of detecting the leak rate or quantity specified for the method in this chapter, with a probability of detection of at least ninety-five percent (95%) and a probability of false alarm of no more than five percent (5%).

6000.10 The Department will not approve a leak detection method or system that does not meet the requirements of this section, presents a safety hazard, or lacks performance data proving the reliability of the method under normal installation and operating conditions.

6000.11 When a release detection system does not perform in accordance with the manufacturer's performance requirements or the requirements of this chapter, the owner or operator shall repair or replace the release detection system within forty-five (45) days of the date of improper performance in accordance with the provisions of this chapter, unless an alternate release detection system that complies with the requirements of this chapter is in use.

6000.12 The owner or operator shall notify the Department within twenty-four (24) hours of the expiration of the forty-five (45) day period set forth in § 6000.11 if the release detection system is not repaired or replaced, and shall comply with the temporary closure requirements set forth in § 6100, unless an alternate release detection system that complies with the requirements of this chapter is in use.

6000.13 When a release detection method operated in accordance with the performance standards of §§ 6004 through 6013 indicates that a release may have occurred, the owner or operator shall notify the Department in accordance with the provisions of Chapter 62.

6000.14 The owner or operator of an UST system shall operate and maintain the release detection system, and test electronic and mechanical components, in accordance with one of the following:

(a) The manufacturer's instructions;

(b) Petroleum Equipment Institute Recommended Practice RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities"; or

(c) An alternative industry standard or code of practice approved by the Department in accordance with § 5506.

6000.15 The owner or operator shall have a certified UST System Technician or UST System Tester test the proper operation of the release detection system at least annually, including, as applicable to the facility:

(a) For automatic tank gauge and other controllers: test alarm, verify system configuration, and test battery backup;

(b) For probes and sensors: inspect for residual buildup, ensure floats move freely, ensure shaft is not damaged, ensure cables are free of kinks and breaks, test alarm operability and communication with controller;

(c) For automatic line leak detectors: test whether they meet the criteria in §§ 6004.3 and 6004.4 by simulating a leak;

(d) For vacuum pumps and pressure gauges: ensure proper communication with sensors and controller; and

(e) For hand-held electronic sampling equipment associated with groundwater and vapor monitoring: ensure proper operation.

6001 RELEASE DETECTION RECORDKEEPING

6001.1 The owner or operator of each UST shall maintain records demonstrating compliance with this chapter in accordance with this section and § 5602.

6001.2 All written performance claims pertaining to any release detection system that is in use, including a description of the manner in which those claims have been

justified or tested by the equipment manufacturer or installer, shall be maintained for at least ten (10) years after the date of installation.

6001.3 The results of any sampling, testing, or monitoring conducted under this chapter shall be maintained for at least ten (10) years, except as provided in § 6001.4.

6001.4 The results of tank tightness testing conducted in accordance with § 6007 shall be retained until the next tightness test is conducted.

6001.5 Written documentation of all calibration, maintenance, and repair of release detection equipment permanently located at the UST facility shall be maintained for at least three (3) years after the servicing work is completed.

6001.6 All schedules of required calibration and maintenance provided by the release detection equipment manufacturer shall be retained for at least ten (10) years from the date of installation of the release detection system.

6001.7 No later than October 13, 2021, an owner or operator using groundwater or vapor monitoring for release detection shall maintain a record of the site assessment conducted pursuant to §§ 6009.7 or 6010.7 for as long as the method is used. Records of site assessments developed after the date the regulations become effective must be signed by a professional engineer or professional geologist, or equivalent licensed professional with experience in environmental engineering, hydrogeology, or other relevant technical discipline acceptable to the Department.

6002 RELEASE DETECTION FOR HAZARDOUS SUBSTANCE UST SYSTEMS

6002.1 The owner or operator of each hazardous substance UST system shall provide release detection that meets the requirements of this section.

6002.2 Each hazardous substance UST system shall use secondary containment with interstitial monitoring in accordance with § 6011.

6002.3 The owner or operator shall check the secondary containment system for evidence of a release at least every thirty (30) days.

6002.4 The owner or operator shall test the secondary containment system every three (3) years to ensure that the interstitial area is liquid-tight or use continuous monitoring methods.

6002.5 For hazardous substance UST systems installed on or before February 8, 2007, the Department may approve an alternative method of release detection for a hazardous substance UST system if the owner or operator submits a request in accordance with § 5500.5 and:

(a) Demonstrates to the satisfaction of the Department that the proposed alternative method can detect a release of the stored substance as effectively as any of the methods allowed in §§ 6006 through 6012; and

(b) Provides information satisfactory to the Department on effective corrective action technologies, known and potential health risks, and the chemical and physical properties of the stored substance, and the physical characteristics of the UST system and facility.

6003 RELEASE DETECTION FOR PETROLEUM UST SYSTEM TANKS

6003.1 Each owner or operator of a petroleum UST system shall provide release detection for tanks in accordance with the provisions of this section.

6003.2 The owner or operator of a petroleum UST system shall conduct release detection in accordance with the requirements for the release detection method set forth in §§ 6005 through 6012 of this chapter.

6003.3 At least once every thirty (30) days, each petroleum UST shall be monitored for a release using one of the methods listed in §§ 6008 through 6012, except as provided in § 6003.4.

6003.4 An owner or operator of a heating oil tank with a capacity of one thousand one hundred (1,100) gallons or more may use one of the following methods of release detection as the sole method of release detection:

(a) Inventory control in accordance with § 6005; or

(b) Tank tightness testing, once every three (3) years, in accordance with § 6007.

6003.5 The owner or operator of a petroleum UST that is not a heating oil tank, with a capacity of five hundred fifty (550) gallons or less, may use manual tank gauging in accordance with § 6006 as the sole method of release detection.

6003.6 The owner or operator of a petroleum UST, other than a heating oil tank or petroleum UST with a capacity of five hundred fifty (550) gallons or less, installed or replaced after February 8, 2007, shall check for evidence of a release at least once every thirty (30) days using interstitial monitoring.

6003.7 The owner or operator shall test the secondary containment system every three (3) years to ensure that the interstitial area is liquid-tight or use continuous monitoring methods.

6004 RELEASE DETECTION FOR PETROLEUM UST SYSTEM PIPING

6004.1 The owner or operator of a petroleum UST system shall regularly monitor all underground piping that contains or conveys regulated substances for releases, in accordance with the provisions of this section.

6004.2 Each method of release detection for petroleum UST system piping, except piping associated with a heating oil tank installed on or before November 12, 1993, shall meet the requirements of this section.

6004.3 Underground piping that conveys pressurized regulated substances shall be equipped with an automatic line leak detector that alerts the operator to the presence of a leak by triggering an audible and visual alarm, or restricting or shutting off the flow of regulated substances through the piping.

6004.4 An automatic line leak detector shall detect, within one (1) hour, leaks of three gallons per hour (3 gal/hr) at ten pounds per square inch (10 psi) line pressure.

6004.5 The owner or operator of an UST shall annually test for the proper operation of the automatic line leak detector in accordance with the manufacturer's instructions.

6004.6 An owner or operator of an UST with underground piping that conveys pressurized regulated substances shall conduct a line tightness test annually in accordance with § 6004.8, or use monthly monitoring methods in accordance with § 6004.10.

6004.7 Except as provided in § 6004.9, an owner or operator of an UST with underground piping that conveys regulated substances under suction shall conduct a line tightness test at least once every three (3) years in accordance with § 6004.8, or use monthly monitoring methods in accordance with § 6004.10.

6004.8 Periodic line tightness testing of piping shall detect a leak rate of one tenth of a gallon per hour (0.1 gal/hr) at one and one half (1.5) times the operating pressure.

6004.9 No release detection is required for safe suction piping if:

(a) The below grade piping operates at less than atmospheric pressure;

(b) The below grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;

(c) Only one (1) check valve is included in each suction line;

(d) The check valve is located directly below and as close as practical to the suction pump; and

(e) The owner or operator maintains documentation that the piping complies with paragraphs (a) through (d) of this subsection and the documentation is readily available for inspection by the Department.

6004.10 Except as provided in § 6004.11, an owner or operator may conduct monthly monitoring of piping using any of the methods of release detection for tanks in §§ 6009 through 6011 if the method used is designed to detect a release from any portion of the underground piping that contains or conveys regulated substances.

6004.11 The owner or operator of an UST with underground piping installed or replaced after February 8, 2007, shall check for evidence of a release from the underground piping at least once every thirty (30) days using interstitial monitoring in accordance with § 6011.

6005 INVENTORY CONTROL AND STATISTICAL INVENTORY RECONCILIATION

6005.1 A release detection method that uses product inventory control shall meet the requirements of this section.

6005.2 An owner or operator may use product inventory control as the sole method of release detection only for heating oil tanks.

6005.3 Product inventory control shall be conducted monthly to detect a release of at least the combined amount of one percent (1%) of flow-through plus one hundred thirty (130) gallons on a monthly basis in the following manner:

(a) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank shall be recorded each operating day;

(b) The measurement equipment used shall be capable of measuring the level of product over the full range of the tank's height to the nearest one eighth (1/8) of an inch;

(c) The regulated substance inputs shall be reconciled with delivery receipts by measuring the tank inventory volume before and after delivery;

(d) Each delivery shall be made through a drop tube that extends to within six (6) inches of the tank bottom;

(e) Product dispensing shall be metered and recorded using devices that are registered with the Department of Consumer and Regulatory Affairs Office of Weights and Measures and in compliance with the Registration and Inspection of Weighing and Measuring Devices Amendment Act of 2004, effective December 7, 2004 (D.C. Law 15-205; D.C. Official Code

§§ 37-201.01 *et seq.*), or within an accuracy of six (6) cubic inches for every five (5) gallons of regulated substance withdrawn; and

(f) The water level at the bottom of the tank shall be measured at least once each month to the nearest one eighth (1/8) of an inch.

6006 MANUAL TANK GAUGING

6006.1 A release detection method that uses manual tank gauging shall meet the requirements of this section.

6006.2 An owner or operator may use manual tank gauging as the sole method of release detection only for a petroleum UST that is not a heating oil tank with a capacity of five hundred fifty (550) gallons or less.

6006.3 Manual tank gauging shall be conducted weekly.

6006.4 An owner or operator using manual tank gauging shall measure the liquid level in the tank at the beginning and end of a period of at least thirty-six (36) hours, during which no liquid is added to or removed from the tank. Each measurement shall be based on an average of two (2) consecutive stick readings. The measurements shall be recorded and maintained in accordance with § 5602.

6006.5 The equipment used for manual tank gauging shall be capable of measuring the level of product over the full range of the height of the tank to the nearest one eighth (1/8) of an inch.

6006.6 If the difference between the measurements at the beginning and end of a single weekly test exceeds ten (10) gallons, or if the average difference between the measurements at the beginning and end of four (4) consecutive weekly tests exceeds five (5) gallons, the owner or operator shall follow the requirements of Chapter 62 for a suspected release.

6007 TANK TIGHTNESS TESTING

6007.1 A release detection method that uses tank tightness testing shall meet the requirements of this section.

6007.2 An owner or operator may use tank tightness testing as the sole method of release detection only for heating oil tanks.

6007.3 Tank tightness testing shall be capable of detecting a leak rate of one tenth of a gallon per hour (0.1 gal/hr) from any portion of the tank that regularly contains or conveys a regulated substance, and shall account for the effects of the following factors when detecting a leak rate:

(a) Thermal expansion or contraction of the regulated substance;

(b) Vapor pockets;

(c) Tank deformation;

(d) Evaporation and condensation; and

(e) The location of the water table at the facility.

6007.4 An owner or operator shall conduct a tightness test in accordance with this section to satisfy the installation, upgrade, and/or repair requirements set forth in Chapters 57 through 59 before operating the newly installed, upgraded, and/or repaired UST system.

6007.5 An owner or operator shall use tightness testing in accordance with this section to confirm a suspected release under § 6203.

6008 AUTOMATIC TANK GAUGING

6008.1 A release detection method using automatic tank gauging equipment that tests for the loss of product and conducts inventory control shall meet the requirements of this section.

6008.2 The owner or operator shall ensure that the tank gauging probe is installed as close as possible to the middle of the tank and is not located adjacent to the fill pipe or submersible pump.

6008.3 An automatic product level monitor test shall be capable of detecting a leak rate of two tenths of a gallon per hour (0.2 gal/hr) from any portion of the tank that routinely contains a regulated substance.

6008.4 A tank installed after November 12, 1993, shall be installed horizontally without tank tilt if automatic tank gauging is used as a method of release detection.

6008.5 The automatic tank gauging system shall be inspected at least every thirty (30) days to ensure that it is operating correctly.

6008.6 The automatic tank gauging equipment shall meet the inventory control requirements of § 6005.3.

6008.7 The owner or operator shall perform the test for loss of product with the system operating in one of the following modes:

(a) In-tank static testing conducted at least once every thirty (30) days; or

(b) Continuous in-tank leak detection operating on an uninterrupted basis or alternatively, operating within a process that allows the system to gather incremental measurements to determine the leak status of the tank at least once every thirty (30) days.

6008.8 An owner or operator of an UST system installed after February 8, 2007, may use automatic tank gauging as a release detection method only if secondary containment and interstitial monitoring methods are also used.

6009 VAPOR MONITORING

6009.1 A release detection method that monitors or tests for vapors within the soil gas of the excavation zone shall meet the requirements of this section.

6009.2 The materials used as backfill (such as gravel, sand, crushed rock, or similar materials) shall be sufficiently porous to readily allow diffusion of vapors from releases into the excavation zone.

6009.3 The stored regulated substance, or a tracer compound placed in the tank system, shall be sufficiently volatile to result in a vapor level that is detectable by the monitoring devices located in the excavation zone in the event of a release from the tank.

6009.4 The monitoring device measuring vapors shall not be rendered inoperative or less effective by groundwater, rainfall, soil moisture, or any other known interference to the point that a release could go undetected for more than fifteen (15) days.

6009.5 The level of background contamination in the excavation zone shall not interfere with the vapor monitoring method used to detect releases from the tank.

6009.6 The vapor monitor used shall be designed and operated to detect any significant increase above the background concentration in the excavation zone of:

(a) The regulated substance stored in the tank system;

(b) A component or components of the regulated substance; or

(c) A tracer compound placed in the tank system.

6009.7 Before using vapor monitoring, the owner or operator shall assess the excavation zone to ensure compliance with §§ 6009.2 through 6009.6 and determine the number and positioning of monitoring wells required to detect releases within the excavation zone from any portion of the tank that routinely contains regulated substances. The owner or operator shall install monitoring wells in accordance with the assessment before operating the UST system.

6009.8 Monitoring wells shall be clearly marked and secured to avoid unauthorized access and tampering. Monitoring wells shall not be marked in any way that could be associated with a regulated substance stored at the facility.

6009.9 An owner or operator of an UST system installed after February 8, 2007, may use vapor monitoring as a release detection method only if secondary containment and interstitial monitoring methods are also used.

6010 GROUNDWATER MONITORING

6010.1 A release detection method that tests or monitors for regulated substances in the groundwater or in the tank excavation zone shall meet the requirements of this section.

6010.2 The regulated substance stored shall be immiscible in water and have a specific gravity of less than one (1).

6010.3 The groundwater shall never be more than twenty feet (20 ft) from the ground surface, and the hydraulic conductivity of the soil(s) between the UST system and the monitoring wells or devices shall not be less than one hundredth of a centimeter per second (0.01 cm/s). The soil should consist of gravel, coarse to medium sand, coarse silt, or other permeable materials.

6010.4 The slotted portion of the monitoring well casing shall be designed to prevent the migration of natural soils or filter pack into the well, while allowing entry of any regulated substance on the water table into the well, under both high and low groundwater conditions.

6010.5 Monitoring wells shall be sealed from the ground surface to the top of the filter pack.

6010.6 Monitoring wells or devices shall intercept the excavation zone or be as close to the excavation zone as is technically feasible.

6010.7 Before using groundwater monitoring methods, the owner or operator shall assess the excavation zone and area immediately below the excavation zone to ensure compliance with §§ 6010.2 through 6010.6, and determine the number and position of monitoring wells or devices that will detect releases within the excavation zone from any portion of the tank that routinely contains a regulated substance. The owner or operator shall install monitoring wells or devices in accordance with the assessment before operating the UST system. A minimum of two (2) monitoring wells shall be required in each excavation zone.

6010.8 The continuous monitoring devices or manual methods used shall be capable of detecting the presence of at least one eighth (1/8) of an inch of free product on top of the groundwater in a monitoring well.

6010.9 Each monitoring well shall be clearly marked and secured to avoid unauthorized access and tampering.

6010.10 An owner or operator of an UST system installed after February 8, 2007, may use groundwater monitoring a release detection method only if secondary containment and interstitial monitoring methods are also used.

6011 INTERSTITIAL MONITORING

6011.1 Interstitial monitoring between an UST system and a secondary barrier immediately around or beneath the UST system shall meet the requirements of this section.

6011.2 The owner or operator of an UST system installed or replaced after February 8, 2007 shall check for evidence of a release at least once every thirty (30) days using interstitial monitoring.

6011.3 An interstitial monitoring system shall be designed, constructed, and installed to detect a leak from any portion of the tank or piping that routinely contains a regulated substance.

6011.4 Where vacuum monitoring is utilized, the vacuum shall be maintained at not less than five (5) inches of mercury, and shall not exceed manufacturer's instructions.

6011.5 If the vacuum falls below five (5) inches of mercury, the owner or operator shall follow the requirements of Chapter 62 for a suspected release.

6011.6 A vacuum shall not be re-instituted more frequently than once every three (3) months without prior approval of the Department.

6011.7 For double-walled USTs, the sampling or testing method shall be capable of detecting a leak through the inner wall in any portion of the tank that routinely contains a regulated substance.

6011.8 For tanks with an internally fitted liner, an automated device shall be used that is capable of detecting a leak between the inner wall of the tank and the liner. The liner shall be compatible with the substance stored.

6011.9 For UST systems with a secondary barrier within the excavation zone, the secondary barrier shall meet the following requirements:

(a) The secondary barrier around or beneath the UST shall consist of synthetic constructed material that is sufficiently thick and impermeable to direct a leak to the monitoring point and permit its detection, and the permeability

shall be not greater than one millionth of a centimeter per second (10^{-6} cm/s) for the regulated substance stored;

(b) The barrier shall be compatible with the regulated substance stored so that a leak from the UST will not cause a deterioration of the barrier sufficient to allow a release to pass through undetected; and

(c) If the tank is cathodically protected, the barrier shall be installed so that it does not interfere with the proper operation of the cathodic protection system.

6011.10 An UST with a secondary barrier within the excavation zone shall use a sampling or testing method that is capable of detecting a release between the UST and the secondary barrier.

6011.11 The testing or sampling method used shall not be rendered inoperative or less effective by groundwater, rainfall, soil moisture, or any other known interference to the point that a release could go undetected for more than thirty (30) days.

6011.12 The owner or operator of an UST system with a secondary barrier within the excavation zone shall assess the facility to ensure that the secondary barrier is always above the groundwater and not located in a twenty-five (25) year floodplain, unless the barrier and monitoring designs are designed for use under those conditions.

6011.13 The monitoring wells for each UST with a secondary barrier within the excavation zone shall be clearly marked and secured to avoid unauthorized access and tampering.

6011.14 Interstitial monitoring alarms are an unusual operating condition that shall be reported as specified under § 6202.5.

6011.15 If a system test confirms a leak in either the inner or outer tank wall or liner, effectively rendering the tank a single wall tank, the owner or operator shall repair, replace, upgrade, or close the UST as specified in § 6203.

6012 STATISTICAL INVENTORY RECONCILIATION

6012.1 A release detection method based on the application of statistical principles to inventory data similar to those described in § 6005 shall meet the requirements of this section.

6012.2 Statistical inventory reconciliation shall be conducted monthly and shall:

(a) Report a quantitative result with a calculated leak rate;

(b) Be capable of detecting a leak rate of two tenths of a gallon per hour (0.2 gal/hr) or a release of one hundred fifty (150) gallons within thirty (30) days; and

(c) Use a threshold for declaring a leak that does not exceed one half of the minimum detectible leak rate.

6012.3 An owner or operator using statistical inventory reconciliation shall verify the accuracy of the selected statistical inventory reconciliation method using a separate test procedure to confirm that the method can detect leaks at the required level in accordance with § 6012.2 and with the probabilities of detection and false alarm required in § 6000.9.

6012.4 An owner or operator using statistical inventory reconciliation shall ensure that the accuracy of the selected method has been evaluated and verified through independent third party certification and shall maintain these evaluation records for a period of ten (10) years.

6013 OTHER METHODS OF RELEASE DETECTION

6013.1 An owner or operator of an UST system installed on or before February 8, 2007 may apply to the Department for approval of another method of release detection by submitting a written request describing the method to the Department in accordance with § 5500.5.

6013.2 For UST systems installed on or before February 8, 2007, the Department may approve an application for the use of another method of release detection only if the owner or operator demonstrates that the method is capable of detecting a release as effectively as any of the methods allowed in §§ 6007 through 6012 and meets the requirements of this section.

6013.3 The alternative release detection method, or combination of methods, shall be capable of detecting either of the following:

(a) A leak rate of two tenths of a gallon per hour (0.2 gal/hr); or

(b) A release of one hundred fifty (150) gallons within a month.

6013.4 The alternative release detection method shall detect a leak rate or quantity in § 6013.3 with a probability of detection of at least ninety-five percent (95%) and a probability of false alarm no more than five percent (5%).

6013.5 In comparing methods, the Department shall consider the size of release that the method can detect and the frequency and reliability with which it can be detected.

6013.6 If an alternative method is approved, the owner or operator shall comply with any conditions imposed by the Department on its use.

6013.7 For any tanks installed or replaced after February 8, 2007, alternatives to interstitial monitoring shall not be approved or used.

CHAPTER 61 UNDERGROUND STORAGE TANKS – CLOSURE

6100 TEMPORARY CLOSURE

6100.1 For purposes of this section, an UST shall be deemed temporarily closed when it is taken out of service for any reason and is not being used to receive or dispense product.

6100.2 When an UST is temporarily closed, the owner or operator of the UST shall comply with the requirements of this section.

6100.3 An UST in temporary closure is subject to the registration requirements in § 5601 and the corrosion protection requirements in § 5901.

6100.4 A heating oil tank shall not be deemed temporarily closed until fifteen (15) months after it is last used to receive or dispense product, unless it cannot be used to dispense product in accordance with the UST Regulations.

6100.5 The owner or operator of an UST shall submit a temporary closure notification form, which is available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents, to the Department at least thirty (30) days prior to the temporary closure of the UST.

6100.6 The UST shall be emptied of product in accordance with § 6100.9 during temporary closure.

6100.7 During the period when the UST system is temporarily closed and still contains product, the owner or operator shall comply with release detection requirements in Chapter 60.

6100.8 If a release is suspected or confirmed during the period when the UST is temporarily closed, the owner or operator shall immediately comply with § 6100.9 and the applicable requirements of Chapter 62.

6100.9 Within ninety (90) days after an UST is temporarily closed, the owner or operator shall do the following:

(a) Remove all regulated substances from the UST and keep the UST empty for the balance of the temporary closure period. The UST system shall be deemed to be empty when all materials have been removed using commonly employed practices so that either of the following is achieved:

(1) No more than two and one half centimeters (2.5 cm) of residue remains in the UST; or

(2) No more than three tenths of one percent (0.3%) by weight of the total capacity of the UST system remains in the system;

(b) Ensure that all vent lines are open and functioning;

(c) Cap and secure all other lines, pumps, manways, and ancillary equipment; and

(d) Within seven (7) days after completing the activities required by §§ 6100.9(a) through (c), the owner or operator shall submit to the Department an amended UST facility notification form pursuant to § 5600.1 that is:

(i) Signed by the UST System Technician who performed the activities stated in §§ 6100.9(a) through (c); or

(ii) Signed by an UST System Technician who has inspected and verified that the owner or operator performed the activities stated in §§ 6100.9(a) through (c).

6100.10 Except as provided in §§ 6100.11 through 6100.12, the owner or operator shall permanently close the UST in accordance with the requirements of § 6101 once the UST has been temporarily closed for twelve (12) months.

6100.11 The owner or operator may submit a written request for an extension to the Department not less than thirty (30) days before the expiration of the twelve (12) month temporary closure period. The request for extension shall include results of a site assessment, conducted in accordance with §§ 6101.10 through 6101.12, of the soil and groundwater conditions near the UST and information about any corrective action taken to address any contamination discovered by the assessment due to any release from the UST.

6100.12 The Department may approve a request for extension of the temporary closure period for two (2) additional twelve (12) month periods. The Department may

approve additional extensions only if the Director determines that the additional extension is justified based on good cause shown.

6101 PERMANENT CLOSURE AND CHANGE-IN-SERVICE

6101.1 Each responsible party permanently closing an UST or changing the use of the UST to storage of a non-regulated substance (a change-in-service) shall comply with the requirements of this section.

6101.2 Not less than two (2) weeks before a permanent closure or a change-in-service of an UST, the responsible party shall notify the Department by submitting an UST activity notification form, which is available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents. Notice is not required if such action is taken pursuant to a corrective action plan approved by the Department.

6101.3 The responsible party may use the following codes of practice, or an alternative industry standard or code of practice approved by the Department in accordance with § 5506, to comply with the cleaning and closure requirements of this section:

(a) American Petroleum Institute Recommended Practice RP 1604, "Closure of Underground Petroleum Storage Tanks";

(b) American Petroleum Institute Standard 2015, "Safe Entry and Cleaning of Petroleum Storage Tanks, Planning and Managing Tank Entry From Decommissioning Through Recommissioning";

(c) American Petroleum Institute Recommended Practice RP 2016, "Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks"; or

(d) National Fire Protection Association Standard 326, "Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair."

6101.4 Before a change-in-service, the responsible party shall empty and clean the tank by removing and properly disposing of all liquid and all accumulated sludge in compliance with applicable laws and regulations.

6101.5 Before an UST system is removed from the ground, the responsible party shall empty the UST system, if it is not already emptied during the temporary closure period, and clean it by removing and properly disposing of all liquids and all accumulated sludge in compliance with applicable laws and regulations.

6101.6 For each UST system that is to be closed permanently, the responsible party shall remove the tank from the ground, unless a tank removal variance is granted by the Department pursuant to § 6101.7.

6101.7 A responsible party may apply for a tank removal variance (for closure-in-place) by submitting the following documents:

(a) A written request for a tank removal variance;

(b) Written certification of the existence of the conditions stated in § 6101.8, with supporting documentation, from a professional engineer licensed in the District; and

(c) A tank interior inspection report or the results of analysis of soil borings taken from soil adjacent to the tank if the interior cannot be inspected.

6101.8 The Department may grant a tank removal variance if removal of the tank is likely to cause substantial structural damage to buildings or other improvements on the property, or there are other circumstances that make removal of the tank infeasible.

6101.9 If the Department grants a variance, the responsible party shall ensure that the tank is emptied, cleaned, and filled with an inert solid material, such as cement, or another material approved by the Department in accordance with § 5500.5.

6101.10 Before a change-in-service or permanent closure of an UST, the responsible party shall conduct a closure assessment of the excavation zone to test for the presence of a release in the areas around the UST system where contamination is most likely to be present.

6101.11 In selecting sample types, sample locations, and analytical methods for the closure assessment, the responsible party shall consider the method of closure, the nature of the stored substance, the type of backfill, the depth to groundwater, and other factors appropriate for identifying the presence of a release. The responsible party shall comply with any directives that may be issued by a Department inspector regarding the number of samples and the location of soil borings or groundwater monitoring wells.

6101.12 If contaminated soil, contaminated groundwater, free product, or vapor are discovered during the closure assessment, or by any other manner, the responsible party shall begin corrective action in accordance with the applicable provisions of Chapter 62, except as provided in § 6101.15.

6101.13 Soil excavated during removal or corrective action shall be handled as follows:

(a) Soil that has been tested and that does not exceed Tier 0 screening levels may be placed on the site and shall be covered with plastic as a soil erosion control measure until backfilled or permanently stabilized;

(b) Soil that exceeds Tier 0 standards shall be treated or properly disposed of at an approved disposal location;

(c) When approved by the Department, excavated soil may be stockpiled at the excavation site for no more than ten (10) business days pending completion of testing and analysis for contaminants; and

(d) Soil shall not be placed on another property unless specifically approved by the Department in accordance with § 5500.5.

6101.14 Soil that exceeds Tier 0 risk-based screening levels shall not be returned to the excavation pit or used on the site without treatment.

6101.15 If a release of a regulated substance has occurred, the responsible party shall evaluate the excavation zone as follows:

(a) Remove contaminated soils to a depth of at least five feet (5 ft) below the tank bottom and a width of at least five feet (5 ft) from the sides of the tank;

(b) Assess the excavation zone for evidence of contamination (such as free product or vapors requiring initial response, initial abatement actions, or free product removal pursuant to §§ 6203 or 6204) and sample the remaining soil for chemicals of concern;

(c) If the levels of chemicals of concern in the remaining soil exceed the Tier 1 screening levels, take at least one (1) groundwater sample to determine whether any chemicals of concern in groundwater exceed the Tier 1 screening levels;

(d) Remove additional soil from the excavation zone as necessary until the levels of chemicals of concern in the remaining soil are below Tier 1 screening levels, the groundwater does not exceed the Tier 1 screening levels, and there is no other evidence of contamination; and

(e) If the criteria set forth in paragraph (d) of this subsection cannot be met, begin corrective action in accordance with the applicable provisions of Chapter 62.

6101.16 Within thirty (30) days after completing the permanent closure or change-in-service, the responsible party shall submit to the Department a closure assessment report in a format provided by the Department and submit an amended UST facility notification form, both of which are available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents. The Department may open a LUST case and require additional site assessment and cleanup according to Chapter 62.

6102 PREVIOUSLY CLOSED UST SYSTEMS

6102.1 If the Department determines that any release or suspected release from an UST system that was closed-in-place, removed, or temporarily closed poses a current or potential threat to human health and the environment, the Department may direct a responsible party to assess the excavation zone and take appropriate corrective action, including closure of the UST system in accordance with § 6101 if it is not already permanently closed.

6102.2 If the Department determines that an UST system has not been temporarily closed or closed-in-place in accordance with this chapter, the Department may direct a responsible party to permanently close the UST system and assess the excavation zone in accordance with § 6101.

6103 CLOSURE RECORDS

6103.1 Each responsible party shall maintain records in accordance with § 5602 that demonstrate compliance with closure requirements of this chapter.

6103.2 The responsible party shall retain the results of a closure assessment required under § 6101.10 for at least ten (10) years after permanent closure or change-in-service or deliver the records to the Department in accordance with the provisions of § 5602.6.

6103.3 After ten (10) years, the responsible party shall deliver all records demonstrating compliance with this chapter to the Department.

CHAPTER 62 UNDERGROUND STORAGE TANKS – REPORTING OF RELEASES, INVESTIGATION, CONFIRMATION, ASSESSMENT, AND CORRECTIVE ACTION

6211 PUBLIC PARTICIPATION IN CORRECTIVE ACTION
6212 VOLUNTARY REMEDIATION ACTION PROGRAM (VRAP)

6200 OBLIGATIONS OF RESPONSIBLE PARTIES - RELEASES, SPILLS, AND OVERFILLS

6200.1 All responsible parties are subject to the requirements of this chapter.

6200.2 If the actions required by this chapter are not taken, the Department may undertake the corrective action and any responsible party shall be liable to the District government for the costs of any corrective action taken.

6200.3 Nothing in this chapter shall be construed to alter the private rights and liabilities between a neighboring property owner and a responsible party, or to relieve a responsible party of any liability he or she may have under statutory or common law for causing the release of the regulated substance which migrated onto a neighboring property.

6200.4 The provisions of 40 CFR §§ 280.200 through 280.230 (Lender Liability) are incorporated by reference and shall apply to all existing and future security interests, including holders of security interests as defined in 40 CFR § 280.200(d).

6200.5 For purposes of this chapter, a voicemail message shall not be considered telephone notification.

6201 REPORTING AND CLEANUP OF SPILLS AND OVERFILLS

6201.1 A responsible party shall take immediate action to contain and clean up any spill or overfill of a regulated substance from an UST system.

6201.2 A responsible party shall immediately report any spill or overfill of a regulated substance from an UST system when there is any danger of fire or explosion to the Department by telephone at (202) 535-2600 or by e-mail at ust.doee@dc.gov, and to the District Fire Chief at (202) 727-1614.

6201.3 A responsible party shall immediately contain and clean up a spill or overfill of petroleum that is less than twenty-five (25) gallons. If the cleanup cannot be completed within twenty-four (24) hours, the responsible party shall immediately notify the Department by telephone or e-mail as stated in § 6201.2.

6201.4 If a spill or overfill of petroleum results in a release to the environment of more than twenty-five (25) gallons or causes a sheen on nearby surface water (such as a lake, pond, stream, river, or creek), a responsible party shall report the release to the Department by telephone or e-mail as stated in § 6201.2 within twenty-four

(24) hours of the occurrence. The responsible party shall begin corrective action in accordance with the applicable provisions of this chapter.

6201.5 A responsible party shall immediately report any spill or overfill of a hazardous substance to the Department by telephone or e-mail and the District Fire Chief as stated in § 6201.2, and to the District Homeland Security and Emergency Management Agency at (202) 727-6161. The responsible party shall immediately contain and clean up the spill or overfill. If the cleanup cannot be completed within twenty-four (24) hours, the responsible party shall begin corrective action in accordance with the applicable provisions of this chapter.

6201.6 In addition to the requirements of § 6201.5, if a spill or overfill of a hazardous substance results in a release to the environment that equals or exceeds the Comprehensive Environmental Response, Compensation, and Liability Act reportable quantity for the substance under 40 CFR Part 302 (Designation, Reportable Quantities, and Notification), a responsible party shall also report the release to the federal government's National Response Center at (800) 424-8802.

6202 REPORTING OF RELEASES OF REGULATED SUBSTANCES

6202.1 A responsible party who has reason to suspect a release from an UST shall notify the Department by telephone or e-mail as stated in § 6201.2 within twenty-four (24) hours.

6202.2 The following persons who know of, or have reason to suspect, a release from an UST system shall notify the owner or operator of the release or suspected release immediately, and notify the Department by telephone or e-mail as stated in § 6201.2 within twenty-four (24) hours of first having knowledge of the release or suspected release:

(a) Any authorized agent, contractor, or consultant for a responsible party;

(b) Any person who tests, installs, or permanently closes tanks;

(c) Any person who engages in site investigation, assessment, remediation, or geotechnical exploration; or

(d) Any public utility company or authorized agent of a public utility company.

6202.3 The notification of a release or suspected release to the Department shall include, if known:

(a) The name of the UST system’s owner and operator, and any other responsible party;

(b) The location, date, time, volume, source, and cause of the release or suspected release;

(c) The substance released or suspected to have been released;

(d) Any immediate or ongoing action taken to mitigate the release;

(e) Any hazardous conditions caused by the release; and

(f) Any potential environmental hazard caused by the condition of the UST system.

6202.4 A responsible party shall not knowingly allow any release from an UST system to continue, and shall investigate and repair the problem causing the release as soon as possible.

6202.5 Each owner or operator of an UST system shall report the following conditions to the Department by telephone or e-mail as stated in § 6201.2 within twenty-four (24) hours of learning of the condition and shall follow the procedures in § 6203 whenever there is:

(a) A discovery of released regulated substances at the UST facility or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines, or nearby surface water);

(b) Unusual operating conditions in the UST system (such as erratic behavior of product dispensing equipment, sudden loss of product from the UST system, unexplained presence of water in the tank, or liquid in the interstitial space of a secondarily contained system), unless:

(1) The system equipment or component is found not to be releasing regulated substances to the environment;

(2) Any defective system equipment or component is immediately repaired or replaced; and

(3) For a secondarily contained system, except as provided for in § 6011.11, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed.

(c) Monitoring results, including an alarm, from a release detection method required under §§ 6002 through 6013, that indicate a release may have occurred unless:

(1) The monitoring device is found to be defective and is immediately repaired, recalibrated, or replaced, and additional monitoring does not confirm the initial result;

(2) The leak is contained in the secondary containment and:

(A) Except as provided for in § 6011.11, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed; and

(B) Any defective system equipment or component is immediately repaired or replaced;

(3) When using the inventory control method described in § 6005, a second month of data does not confirm the initial result or an investigation determines that no release has occurred; or

(4) The alarm was investigated and the cause is determined to be a non-release event (for example, from a power surge or caused by filling the tank during release detection testing).

6202.6 A responsible party shall immediately investigate a suspected release or condition listed in § 6202.5 using the procedures in § 6203, and shall confirm whether a release has occurred within seven (7) days of the suspected release or discovery of the condition.

6202.7 If the Department has reason to believe a release has occurred, the Department may require the owner or operator of the UST to follow the procedures in § 6203.

6203 SITE INVESTIGATION, CONFIRMATION OF RELEASE, INITIAL ABATEMENT, AND INITIAL SITE ASSESSMENT

6203.1 When a release, or leak into the interstitial area of a secondarily contained system, is suspected, a responsible party shall conduct tightness testing in accordance with §§ 5902.7, 6004.8, and 6007 to determine whether:

(a) A leak exists in the portion of the tank that routinely contains a regulated substance or in the attached delivery piping; or

(b) A breach of either wall of the secondary containment has occurred.

6203.2 If the tightness test confirms a leak into the interstitial area or a release, the responsible party shall repair, replace, upgrade, or close the UST system, and begin corrective action in accordance with this chapter.

6203.3 The responsible party may use the UST system to store regulated substances before completing corrective action only if the source and cause of the leak or release has been identified and remedied.

6203.4 A responsible party shall also conduct a site investigation, as set forth in §§ 6203.5 through 6203.7, if:

(a) The tightness test results for the system, tank, or delivery piping indicate that a release has occurred; or

(b) The environmental contamination detected by visual or analytical data indicates that a release has occurred.

6203.5 When conducting a site investigation, the responsible party shall test for the presence of a release where contamination is most likely to be present at the UST site.

6203.6 In selecting the sample types, sample locations, and measurement methods for a site investigation, the responsible party shall consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of groundwater, the presence of a basement sump pump, and other factors appropriate for identifying the presence of a released substance and the source of the release. The responsible party shall comply with any Department directives, available on the Department's website at https://doee.dc.gov/page/ust-forms-guidance-and-public-documents, regarding sample types, sample locations, measurement methods, and sampling protocols.

6203.7 If the sample results of the site investigation do not confirm that a release has occurred, no further investigation is required.

6203.8 Upon discovery of a release or confirmation of a suspected release, a responsible party shall perform the following initial response actions:

(a) Immediately identify and mitigate any fire, explosion, and vapor hazards;

(b) Take immediate action to prevent any further release of the regulated substance into the environment;

(c) If the notification under § 6202 was of a suspected release or condition listed in § 6202.5, notify the Department by telephone or e-mail and the District Fire Chief, as stated in § 6201.2, no later than twenty-four (24) hours after confirmation of the release or of a false alarm; and

(d) Submit a written report containing the information required in § 6202.3 to the Department, in accordance with § 5500.4, within seven (7) days of discovery or confirmation of the release.

6203.9 Section 6203.8 does not apply to any UST system exempt from the UST regulations under § 5501.3, or to any UST system subject to the corrective action requirements under § 3004(u) of the Solid Waste Disposal Act, 42 USC § 6924(u), as amended.

6203.10 Upon discovery of a release or confirmation of a suspected release, a responsible party shall take the following initial abatement actions:

(a) Remove all regulated substance from the UST, unless the Department approves removal of a lesser amount that is sufficient to prevent further release to the environment;

(b) Visually inspect any aboveground releases or exposed belowground releases and prevent further migration of the released substance into surrounding soils and groundwater; and

(c) Continue to monitor and mitigate any fire and safety hazards posed by vapors or free product that have migrated from the excavation zone and entered into subsurface structures (such as sewers or basements).

6203.11 A responsible party shall remedy hazards posed by contaminated soils that are excavated or exposed as a result of site investigation, release confirmation, abatement, or corrective action activities. If the remedy includes treatment or disposal of soil, the responsible party shall comply with all applicable provisions of District laws and regulations, including 21 DCMR Chapters 7, 8, and 20.

6203.12 Upon discovery of a release or confirmation of a suspected release, a responsible party shall conduct an initial site assessment that evaluates conditions within the property boundaries of the property where the UST is located, and prepare an initial site assessment report summarizing the results, which includes the following actions:

(a) Unless the presence, source, and cause of the release have been confirmed in the site investigation required by § 6203.4 or the closure assessment in § 6101.10, test for the presence of a regulated substance by taking soil borings and by installing monitoring wells where contamination is most likely to be present at the UST facility;

(b) In selecting the sample types, sample locations, and measurement methods to test pursuant to § 6203.12(a), consider the nature of the stored substance, the type of backfill, depth to groundwater, and other factors as appropriate for identifying the presence and source of the release;

(c) Analyze and summarize the levels of contaminants in the soil borings and groundwater samples;

(d) Summarize the initial response actions taken pursuant to § 6203.8; and

(e) Summarize the initial abatement actions taken pursuant to § 6203.10.

6203.13 Upon discovery of a release or confirmation of a suspected release, a responsible party shall determine whether free product is present. If any phase of the site investigation determines that free product is present, the responsible party shall begin free product removal as soon as practicable in accordance with § 6204.

6203.14 Within sixty (60) days after release confirmation, a responsible party shall submit to the Department, in accordance with § 5500.4, an initial site assessment report prepared pursuant to § 6203.12 for review, and if applicable, include the first status report on the removal of free product. If further assessment is needed to determine the nature and extent of contamination from the release, the responsible party shall submit a work plan for comprehensive site assessment, in accordance with § 6205, for the Department's approval. A responsible party may request a meeting with the Department to discuss the work plan.

6203.15 For purposes of this section, the phrase "aboveground release" means a release to the surface of the land or to surface water, including a release from a portion of an UST system above the ground surface or a release associated with a transfer of a regulated substance to or from an UST system.

6203.16 For purposes of this section, the phrase "belowground release" means any release to the subsurface of the land and to groundwater, including a release from the portion of an UST system below the ground surface or a belowground release associated with a transfer of a regulated substance to or from an UST.

6204 REMOVAL OF FREE PRODUCT

6204.1 When an investigation indicates the presence of any free product, the responsible party shall remove measurable free product in accordance with this section until the Department determines that the free product has been removed to the maximum extent practicable.

6204.2 The Department may issue a directive with a schedule for removal of free product, or the responsible party may submit a schedule to the Department in writing, in accordance with § 5500.5, for the Department's approval.

6204.3 The responsible party shall conduct the removal of free product in a manner that minimizes the spread of contamination by using recovery techniques appropriate to the hydrogeological conditions at the site.

6204.4 The responsible party shall conduct the recovery and off-site disposal of free product in a manner that properly treats, discharges, recycles, or disposes of recovery byproducts in compliance with all applicable laws and regulations.

6204.5 The free product removal system shall be designed to prevent free product migration.

6204.6 The responsible party shall ensure that any flammable substances are handled in a manner that will prevent fire and explosion.

6204.7 The responsible party shall prepare and submit to the Department, in accordance with § 5500.4, a status report on the removal of any free product that provides at least the following information:

(a) The name of the person(s) responsible for implementing the free product removal measures;

(b) The estimated quantity, type, and viscosity of free product observed or measured on-site, including in wells, boreholes, and excavations;

(c) The type of free product recovery system used;

(d) Whether any groundwater treatment and discharge will take place during the recovery operation and where the discharge point will be located;

(e) The type of treatment applied to, and the effluent quality expected from, any such discharge;

(f) The steps that have been or are being taken to obtain necessary permits for any discharge; and

(g) The disposition of the recovered free product.

6204.8 Unless otherwise directed by the Department, the status report required in § 6204.7 shall be submitted to the Department, in accordance with § 5500.4, within sixty (60) days of release confirmation and then once each quarter until the Department determines that free product removal is complete.

6205 COMPREHENSIVE SITE ASSESSMENT

6205.1 Unless otherwise directed by the Department, the responsible party shall perform a comprehensive site assessment in the time and manner set forth in this section.

6205.2 Within sixty (60) days after Department approval of a work plan pursuant to § 6203.14, the responsible party shall submit a comprehensive site assessment report to the Department, in accordance with § 5500.4, in a form satisfactory to

the Department, which is available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents.

6205.3 A comprehensive site assessment report shall include the following elements, as appropriate to the conditions of the site:

(a) The nature of the release, including: the chemical compound(s) present; its concentration(s); the quantity or quantities released if known; and the physical and chemical characteristic(s) related to potential human health and environmental impacts and cleanup procedures;

(b) Information from available sources or site investigations about:

(1) Surrounding land use;

(2) Surrounding populations;

(3) Water quality;

(4) Use and approximate location of wells potentially affected by the release;

(5) Subsurface soil conditions;

(6) Climatological conditions; and

(7) Locations of all subsurface utilities that are potential pathways, including sewers, water and gas pipelines, or other conduits;

(c) The results of the site investigation and any information gained while performing initial abatement measures pursuant to § 6203;

(d) The results of the free product investigations required under § 6203.13;

(e) The areal extent of the release, including the horizontal and vertical extent of the release, whether the chemicals of concern are distributed homogeneously or heterogeneously, and any future migration potential;

(f) The physical characteristics of the site, including characteristics affecting the occurrence, distribution, and movement of the released contaminant(s) and any characteristics affecting access to the site that may influence the feasibility of investigation and remediation procedures;

(g) A qualitative evaluation of the potential risks posed by the release, including identification of environmentally sensitive receptors, and an

estimate of the impacts to human health and the environment that may occur as a result of the release;

(h) A comparison of contaminant levels to District soil and groundwater quality risk-based screening levels contained in § 6209; and

(i) Any other information requested by the Department or deemed useful or necessary by the responsible party.

6205.4 Comprehensive site assessment activities shall be conducted in accordance with a site safety and health plan that meets the requirements of 29 CFR § 1910.120. The site safety and health plan shall be available for inspection by the Department.

6205.5 Upon receipt and review of the comprehensive site assessment report, the Department may require the responsible party to conduct additional field studies and collect more data.

6205.6 The responsible party may request an extension of the sixty (60) day deadline set forth in § 6205.2 by submitting a written request for an extension to the Department, in accordance with § 5500.4, no later than forty-five (45) days after submitting the work plan pursuant to § 6203.14. The request shall include the following:

(a) A summary of all work performed and all information gathered to date pursuant to § 6205.3;

(b) A summary work plan for the additional assessment activities required; and

(c) A proposed schedule for completion of the remaining assessment activities and submission of the completed comprehensive site assessment report.

6205.7 The Department may grant or deny the request for extension, or grant the extension with modifications to the work plan or schedule.

6206 RISK-BASED CORRECTIVE ACTION (RBCA) PROCESS

6206.1 Risk-based decision making and development of a risk-based corrective action (RBCA) plan shall be conducted in accordance with this section and the Department's RBCA technical guidance, which is available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents.

6206.2 Before initiating a risk-based decision making process to develop a RBCA plan for releases, a responsible party shall:

(a) Prevent further release from the UST by removing all products from the UST, or if approved by the Department, removing a lesser amount and performing any necessary repairs to the UST;

(b) Remove measurable free product to the maximum extent practicable;

(c) Remove impacted source material to the maximum extent practicable; and

(d) Select a qualified risk assessor who has successfully completed a risk-based corrective action training, such as training provided by the Interstate Technology & Regulatory Council, ASTM International, the U.S. Environmental Protection Agency, a state government, or a third party approved by the Department in accordance with § 5500.5.

6206.3 A responsible party using RBCA shall:

(a) Perform an initial site assessment, including identification of potential exposure pathways, take response action(s) as set forth in § 6203, and submit a work plan;

(b) Complete site classification as described in the Department's RBCA technical guidance, available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents, including a qualitative evaluation of the site based on known or readily available information to identify the need for interim remedial actions and further information gathering;

(c) Complete the comprehensive site assessment pursuant to § 6205 and the Tier 1 site assessment as described in the Department's RBCA technical guidance, which is available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents;

(d) Compare the concentrations of chemicals of concern with Tier 1 risk-based screening levels, which are specified in the Department's RBCA technical guidance, available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents;

(e) If the concentrations exceed Tier 1 risk-based screening levels, develop and implement a corrective action plan to achieve Tier 1 levels or proceed to perform Tier 2A or 2B site-specific evaluation as described in the Department's RBCA technical guidance, which is available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents;

(f) If necessary for development of Tier 2 site-specific target levels, collect additional site-specific information and perform fate and transport analysis, including modeling, to determine points of demonstration;

(g) Develop and implement a corrective action plan to achieve the site-specific target levels or monitor for compliance; and

(h) When computer models are used in support of a case closure or no further action determination, provide a statement that the responsible party's staff or third-party contractor has been trained in the use of the District's RBCA software, which is available by contacting the RAM Group of Gannett Fleming, Inc. by e-mail to admin@ramgp.com, or other software, systems, or computer-based programs approved by the Department in accordance with § 5500.4.

6206.4 For RBCA in the District:

(a) The chemicals of concern shall include the petroleum products or by-products listed in Table 1 and any others deemed appropriate by the Department:

Table 1 – Chemicals of Concern

Benzene
Toluene
Ethylbenzene
Xylenes (total)
Ethylene dibromide (EDB)
Ethylene dichloride (EDC (1,2-DCA))
Methyl-tert-butyl-ether (MTBE)
Tertiary butyl alcohol (TBA)
Ethanol
Acenaphthene
Anthracene
Benzo(a)anthracene
Benzo(a)pyrene
Benzo(b)fluoranthene
Benzo(g,h,i)perylene
Benzo(k)fluoranthene
Chrysene
Fluoranthene
Fluorene
Naphthalene
Phenanthrene
Pyrene NC
TPH GRO
>C6-C8 Aliphatics

>C8-C10 Aliphatics
>C8-C10 Aromatics
TPH DRO
>C10-C12 Aliphatics
>C12-C16 Aliphatics
>C16-C21 Aliphatics
>C10-C12 Aromatics
>C12-C16 Aromatics
>C16-C21 Aromatics
TPH ORO
>C21-C35 Aliphatics
>C21-C35 Aromatics

(b) The point(s) of demonstration shall be:

(1) For Tier 1 assessment:

(A) The point of release or the source area;

(B) Groundwater affected by the contaminant plume, including any areas of the plume that are outside of the property boundary in accordance with the Department's RBCA technical guidance; and

(C) Soil throughout the area of the soil contaminated by the release and within the property boundary.

(2) For Tier 2 assessments, the point between the source and the potential point of exposure as approved by the Department.

(c) For any property where zoning allows for residential or mixed use, the maximum tolerable human health risk for carcinogens shall be a one in one million ($1x10^{-6}$) excess cancer risk level (the estimated incremental increase in cancer risk over a lifetime). For non-carcinogenic health effects, the hazard quotient and hazard index shall be no greater than one (1).

(d) The Tier 0 standards and the Tier 1 standards shall be the standards in §§ 6208 and 6209, respectively.

(e) The exposure routes shall include ingestion of groundwater or soil, dermal contact with surface water or soil, ground water protection, and inhalation of volatiles.

(f) For each exposure pathway, the points of exposure shall include groundwater, surface water, and soil and transport media shall include leaching to groundwater and soil vapor migration into buildings.

6206.5 If levels of chemicals of concern exceed the Tier 1 standards set forth in § 6209, the responsible party shall:

(a) Submit a corrective action plan pursuant to § 6207 to achieve the Tier 1 levels; or

(b) Conduct a Tier 2 site-specific evaluation following the procedures and protocols for Tier 2 evaluations contained in the Department's RBCA technical guidance, which is available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents.

6206.6 After completion of the RBCA process, the responsible party may apply for a case closure or no further action letter pursuant to the requirements of § 6210.

6206.7 For purposes of this section, the phrase "risk assessor" means an individual who evaluates the qualitative or quantitative risk posed to human health and the environment by the actual or potential presence or release of hazardous substances, pollutants, or contaminants.

6207 CORRECTIVE ACTION PLAN AND ITS IMPLEMENTATION

6207.1 After a release is confirmed, the Department may require the responsible party to develop and submit a corrective action plan (CAP) for remediating chemicals of concern in soil and groundwater.

6207.2 The responsible party shall submit a CAP, in accordance with § 5500.4, that provides for adequate protection of human health in accordance with § 6206.4(c) (maximum tolerable human health risks) and the environment, as determined by the Department, and shall modify the corrective action plan as necessary to meet this standard.

6207.3 A CAP shall propose corrective actions for the site that will:

(a) Ensure that measurable free product does not exist or is no longer recoverable at the site;

(b) Provide appropriate measures to protect the environmentally sensitive receptors that were identified in the comprehensive site assessment; and

(c) Remediate the site to one (1) of the following standards:

(1) The Tier 0 standards set forth in § 6208;

(2) The Tier 1 risk-based screening levels set forth in § 6209; or

(3) The Tier 2 site-specific target levels identified in the CAP and approved by the Department.

6207.4 If the responsible party elects to perform a Tier 2 evaluation, the CAP shall:

(a) Remediate levels of chemicals of concern to achieve the Tier 2 site-specific target levels;

(b) Provide for engineering or institutional controls, or both, that are approved by the Department in accordance with § 5500.5, if such controls are needed to achieve target levels or maintain activity and use limitations used in the risk assessment; and

(c) Provide for monitoring of the site as long as necessary to ensure that the chemicals of concern on the site will not adversely impact human health, safety, or the environment under present or reasonably foreseeable future uses of the site based on District zoning.

6207.5 A CAP shall provide for proper disposal of any contaminated soils removed from the ground, and:

(a) Shall not permit the placement of contaminated soils that exceed Tier 0 standards back into the ground for the purposes of in situ remediation or storage, unless specifically approved by the Department in accordance with § 5500.5; and

(b) Shall not permit the placement of any soil excavated from the site on another property, unless specifically approved by the Department in accordance with § 5500.5.

6207.6 The responsible party shall prepare a site-specific quality assurance and quality control plan for the activities to be carried out during implementation of the CAP before starting CAP activities. The quality assurance and quality control plan shall cover all actions proposed in the CAP.

6207.7 A site-specific safety and health plan that meets the requirements of 29 CFR § 1910.120 shall be prepared and submitted to the Department in conjunction with the CAP.

6207.8 The Department may approve a CAP only if the Department determines that implementation of the CAP will adequately protect human health, safety, and the environment based on the following factors, as appropriate:

(a) The physical and chemical characteristics of the regulated substance released or threatened to be released, including its toxicity, persistence, and potential for migration;

(b) The hydrogeological characteristics of the site and the surrounding area;

(c) The proximity and quality of nearby surface water and groundwater, and current and reasonably foreseeable future uses of these waters;

(d) The potential effects of residual chemicals of concern on nearby surface water (such as creeks, ponds, lakes, and rivers) and groundwater;

(e) Potential risk to human health or the environment based upon current and reasonably foreseeable future uses of the site;

(f) The estimated timetable for completion of the remediation; and

(g) Any information assembled in compliance with this chapter.

6207.9 If such action will minimize environmental contamination and promote more effective corrective action, the responsible party may begin remediation of soil and groundwater before a CAP is approved, provided that the responsible party:

(a) Notifies the Department, in accordance with § 5500.4, and the owner of any adjacent property or property affected by the remediation, of its intention to begin remediation;

(b) Obtains provisional approval from the Department to begin remediation;

(c) Provides the Department with an opportunity to inspect the site during the remediation;

(d) Complies with any directives issued by the Department, including halting remediation or mitigating adverse consequences from cleanup activities; and

(e) Incorporates these self-initiated remediation measures in the final CAP submitted to the Department for approval.

6207.10 A responsible party may submit a written request for waiver of the Department's approval of the CAP, in accordance with § 5500.5, and begin implementation of the CAP, provided that the responsible party:

(a) Has satisfactorily performed another corrective action under Departmental oversight within the three (3) years immediately preceding the current request for a waiver of CAP approval;

(b) Notifies the Department of its intention to begin remediation and provides the Department with an opportunity to inspect the site during the remediation; and

(c) Agrees to comply with any directives issued by the Department, including halting remediation or mitigating adverse consequences from cleanup activities.

6207.11 Except as provided in §§ 6207.9 and 6207.10, the responsible party shall begin the remediation specified in the CAP, including modifications to the CAP made by the Department, within sixty (60) days after CAP approval, or in accordance with a schedule agreed to by the Department.

6207.12 The responsible party shall provide the Department with an opportunity to inspect the site prior to implementing the CAP upon the Department's request.

6207.13 The responsible party shall monitor, evaluate, and report the results of CAP implementation at least quarterly, or in accordance with a schedule approved by the Department in accordance with the procedures in § 5500.5.

6207.14 The responsible party may apply to the Department for modification of the CAP, in accordance with the procedures in § 5500.5, and may only implement the modification if the modification is approved in writing by the Department.

6207.15 If the Department determines that the implemented CAP is not achieving adequate protection of human health and the environment, the Department may require additional corrective action to be taken.

6207.16 The responsible party shall evaluate the effectiveness of the CAP and any CAP amendments at the end of each year of implementing the plan or amendment to determine whether additional measures must be implemented to protect human health and the environment and shall submit the evaluation to the Department, in accordance with § 5500.4.

6207.17 The Department may approve an alternative procedure for remediation of contaminants from past releases if the responsible party submits a written description of the alternative procedure to the Department in accordance with § 5500.5 and demonstrates to the satisfaction of the Department that:

(a) Compliance with the procedure in this section is not feasible; and

(b) The proposed alternative provides equivalent control of the cleanup to that of the procedures in this section.

6208 TIER 0 STANDARDS

6208.1 The Tier 0 standards for soil shall be the following:

(a) Total petroleum hydrocarbons (TPH), gasoline range organics (GRO), or diesel range organics (DRO) concentrations in soil shall be no greater than one hundred milligrams per kilogram (100 mg/kg); and

(b) Individual chemicals of concern concentrations in soil shall not exceed:

(1) For benzene: five thousandths of a milligram per kilogram (0.005 mg/kg);

(2) For tolulene: nine and six tenths milligrams per kilogram (9.6 mg/kg);

(3) For ethylbenzene: four hundredths of a milligram per kilogram (0.04 mg/kg); and

(4) For total xylenes: three and eighty-six hundredths of a milligram per kilogram (3.86 mg/kg).

6208.2 The Tier 0 standards for water shall be the following:

(a) Levels for ground water quality are the District Water Quality Standards for Ground Water in 21 DCMR § 1155; and

(b) Levels for surface water quality are the District Water Quality Standards in 21 DCMR § 1104.

6209 TIER 1 AND 2 STANDARDS

6209.1 The Tier 1 and 2 standards for water, soil, soil vapor, and indoor air shall be the levels specified in the Department's RBCA technical guidance, which is available on the Department's website at https://doee.dc.gov/page/lust-forms-guidance-and-public-documents.

6210 NO FURTHER ACTION AND CASE CLOSURE REQUIREMENTS

6210.1 A responsible party may request a no further action letter or a case closure letter by submitting a written request to the Department in accordance with § 5500.4. The responsible party or an authorized representative shall sign the request. The request shall include a summary of the site investigation and remediation process, including the following:

(a) The source and cause of the release if known;

(b) The estimated amount and type of product released;

(c) The estimated amount of product recovered;

(d) An analysis demonstrating that the site meets the screening or target levels for cleanup established by the Department in §§ 6208 or 6209 as applicable; and

(e) All documents (such as permits, certificates, or approvals) relating to the transportation and disposal of solid and liquid wastes from the site (such as tanks, soils, product, or water), unless previously submitted to the Department, and if previously submitted, a list containing the names of the documents, dates of submission, and the division of the Department to which the documents were submitted.

6210.2 All records or reports documenting the transport and disposal of any free product, contaminated water or soil, or other waste generated at the site during implementation of the corrective action plan shall be maintained by the responsible party for a period of at least three (3) years from the date of issuance of no further action or case closure letter.

6210.3 The Department may issue a no further action or case closure letter only if it is satisfied that:

(a) The responsible party has implemented all corrective actions required by the Department;

(b) All free product has been removed to the maximum extent practicable; and

(c) The site does not pose a threat to human health or the environment.

6210.4 The Department may issue case closure letter if:

(a) The requirements for case closure set forth in §§ 6210.1 and 6210.3 have been met; and

(b) The site meets Tier 0 or Tier 1 cleanup standards.

6210.5 The Department may issue a no further action letter if:

(a) All of the corrective actions required by the Department have been implemented; and

(b) The corrective action achieved less than a complete cleanup under Tier 0 or Tier 1 standards or only achieved Tier 2 site-specific target levels.

6210.6 A case closure or no further action letter does not absolve a responsible party from previously incurred or potential future liability.

6210.7 If the Department denies the request for no further action or case closure, the responsible party may conduct further remediation or appeal the denial in accordance with § 6604.

6210.8 The responsible party shall remove all equipment, drums, and waste from the site and ensure that all wells are properly abandoned within six (6) months of receiving a no further action or case closure letter, unless otherwise authorized by the Department. The responsible party shall obtain a well abandonment permit if required under 21 DCMR Chapter 16.

6210.9 A no further action letter may include conditions such as monitoring chemicals of concern in indoor air (vapor intrusion), soil vapor, soil, or water, and reporting the monitoring results to the Department, or maintaining engineering and institutional controls.

6210.10 The Department may require the responsible party to execute and record an environmental covenant in accordance with D.C. Official Code §§ 8-671.01 through 8-671.14 to ensure compliance with the terms and conditions of a no further action letter. The environmental covenant may include activity and use limitations and any other information, restrictions, or requirements authorized under D.C. Official Code § 8-671.03.

6210.11 The Department may rescind any letter that is obtained through fraud or misrepresentation.

6211 PUBLIC PARTICIPATION IN CORRECTIVE ACTION

6211.1 For each release that requires a corrective action plan, the Department will provide a public notice designed to reach those members of the public directly affected by the release and the planned corrective action.

6211.2 Notice of the corrective action plan may be provided by publication in local newspapers, the District of Columbia Register, block advertisements, public service announcements, letters to individual households, personal contacts by Department staff, e-mails to stakeholders, posting on the Department's website, or notification to the affected Advisory Neighborhood Commissioners and civic associations.

6211.3 Any person directly impacted by a release that has migrated onto his or her property has a right to obtain a copy of any comprehensive site assessment, RBCA site evaluation, or corrective action plan, and if the person requests, shall be given an opportunity to comment on the corrective action plan.

6211.4 If implementation of an approved corrective action plan does not achieve the cleanup levels established in the plan and the Department is considering case closure or no further action, the Department will give public notice in accordance with §§ 6211.1 and 6211.2.

6211.5 The Department will investigate complaints concerning any violation(s) of the UST Regulations and will notify the complainant of the results of the investigation.

6212 VOLUNTARY REMEDIATION ACTION PROGRAM (VRAP)

6212.1 The Department may permit a person, other than a responsible party, to remediate leaking underground storage tank (LUST) sites in accordance with the UST Regulations, provided that the person:

(a) Intends to develop the LUST facility or site for personal or business reasons;

(b) Intends to conduct a phased investigation of the conditions at the LUST facility or site prior to acquiring or developing the LUST facility or site; or

(c) Is a neighboring property owner who is unable to obtain relief from the responsible party.

6212.2 A person who wishes to voluntarily remediate a LUST site shall submit a Voluntary Remedial Action Program (VRAP) application to the Department in accordance with § 5500.4 that contains the following:

(a) Proof that the applicant satisfies § 6212.1;

(b) A statement of interest in undertaking corrective action at the site;

(c) Evidence of financial responsibility to satisfactorily complete the remediation using any mechanism in § 6701;

(d) A copy of a written access agreement or other document that permits the applicant to access the site;

(e) An application fee as specified in § 5605;

(f) Any available documentation demonstrating that the applicant is not a responsible party; and

(g) Proof that the applicant, if a business entity, is a registered business in the District of Columbia.

6212.3 Upon receiving a VRAP application, the Department may, in its discretion, approve or deny the application. If approved, the Department will issue a conditional authorization letter that authorizes the Voluntary Remediating Party (VRP) to participate in the VRAP, contingent upon the VRP's submission and the Department's approval of a corrective action plan that meets the requirements of §§ 6206 and 6207.

6212.4 The VRP may, in its discretion, enter into an agreement to release the responsible party or parties from liability. A VRP that wishes to assume responsible party status shall submit a responsible party transfer request to the Department in accordance with § 5500.4. Any release granted to a responsible party must state that the release may be voided by the Department under the following circumstances:

(a) The responsible party or the VRP submitted false or misleading information to the Department in the responsible party transfer request; or

(b) The VRP failed to complete the corrective action and the Department or the U.S. Environmental Protection Agency expended funds to remediate the site.

6212.5 A VRP shall be liable for all work performed at the site.

6212.6 Unless the VRP has assumed responsible party status, a VRP will only be required to perform the work agreed upon with the Department in the corrective action plan. The VRP shall comply with any directives issued by the Department pertaining to investigation and remediation of the site and the notification requirements in §§ 5600, 5603, and 6202. If the corrective action includes closure of an UST, the VRP shall comply with all requirements of Chapter 61.

6212.7 A VRP, other than a VRP that has released the original responsible party and assumed responsible party status in accordance with § 6212.5, may cease corrective action activities at the site before completing remediation of the site and incur no liability, other than liability pursuant to § 6212.5, provided the VRP:

(a) Has not aggravated the site conditions or increased the costs of subsequent corrective action;

(b) Gives written notice in accordance with § 5500.4 to the Department of the VRP's intention to cease activities at the site; and

(c) Stabilizes the site by properly backfilling any excavations, properly securing or abandoning any monitoring wells, and any other actions required to secure the site as may be ordered by the Department.

6212.8 After completing all actions under the approved corrective action plan, a VRP may submit a written request for a no further action or a case closure letter as set forth in § 6210.

6212.9 The Department may revoke its approval of a VRAP application if a VRP:

(a) Refuses to comply with directives issued by the Department; or

(b) Fails to begin, or actively implement, corrective action by the anniversary date of approval of the VRAP Application, or stops corrective action for more than twelve (12) months, unless otherwise authorized by the Department.

CHAPTER 63 UNDERGROUND STORAGE TANKS - RIGHT OF ENTRY FOR INSPECTIONS, MONITORING, TESTING, AND CORRECTIVE ACTION

6300 RIGHT OF ENTRY

6300.1 An inspector designated by the Department may, at any reasonable time and upon presentation of appropriate credentials to the owner, operator, or agent in charge, enter without delay any place where an UST is or was located or where a release is suspected, for the purpose of enforcing the Act or the UST Regulations.

6300.2 Appropriate credentials include a photo identification card or badge showing the name of the inspector and his or her employment with the Department.

6300.3 The inspector may enter the facility, with or without prior notice, as follows:

(a) In emergency situations, at any hour; and

(b) In non-emergency situations, between the hours of 9:00 a.m. and 5:00 p.m. on weekdays, and any other time that the facility where the UST is located is open for business.

6300.4 Emergency situations include any situation posing an immediate threat to public health or the environment, such as free product floating on surface or ground water, or an ignition source near a leaking UST.

6301 ENTRIES FOR INSPECTIONS AND MONITORING

6301.1 An inspector designated by the Department may:

(a) Inspect any UST, UST system, or area that may be impacted by a release or suspected release from an UST or UST system;

(b) Inspect and obtain samples of any regulated substance contained in, or released from, any UST or UST system;

(c) Inspect and copy any record, report, information, or test result required to be maintained pursuant to the Act or the UST Regulations, or that is otherwise relevant to the operation of any UST system; and

(d) Conduct monitoring or testing of any UST system, associated equipment, contents, surrounding soils, air, surface water, or groundwater.

6301.2 If the inspector obtains any sample prior to leaving the premises, the inspector will give the owner, operator, or agent in charge a receipt that describes the sample obtained, and if requested, a portion of the sample equal in volume or weight to the portion obtained. If any analysis is made of the sample, a copy of the results of the analysis will be furnished promptly to the owner, operator, or agent in charge.

6301.3 The Department may require the owner, operator, or other responsible party to provide information or records, conduct monitoring or testing, or take any necessary corrective action in accordance with the requirements of § 5602 and Chapters 60 and 62.

6301.4 If the Department makes a written request for submission of records, documents, or other information required to be maintained by the owner, operator, or other responsible party, the records or documents shall be submitted to the Department within twenty (20) days of a request, unless a different time period is specified by the Department.

6302 ENTRY FOR CORRECTIVE ACTION

6302.1 The Department may enter upon property to perform, or cause to be performed, release response and corrective actions that are necessary to protect human health or the environment, including in any of the following circumstances:

(a) No responsible party subject to the requirements of Chapter 62 and capable of implementing the required corrective action can be found within ninety (90) days or a shorter period, as may be necessary to protect human health or the environment;

(b) A situation exists that requires immediate action by the Department to protect human health or the environment; or

(c) The responsible party has failed or refused to comply with an order issued by the Department requiring compliance with the UST Regulations and:

(1) The responsible party did not appeal the order pursuant to Chapter 66; or

(2) The order was upheld after an appeal pursuant to Chapter 66.

6302.2 Except as provided in § 6302.4, the Department will provide prior written notice to the real property owner of its intent to enter the property to take corrective action and will serve the notice in one of the following ways:

(a) By personal delivery to a person of suitable age and discretion residing or employed at the last known address of the real property owner;

(b) By registered first-class mail to the last known address of the real property owner; or

(c) If service cannot be effected as provided in paragraph (a) or (b) of this subsection, then:

(1) By publishing the notice once a week for three (3) weeks in a newspaper of general circulation in the District of Columbia; and

(2) By conspicuous posting of the notice on the property.

6302.3 If the real property owner is a corporation, any notice served on the president, treasurer, general manager, registered agent, or any principal officer of such corporation in the manner provided in § 6302.2 shall be deemed to have been served on the corporation.

6302.4 If a release of a regulated substance from an UST system creates an imminent threat to human health or the environment requiring summary corrective action, and the emergency nature of the situation makes it impractical to give prior notice as provided in § 6302.2, the Department may provide notice by conspicuous posting on the property at the earliest time feasible before commencing work.

CHAPTER 64 UNDERGROUND STORAGE TANKS – CORRECTIVE ACTION BY THE DISTRICT AND COST RECOVERY

6400 CORRECTIVE ACTION BY THE DISTRICT
6401 COST RECOVERY

6400 CORRECTIVE ACTION BY THE DISTRICT

6400.1 The Department may undertake corrective action to protect human health or the environment when any of the circumstances in §§ 6302.1(a) through (c) exist. The Department may take summary corrective action if a release of a regulated substance from an UST system creates an imminent threat to human health or the environment.

6400.2 Corrective action by the Department may include, but is not limited to, the following:

(a) Temporary or permanent relocation assistance for residents exposed to contamination from an UST site;

(b) Provision of alternative household water supplies;

(c) Exposure or risk assessments;

(d) Repair, upgrade, or closure of the UST system;

(e) Site assessment;

(f) Transportation and disposal of solid and liquid wastes from the site (such as tanks, soils, product, or water); and

(g) Development and implementation of a corrective action plan in accordance with Chapter 62.

6400.3 The Department may initiate summary corrective action if, in the judgment of the Department, a release of a regulated substance creates an imminent threat to human health or the environment.

6401 COST RECOVERY

6401.1 The Department may recover the District's corrective action costs pursuant to the District of Columbia Underground Storage Tank Management Act of 1990, D.C. Official Code § 8-113.09(b); the District of Columbia Hazardous Waste Management Act of 1977, D.C. Official Code § 8-1311(a)(2)(B); the Water Pollution Control Act of 1984, D.C. Official Code § 8-103.17(e); the Brownfield Revitalization Amendment Act of 2000, D.C. Official Code § 8-632.01; or any other authority.

6401.2 If the District incurs costs under § 9003(h)(7) of the Resource Conservation and Recovery Act, 42 USC § 6991b(h)(7), for undertaking corrective action or enforcement action with respect to the release of petroleum from an UST, the owner or operator shall be liable to the District for the costs.

CHAPTER 65 UNDERGROUND STORAGE TANKS – LICENSING, CERTIFICATION, OPERATOR REQUIREMENTS, AND OPERATOR TRAINING

6500 LICENSING AND CERTIFICATION OF UST SYSTEM INSTALLERS, REMOVERS, TESTERS, AND TECHNICIANS

6500.1 An individual who performs UST system activities in the District, which include installation, upgrade, repair, tightness testing, or permanent closure of any UST or UST system component, shall be certified in accordance with this chapter or be supervised on-site by an individual certified in accordance with this chapter.

6500.2 An individual performing or supervising UST system installation, upgrade, retrofit, or repair shall be certified as an UST System Technician.

6500.3 An individual performing or supervising UST system closure-in-place or removal shall be certified as an UST System Technician or UST Closure Specialist.

6500.4 An individual performing or supervising UST system tightness testing shall be certified as an UST System Tester.

6500.5 The owner or operator of each UST system shall ensure that any UST system activity is performed by, or is done under the continuous on-site supervision of, a person certified to perform or supervise the activity under this chapter.

6500.6 Each UST System Technician, UST Closure Specialist, and UST System Tester performing or supervising an UST system activity shall carry the certificate issued by the Department while performing or supervising UST system activities. The certificate shall be available for inspection by the owner, operator, and the Department.

6500.7 Each business that performs UST system activities in the District shall be licensed by the Department under this chapter. The business shall employ an individual certified to perform each of the UST system activities for which the business is licensed.

6500.8 Each business that is licensed to perform UST system activities in the District shall provide the Department with a list of employees who are not certified as UST System Technicians, UST Closure Specialists, or UST System Testers, but perform UST system activities under on-site supervision.

6500.9 No business may transfer the license issued to it by the Department.

6500.10 Within ten (10) business days after closure or termination of a licensed business, the business shall surrender the license to the Department for cancellation.

6501 CERTIFICATION PROCEDURES

6501.1 The Department may certify an individual to perform the UST activities set forth in § 6500 in the District only if the individual:

(a) Submits a complete application and pays the initial application fee specified in § 5605;

(b) Provides evidence of satisfactory completion of a recognized training program in the UST system activities for which the applicant seeks certification; and

(c) Has at least five (5) years experience in the United States engaging in the activities for which the applicant seeks certification, or passes a written test of the applicant's knowledge of the technical area for which the applicant seeks certification, the Act, and the UST Regulations.

6501.2 The Department may license a business to perform the UST system activities in § 6500 in the District only if the business:

(a) Submits a complete application and pays the initial application fee specified in § 5605;

(b) Demonstrates, to the satisfaction of the Department, that the business is qualified to perform the UST activities for which it seeks a license; and

(c) Demonstrates, to the satisfaction of the Department, that the business employs at least one individual who has expertise and is certified by the Department to perform or supervise the UST activities the business will offer.

6501.3 The Department may certify an individual or license a business that is certified or licensed to perform UST system activities in Delaware, Maryland, Pennsylvania, Virginia, or West Virginia to perform the UST system activities set forth in § 6500 in the District, if the applicant:

(a) Submits a complete application and pays the initial application fee specified in § 5605;

(b) Is currently certified or licensed by one or more of the states listed as an

UST System Technician, UST Closure Specialist, UST System Tester, or currently holds a certification or license determined by the Department to be equivalent in accordance with § 5500.5; and

(c) Is currently in good standing in each of the states in which the applicant is certified or licensed.

6501.4 The Department may require an applicant certified or licensed in one of the states in § 6501.3 to take a test to verify the applicant's knowledge of the Act and the UST Regulations.

6501.5 An applicant for certification or a license under § 6501.3 may only be certified or licensed to perform the same UST system activities that the applicant was certified or licensed to perform in the state in which the applicant is certified or licensed.

6501.6 An individual or business shall apply for a certification or license by submitting an application form provided by the Department, which is available on the Department's website at https://doee.dc.gov/publication/ust-contractor-certification-applications-business-and-individual, along with the following documents:

(a) A copy of the applicant's current Occupational Safety and Health Administration Hazardous Waste Operations and Emergency Response Standard certification;

(b) Documentation of insurance coverage;

(c) If the applicant is a business, a copy of a valid, current District of Columbia business license; and

(d) If the applicant is seeking certification under § 6501.3:

(1) A letter from a state official of each state listed in § 6501.3 in which the applicant is certified or licensed, stating that the applicant is in good standing; and

(2) A list of any additional states in which the applicant is certified or licensed to perform UST system activities.

6501.7 The initial certification or license issued by the Department will be valid for one (1) year from the date the certification or license is issued.

6501.8 An individual or business may renew the certification or license for one (1) or two (2) years by submitting an application form, the renewal fee specified in § 5605, and the documents listed in § 6501.6. The fee for a two (2) year renewal will be

twice the annual fee specified in § 5605.

6502 OPERATOR DESIGNATION

6502.1 The owner of a regulated UST system in the District, except an UST system that has been permanently closed in accordance with Chapter 61, shall designate at least one Class A, one Class B, and one Class C operator for each UST facility. One operator may be designated as both the Class A and the Class B operator, except at fuel dispensing operations. Twenty-four (24) hour dispensing facilities, such as gas stations, shall have multiple Class C operators designated.

6502.2 No facility shall dispense or store a regulated substance unless operators have been designated and trained as required in this section and § 6503.

6502.3 A Class A operator shall have primary responsibility for operating and maintaining the UST facility in compliance with the Act and UST Regulations. Class A operators shall:

(a) Ensure that UST systems are properly installed, inspected, tested, and repaired, and that the required records are retained and made available to the Department;

(b) Be familiar with training requirements for each class of operators and be able to provide the required training for Class C operators; and

(c) Prepare facility procedures for Class B and C operators.

6502.4 A Class B operator shall be responsible for the daily operation and maintenance of UST systems at one or more facilities. Class B operators shall:

(a) Check spill and overfill prevention equipment and corrosion protection equipment to ensure proper function, and that any required system tests are performed at appropriate intervals;

(b) Ensure release detection equipment is operational, release detection is performed at proper intervals, and release detection records are retained and made available to the Department; and

(c) Be familiar with all aspects of Class B and Class C operator responsibilities and be able to provide the required training for Class C operators.

6502.5 A Class C operator shall be responsible for responding to alarms or other indications of emergencies caused by a spill or release from an UST system or equipment failures. Class C operators shall:

(a) Control or monitor the dispensing and sale of regulated substances;

(b) Follow written instructions or procedures on how to respond to alarms or releases provided by the Class A or Class B operators; and

(c) Notify Class A or B operators and appropriate emergency responders of releases and other emergencies in accordance with facility procedures and applicable laws and regulations.

6502.6 Trained operators shall be readily available to respond to suspected or confirmed releases, other unusual operating conditions, emergencies, and equipment failures as follows:

(a) A Class A or Class B operator shall be available for immediate telephone consultation at all times when a facility is in operation;

(b) A Class A or Class B operator shall be on-site at the UST facility within twenty-four (24) hours of being contacted;

(c) For staffed facilities, a Class C operator shall be on-site whenever the facility is in operation; and

(d) For unstaffed facilities, a Class C operator shall be available for immediate telephone consultation and shall be able to be on-site within two (2) hours of being contacted.

6502.7 Emergency contact information (name, position title and telephone numbers) shall be prominently displayed at all facilities, and unstaffed facilities shall also have emergency procedures prominently displayed to users.

6502.8 No person shall serve as a designated operator unless he or she has successfully completed all training required in § 6503.

6502.9 The owner of an UST system shall maintain a list of designated operators. The list shall identify the current Class A, B, and C operators for the facility and shall include:

(a) The name and operator class of each operator and the date each operator successfully completed training; and

(b) For operators that are not on-site when the facility is in operation, emergency telephone numbers to contact the operators.

6502.10 A copy of the following documentation shall be on-site and readily available for inspection at the facility:

(a) Certificates of training for Class A and B operators, and documentation of the trainer, trainee, and date training occurred for Class C operators;

(b) The facility list of Class A, B, and C operators; and

(c) Class C operator facility procedures, including emergency notification procedures.

6502.11 Class C operator and owner contact information, including name, telephone number, and any emergency contact information, shall be conspicuously posted at unstaffed facilities.

6503 OPERATOR TRAINING AND TRAINING PROGRAM APPROVAL

6503.1 The owner of an UST system shall ensure that all operators have received the training required by this section. Class A and B operators shall complete retraining every five (5) years or as required by the Department in accordance with § 6503.2. Class C operators shall receive retraining as provided in § 6503.5.

6503.2 If the Department determines that a petroleum UST system is not in compliance with any requirement of the Act or UST Regulations, the designated Class A and B operators shall repeat the required training, or any applicable part of the training as determined by the Department. Operators shall complete the required retraining within thirty (30) days of being notified by the Department.

6503.3 A Class A operator shall successfully complete a training course approved by the Department that includes general knowledge of the requirements of the Act and UST Regulations. At the completion of the training course, the operator shall be able to demonstrate knowledge of operation, maintenance, and recordkeeping requirements, including the following:

(a) Spill and overfill prevention;

(b) Release detection and related reporting, record keeping, testing, and inspection requirements;

(c) Corrosion protection;

(d) Emergency response;

(e) Product and equipment compatibility;

(f) Financial responsibility;

(g) Notification and UST registration requirements;

(h) Temporary and permanent UST closure requirements;

(i) Class B and C operator training requirements; and

(j) Environmental and regulatory consequences of releases.

6503.4 A Class B operator shall successfully complete a training course approved by the Department that includes detailed instruction on operation and maintenance of UST systems and the requirements of the Act and UST Regulations. Training shall provide specific information about the components of UST systems, UST construction materials, methods of release detection, and release prevention, including the following:

(a) Spill and overfill prevention;

(b) Release detection and related reporting requirements;

(c) Corrosion protection;

(d) Emergency response;

(e) Product and equipment compatibility;

(f) Report and recordkeeping requirements;

(g) Class C operator training requirements; and

(h) Environmental and regulatory consequences of releases.

6503.5 Class C operators shall complete training provided by a Class A or B operator or successfully complete a training course approved by the Department. The training shall enable the Class C operator to take action in response to emergencies or alarms caused by spills or releases from an UST system. Training shall include written instructions and notification procedures for the Class C operator to follow in the event of an emergency. After the initial training, the Class A or B operator shall retrain the Class C operator on these instructions and emergency procedures at least every twelve (12) months. At the conclusion of the training, the Class A or B operator shall evaluate the ability of the Class C operator to respond to emergencies and provide additional training as necessary to ensure the Class C operator is able to respond.

6503.6 An operator successfully completes training if he or she:

(a) Attends the entire training course;

(b) Demonstrates knowledge of the course material by receiving a grade of eighty percent (80%) or higher on an examination containing material presented in the training course or demonstrates to the trainer his or her ability to perform operation and maintenance checks of UST system equipment, including release detection; and

(c) Receives a training certificate from the training provider.

6503.7 When a Class A or B operator is replaced, the new operator shall be trained within thirty (30) days of assuming duties for that class of operator.

6503.8 Class C operators shall be trained before assuming the duties of a Class C operator.

6503.9 A training provider may request approval of a training course by submitting a request in writing to the Department in accordance with § 5500.5 and providing any information about the course requested by the Department. The Department may, in its discretion, approve or disapprove the training course. Each training provider shall obtain written approval from the Department before offering training courses for Class A, B, or C operators in the District.

6503.10 The owner or operator shall maintain documentation that the designated Class A, B, and C operators have completed the required training and retraining for as long as the Class A, B, and C operators are designated.

CHAPTER 66 UNDERGROUND STORAGE TANKS – ENFORCEMENT

6600 ENFORCEMENT AUTHORITY

6600.1 The Department may take one or more of the following administrative actions:

(a) Issue an administrative civil fine, penalty, or fee under § 6600.5;

(b) Issue a directive under § 6601;

(c) Issue an administrative order under § 6602; and

(d) Deny, suspend, revoke, or restrict a license or certificate under § 6603.

6600.2 If a person fails to comply with a notice of violation or threatened violation issued under § 6602.1 within the time stated in the notice, the Department may initiate a civil action in the Superior Court of the District of Columbia, pursuant to the approval and supervision of the Attorney General of the District of Columbia, for injunctive relief, damages, civil penalties, or recovery of any corrective action costs necessary to promptly and effectively terminate the violation or threatened violation and protect life, property, or the environment.

6600.3 To correct a situation that immediately threatens health or the environment, or to restrain any person from engaging in any unauthorized activity that immediately endangers or causes damage to public health or the environment, the Department may initiate a civil action in the Superior Court of the District of Columbia and seek a temporary restraining order in lieu of issuing an administrative order, pursuant to the approval and supervision of the Attorney General of the District of Columbia.

6600.4 The District may bring a civil action in the Superior Court of the District of Columbia, or in any other court of competent jurisdiction, for recovery of corrective action costs in accordance with § 6400.

6600.5 As an alternative to a civil judicial action, the Department may impose an administrative civil fine, penalty, or fee pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801.01 *et seq.*).

6600.6 Except when otherwise provided by statute, a person violating a provision of this chapter shall be fined according to the schedules in Chapters 32 (Civil Infractions: Schedule of Fines) and 40 (Department of the Environment Infractions) of Title 16 (Consumers, Commercial Practices, and Civil Infractions) of the District of Columbia Municipal Regulations.

6600.7 The imposition of a civil fine or penalty does not preclude the Department from initiating an administrative or judicial civil action seeking injunctive relief, damages, or costs except that a person shall not, for the same violation of this chapter, be assessed both a judicial civil fine and an administrative fine.

6601 DIRECTIVE

6601.1 The Department may issue a directive requiring an owner, operator, or responsible party to:

(a) Provide any information, record, documentation, report, plan, or form with respect to the UST system if necessary to determine compliance with the UST regulations;

(b) Conduct investigations, monitoring, or testing of the UST system, associated equipment, contents, surrounding soils, air, surface water, or groundwater;

(c) Conduct a repair, upgrade, replacement, or temporary or permanent closure of the UST system or equipment; or

(d) Take any necessary corrective action.

6601.2 The directive will be in writing and will identify the actions that the responsible party is required to take and the time period within which the actions must be performed.

6601.3 A directive may be served on a person or the person's authorized agent by one or more of the following methods:

(a) Personal service;

(b) Delivery to the last known home or business address and leaving it with a person over the age of eighteen (18) residing or employed there; or

(c) United States Postal Service mail, first class and postage prepaid, to the last known home or business address. A courtesy copy may be sent via email or fax.

6601.4 If a person objects that a required action in a directive is not necessary or appropriate from a technical, engineering, geophysical, or other scientific perspective, the person shall submit a written statement to the Department, in accordance with § 5500.4, including the grounds for the objection, within the time period stated in the directive.

6601.5 A person named in the directive may file an appeal with the Department in accordance with the procedures in § 6604 within fifteen (15) days after a directive is served, or within twenty (20) days of the date of the directive if served by mail, unless a later date is approved in writing by the Department.

6602 ADMINISTRATIVE ORDER

6602.1 If the Department believes or has reason to believe that there is a violation or threatened violation of the Act or the UST Regulations, the Department may issue a written notice of the violation or threatened violation to the owner, operator, or any other responsible party deemed appropriate by the Department and may require the person to take corrective measures that the Department considers reasonable and necessary.

6602.2 If a person fails to comply with the notice of violation issued pursuant to § 6602.1 within the time stated in the notice, the Department may issue a proposed administrative order, which may be a compliance order, cease and desist order, or both.

6602.3 The proposed order shall be in writing and:

(a) Include a statement of the nature of the violation or threatened violation;

(b) Explain that the person has a right to a hearing;

(c) Allow a reasonable time for compliance with the order, consistent with the likelihood of harm and the need to protect health, safety, life, property, and the environment;

(d) State any penalties for failure to comply with the order.

6602.4 A proposed order may be served on a person or the person's authorized agent by one or more of the methods listed in § 6601.3, or if there is an immediate threat to human health or the environment by:

(a) Telephone or e-mail, followed by service by another method listed in § 6601.3; or

(b) If the owner, operator, or responsible party cannot be located, conspicuous posting on the property.

6602.5 A proposed order shall become effective and final, unless the person or persons named in the order requests a hearing under § 6604 no later than fifteen (15) days after the order is served or no later than twenty (20) days after the date of the order if served by mail.

6602.6 The Department may issue an immediate order to require a person to correct a situation that immediately threatens health or the environment, or to restrain any person from engaging in any unauthorized activity that immediately endangers or causes damage to public health or the environment.

6602.7 The Department may issue an immediate order prohibiting the delivery of regulated substances or other use of an UST system in situations that threaten health or the environment including, but not limited to, the following:

(a) An accumulation of toxic, flammable, or explosive vapors in a structure, sewer, or excavation;

(b) Free floating product on surface or ground water;

(c) Potential for migration of a release to surface waters or other sensitive environmental receptors;

(d) An open pit or excavation that is not secured properly during or left in place after corrective action;

(e) Anything which may cause potential exposure of humans, plants, or animals to hazardous substances;

(f) Missing or inoperable required spill or overfill prevention, release detection, or corrosion protection equipment; or

(g) Failure to register an UST system.

6602.8 An immediate order is effective upon issuance and is final unless the person named in the order requests a hearing under § 6604 within seventy-two (72) hours after the order is served.

6603 SUSPENSION, REVOCATION, RESTRICTION, OR DENIAL OF A LICENSE OR CERTIFICATE

6603.1 In order to protect the public health, safety, and welfare, the Department may suspend, revoke, or refuse to issue, renew, or restore a license or certificate after giving written notice if the Department finds that the applicant or holder:

(a) Failed to meet and maintain the standards established by the Act and the UST Regulations;

(b) Submitted a false or fraudulent record, invoice, or report;

(c) Engaged in fraud or misrepresentation in the application for licensure or certification;

(d) Had a history of repeated violations of the Act or the UST Regulations; or

(e) Had a license or certification denied, revoked, or suspended in another state or jurisdiction.

6603.2 Notice of a proposed action to suspend, revoke, or refuse to issue, renew, or restore a license or certificate will be served as specified in § 6601.3.

6603.3 A proposed action shall become effective and final, unless the applicant or license or certificate holder requests a hearing under § 6604 no later than fifteen (15) days after the action is served, or no later than twenty (20) days after the date of the action if served by mail.

6603.4 If the Department determines during or after an investigation that the conduct of any licensed business or certified individual presents an imminent danger to the health or safety of the residents of the District, the Department may summarily suspend or restrict the license of the business or the certificate of the individual in accordance with this chapter.

6603.5 At the time of the summary suspension or restriction, the Department will provide the licensee or certificate holder with a written notice stating:

(a) The action that is being taken;

(b) The basis for the action; and

(c) The right of the licensee or certificate holder to request a hearing.

6603.6 In the case of a summary action under § 6603.5:

(a) The suspension or restriction shall be effective immediately and shall become final, unless the license or certificate holder requests a hearing within seventy-two (72) hours after the notice is served; and

(b) A hearing will be held within fifteen (15) days of receipt of a timely request and a decision will be issued no later than fifteen (15) days after the hearing.

6604 APPEALS TO THE DEPARTMENT

6604.1 A person named in a directive, order, proposed order, action or proposed action of the Department under §§ 6210.7, 6601, 6602, or 6603 may appeal in accordance with this section.

6604.2 Before or in lieu of requesting a hearing under § 6605, a person named in a Department directive, order, or action may make an informal appeal in the manner and by the date stated in the directive, order, or action by providing orally or in writing any information or material that would support a change in or withdrawal of the Department's directive, order, or action.

6604.3 If the matter is not resolved under § 6604.2, the aggrieved person may appeal to the Deputy Director of the Department's Environmental Services Administration in accordance with § 5500.5.

6604.4 If the matter is not resolved under § 6604.3, the aggrieved person may appeal the decision of the Deputy Director of the Environmental Services Administration to the Director of the Department in accordance with § 5500.5.

6604.5 Appeals under §§ 6604.3 and 6604.4 must be in writing and present all information and material that the aggrieved person wishes to present for consideration on appeal.

6604.6 When considering an appeal, the Deputy Director or the Director may stay the effect of a decision or action being appealed pending determination of the appeal.

6604.7 Unless stayed by the Deputy Director or the Director, the original decision or action remains in effect during pendency of the appeal.

6604.8 Any person adversely affected or aggrieved by a decision of the Director may request a hearing in accordance with § 6605.

6605 APPEALS TO THE OFFICE OF ADMINISTRATIVE HEARINGS

6605.1 A person adversely affected or aggrieved by a decision of the Director under § 6604 or named in a notice of infraction assessing a civil fine, penalty, or fee under § 6600.5 may appeal in accordance with this section.

6605.2 To appeal the decision or notice of infraction, the person shall file an administrative appeal with, and request a hearing before, the District of Columbia Office of Administrative Hearings (OAH).

6605.3 The person shall file a written appeal with OAH within fifteen (15) calendar days of service of the decision or notice of infraction or no later than twenty (20) days after the date of the decision or notice if served by mail.

6605.4 The hearing and prehearing practice shall be conducted in accordance with the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801 *et seq*.) and the regulations set forth at Title 1, Chapter 28 of the District of Columbia Municipal Regulations.

6605.5 The final OAH decision on an administrative appeal under this section shall constitute the final action of the Department, and shall be subject to the applicable statutes and rules of judicial review for OAH final orders.

CHAPTER 67 UNDERGROUND STORAGE TANKS – FINANCIAL RESPONSIBILITY

6705 FINANCIAL TEST OF SELF-INSURANCE: TEST B
6706 GUARANTEES
6707 INSURANCE AND RISK RETENTION GROUP COVERAGE
6708 SURETY BONDS
6709 LETTER OF CREDIT
6710 PRIVATE TRUST FUNDS
6711 STANDBY TRUST FUNDS
6712 DRAWING ON FINANCIAL ASSURANCE MECHANISM
6713 REPLENISHMENT OF GUARANTEES, LETTERS OF CREDIT, OR SURETY BONDS
6714 CANCELLATION OR NON-RENEWAL OF FINANCIAL ASSURANCE
6715 BANKRUPTCY OR INCAPACITY

6700 PETROLEUM UST SYSTEMS

6700.1 The owner and operator of a petroleum UST shall demonstrate financial responsibility in accordance with the provisions of this chapter, except as otherwise provided in this section, for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs.

6700.2 State and federal government entities whose debts and liabilities are the debts and liabilities of a state, the United States, or the District of Columbia government are exempt from the requirements of this chapter.

6700.3 The requirements of this chapter do not apply to owners or operators of any UST described in §§ 5501.3 or 5503.

6700.4 If the owner and operator of a petroleum UST are separate persons, only the owner is required to demonstrate financial responsibility; however, both the owner and operator are liable for noncompliance.

6700.5 An owner is not required to maintain financial responsibility under this chapter for an UST after the UST has been permanently closed or undergone a change-in-service in accordance with Chapter 61, except as provided in § 6700.6.

6700.6 If the closure assessment performed in accordance with § 6101 indicates that corrective action is needed, the owner or operator shall maintain financial responsibility until the corrective action is completed in accordance with Chapter 62.

6700.7 The amounts of financial assurance required under this section do not include legal defense costs.

6700.8 The owner of any petroleum UST who has not previously filed a certification of financial responsibility with the Department shall immediately file, in accordance

with § 5500.4, the certification in the form prescribed by Appendix 67-1 (Certification of Financial Responsibility).

6700.9 Within thirty (30) days after installation of a new petroleum UST or changing the substance stored in an UST to petroleum, the owner of the petroleum UST system shall file a certification of financial responsibility with the Department as described in § 6700.8.

6700.10 The owner of a petroleum UST shall demonstrate financial responsibility in the per-occurrence amount of at least one million dollars ($1,000,000):

(a) For a petroleum UST that is located at a petroleum marketing facility; and

(b) For a petroleum UST that handles an average of more than ten thousand (10,000) gallons of petroleum per month based on annual throughput for the previous calendar year.

6700.11 The owner of a petroleum UST not covered under § 6700.10 shall demonstrate financial responsibility in the per-occurrence amount of five hundred thousand dollars ($500,000).

6700.12 The owner of a petroleum UST shall demonstrate financial responsibility in at least the following annual aggregate amounts:

(a) For an owner of one (1) to one hundred (100) petroleum USTs, one million dollars ($1,000,000); and

(b) For an owner of one-hundred-one (101) or more petroleum USTs, two million dollars ($2,000,000).

6700.13 For the purposes of §§ 6700.12 and 6700.16 only, the term "petroleum UST" means a single containment unit and does not mean combinations of single containment units.

6700.14 Except as provided in § 6700.15, if an owner uses separate mechanisms or separate combinations of mechanisms authorized under § 6701, the amount of assurance provided by each separate mechanism or combination of mechanisms shall be meet the aggregate amount specified in §§ 6700.10 through 6700.12.

6700.15 If an owner uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for different USTs, the annual aggregate amount required under § 6700.12 shall be based on the number of tanks covered by each separate mechanism or separate combination of mechanisms.

6700.16 Owners shall review the amount of aggregate assurance required whenever one (1) or more additional petroleum USTs are acquired or installed. If, after review, the

number of petroleum USTs for which financial responsibility must be demonstrated exceeds one hundred (100), the owner shall comply with the requirements of § 6700.12(b) by the anniversary of the date on which the mechanism demonstrating financial responsibility became effective. If financial responsibility is being demonstrated by a combination of mechanisms, the owner shall demonstrate financial responsibility in the amount of at least two million dollars ($2,000,000) of annual aggregate assurance by the first-occurring effective date anniversary of any one of the mechanisms, combined (other than a financial test or guarantee) to provide assurance.

6700.17 The per-occurrence and annual aggregate coverage amounts required under this section shall not in any way limit the liability of the owner or operator.

6701 FINANCIAL RESPONSIBILITY MECHANISMS

6701.1 Subject to the limitations of §§ 6701.2 and 6701.3, the owner of a petroleum UST may use any single mechanism or combination of mechanisms listed in §§ 6703 through 6710 to demonstrate financial responsibility under this chapter for one (1) or more USTs.

6701.2 An owner may use a guarantee or surety bond to establish financial responsibility only if the Office of the Attorney General of the District of Columbia has submitted a written statement to the Department that the guarantee or surety bond executed as described in this chapter is a legally valid and enforceable obligation in the District.

6701.3 An owner may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirements of the financial test under §§ 6703 through 6705, the financial statements of the owner are not consolidated with the financial statements of the guarantor.

6701.4 Subject to the requirements of §§ 6701.5 and 6701.6, an owner may substitute any alternative financial assurance mechanism or combination of mechanisms specified in §§ 6703 through 6710 for a financial assurance mechanism currently in place.

6701.5 If an owner substitutes an alternative financial mechanism, the owner shall maintain the existing financial assurance mechanism or combination of mechanisms in effect, in compliance with the requirements of § 6700, until the transition to the alternative mechanism or mechanisms is completed.

6701.6 An owner shall obtain alternative assurance of financial responsibility within thirty (30) days after the owner receives notice of any of the following:

(a) Commencement of a voluntary or involuntary proceeding under Title 11 of the United States Code (Bankruptcy) naming a provider of financial assurance as a debtor;

(b) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;

(c) Failure of a guarantor to meet the requirements of the financial test required under this chapter; or

(d) Any other incapacity of a provider of financial assurance.

6701.7 Whenever there is a change in a financial assurance mechanism used to demonstrate financial responsibility, the owner shall update the certification of financial responsibility within thirty (30) days of the change in accordance with §5500.4 and in the form prescribed by Appendix 67-1 (Certification of Financial Responsibility).

6702 FINANCIAL RESPONSIBILITY RECORDS AND REPORTS

6702.1 Each owner shall maintain a copy of each financial assurance mechanism used to demonstrate financial responsibility under §§ 6703 through 6710 of this chapter for each UST until released from the requirements of this chapter under §§ 6700.5 or 6700.6.

6702.2 An owner may maintain the documentary evidence required under § 6702.1 at the UST facility or the owner's or operator's place of business. Records that are not maintained at the UST facility shall be made available to the Department upon request.

6702.3 Each owner using an assurance mechanism specified in §§ 6703 through 6710 shall maintain a copy of the assurance instrument in the form prescribed in §§ 6703 through 6710.

6702.4 Each owner using a financial test of self-insurance or guarantee shall maintain a copy of the chief financial officer's letter of assurance based on year-end financial statements for the most recent completed financial reporting year. This letter shall be on file at the UST facility or the owner’s or operator’s place of business not later than one hundred twenty (120) days after the close of the owner's financial reporting year.

6702.5 An owner using a guarantee, surety bond, or letter of credit shall maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

6702.6 An owner using an insurance policy or risk retention group coverage shall maintain a copy of the signed insurance policy or risk retention group coverage policy, along with the endorsement or certificate of insurance and any amendments to the agreements.

6702.7 An owner shall maintain a copy of the certification of financial responsibility that is required to be filed under §§ 6700.8, 6700.9 and 6701.7 at the UST facility or the owner's place of business.

6702.8 An owner shall submit evidence of current financial responsibility to the Department not later than thirty (30) days after the owner or operator identifies a spill, overfill, release, or suspected release from an UST system required to be reported under § 6201 or § 6202.

6702.9 An owner shall submit evidence of current financial responsibility to the Department not later than thirty (30) days after the owner or operator receives notice of the incapacity of a provider of assurance under § 6701.6.

6702.10 The Department may require an owner at any time to submit evidence of financial assurance or any other information relevant to compliance with §§ 6703 through 6711.

6703 FINANCIAL TEST OF SELF-INSURANCE

6703.1 An owner or a guarantor may satisfy the requirements of § 6700 by passing either of the financial tests set forth in this section.

6703.2 To pass a financial test of self-insurance, the owner or guarantor shall meet either of the following based on year-end financial statements for the latest completed fiscal year:

(a) The criteria of Test A, as set forth in § 6704; or

(b) The criteria of Test B, as set forth in § 6705.

6703.3 To demonstrate that the owner or guarantor meets either of the financial tests under § 6703.2, the chief financial officer of the owner or guarantor shall sign a letter of assurance in the form specified in Appendix 67-2 (Financial Test of Self-Insurance) not later than one hundred twenty (120) days after the close of each financial reporting year, as defined by the twelve (12) month period for which financial statements used support the financial test are prepared.

6703.4 If an owner no longer meets the requirements of the financial test set forth in §§ 6704 or 6705 based on year-end financial statements, the owner shall obtain alternative assurance not later than one hundred fifty (150) days after the end of the year for which the financial statements used were prepared.

6703.5 The Department may require reports of financial condition at any time from the owner or guarantor demonstrating compliance with this section. If the Department finds, on the basis of any report or other information, that the owner or guarantor no longer meets the financial test requirements of this section, the owner shall be required to obtain alternative assurance not later than thirty (30) days after the Department notifies the owner of the finding.

6703.6 If an owner fails to obtain alternative assurance as required by §§ 6703.4 or 6703.5, the owner shall notify the Department, in accordance with § 5500.4, of the failure not later than ten (10) days after the expiration of the required period.

6704 FINANCIAL TEST OF SELF-INSURANCE: TEST A

6704.1 To meet financial Test A, the owner, guarantor, or both shall have a tangible net worth of at least ten (10) times the sum of the following:

(a) The total of the applicable aggregate amount required by § 6700, based on the number of USTs for which a financial test is used to demonstrate financial responsibility to the Department;

(b) The sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and the amount of liability coverage for which a financial test is used to demonstrate financial responsibility to the Department; and

(c) The sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial responsibility to the Department.

6704.2 The owner or guarantor seeking to meet financial Test A shall have a tangible net worth of at least ten million dollars ($10,000,000).

6704.3 The owner or guarantor seeking to meet financial Test A shall have a letter of assurance signed by the chief financial officer in the form specified by Appendix 67-2 (Financial Test of Self-Insurance Letter from Chief Financial Officer).

6704.4 The owner or guarantor seeking to meet financial Test A must either:

(a) File financial statements annually with the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Utilities Service; or

(b) Report the firm's tangible net worth annually to Dun and Bradstreet, and Dun and Bradstreet must have assigned the firm a financial strength rating of 4A or 5A.

6704.5 The owner or guarantor seeking to meet financial Test A cannot have year-end financial statements, if independently audited, that include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

6705 FINANCIAL TEST OF SELF-INSURANCE: TEST B

6705.1 To meet financial Test B, the owner or a guarantor shall meet the federal financial test requirements set forth in 40 CFR § 264.147(f)(1), substituting the appropriate amount specified in § 6700.12(a) or (b) for the "amount of liability coverage" each time specified in the federal regulations.

6705.2 The fiscal year-end financial statements of the owner or guarantor seeking to meet financial Test B shall be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

6705.3 The owner or guarantor seeking to meet financial Test B cannot have year-end financial statements that include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

6705.4 The owner or guarantor seeking to meet financial Test B shall have a letter of assurance signed by the chief financial officer in the form specified by Appendix 67-2 (Financial Test of Self-Insurance).

6705.5 If the financial statements of the owner or guarantor seeking to meet financial Test B are not submitted annually to the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Utilities Service, the owner or guarantor shall obtain a special report by an independent certified public accountant stating the following:

(a) The certified public accountant has compared the data that the letter from the chief financial officer specifies as having been derived from the latest year-end financial statements of the owner or guarantor with the amounts in the financial statements; and

(b) In connection with that comparison, no matters came to the attention of the certified public accountant that caused him or her to believe the specified data should be adjusted.

6706 GUARANTEES

6706.1 An owner may satisfy the requirements of § 6700 by obtaining a guarantee that conforms to the requirements of this section.

6706.2 The guarantor shall be a firm that:

(a) Has a controlling interest in the owner;

(b) Has a controlling interest in a firm that has a controlling interest in the owner;

(c) Is controlled through stock ownership by a common parent firm that has a controlling interest in the owner; or

(d) Is engaged in a substantial business relationship with the owner and issues the guarantee as an act incident to that business relationship.

For purposes of this section, the phrase "controlling interest" means direct ownership of at least fifty percent (50%) of the voting stock of another entity.

6706.3 Each guarantee issued under this section shall be provided in the form prescribed by Appendix 67-3 (Guarantee).

6706.4 Not later than one hundred twenty (120) days after the close of each financial reporting year, the guarantor shall demonstrate that it meets the financial test criteria of §§ 6704 or 6705 based on year-end financial statements for the latest completed financial reporting year by completing a letter of assurance from the chief financial officer, as described in § 6703.3, and delivering the letter to the owner.

6706.5 If the guarantor fails to satisfy the financial tests of either §§ 6704 or 6705 at the end of any financial reporting year, the guarantor shall notify the owner by certified mail, return receipt requested, not later than one hundred twenty (120) days after the end of that financial reporting year, and before cancellation or non-renewal of the guarantee.

6706.6 If the Department notifies the guarantor that the guarantor no longer satisfies the financial tests of either §§ 6704 or 6705, or the requirements of § 6703.3, the guarantor shall notify the owner by certified mail, return receipt requested, not later than ten (10) days after receiving the notification from the Department.

6706.7 The guarantee shall terminate not less than one hundred twenty (120) days after the date the owner receives the notification pursuant to §§ 6706.5 or 6706.6 as evidenced by the return receipt. The owner shall obtain alternative assurance in accordance with § 6701.6.

6706.8 An owner that uses a guarantee to satisfy the requirements of § 6700 shall establish a standby trust fund in accordance with § 6711 when the guarantee is obtained.

6706.9 Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee shall be deposited directly into the standby trust fund in accordance with § 6712.

6707 INSURANCE AND RISK RETENTION GROUP COVERAGE

6707.1 An owner may satisfy the requirements of § 6700 by obtaining liability insurance that meets the requirements of this section from a qualified insurer or risk retention group.

6707.2 The liability insurance required under this section may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

6707.3 Each certificate of insurance and each insurance policy endorsement issued under this section shall be in the form prescribed by Appendix 67-4 (Certificate of Insurance) or Appendix 67-5 (Endorsement).

6707.4 Each insurance policy shall be issued by an insurer or risk retention group that, at a minimum, is licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in the District of Columbia.

6708 SURETY BONDS

6708.1 An owner may satisfy the requirements of § 6700 by obtaining a surety or performance bond that conforms to the requirements of this section.

6708.2 The surety company issuing the bond shall be among those listed as acceptable sureties on federal bonds in the latest U.S. Department of the Treasury Circular 570.

6708.3 Each surety bond shall be provided in the form prescribed by Appendix 67-6 (Performance Bond).

6708.4 Under the terms of the bond, the surety shall become liable on the bond obligation when the owner fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums set forth in § 6700.

6708.5 The owner who uses a surety bond to satisfy the requirements of § 6700 shall establish a standby trust fund in accordance with § 6711 when the surety bond is acquired.

6708.6 Under the terms of the bond, all amounts paid by the surety under the bond shall be deposited directly into the standby trust fund in accordance with § 6712.

6709 LETTER OF CREDIT

6709.1 An owner may satisfy the requirements of § 6700 by obtaining an irrevocable standby letter of credit that meets the requirements of this section.

6709.2 The issuing institution shall be an entity that has the authority to issue letters of credit in the District of Columbia and whose letter of credit operations are regulated and examined by an agency of the federal government or the District of Columbia.

6709.3 Each letter of credit issued under this section shall be in the form prescribed by Appendix 67-7 (Irrevocable Standby Letter of Credit).

6709.4 An owner who uses a letter of credit to satisfy the requirements of § 6700 shall also establish a standby trust fund in accordance with § 6711 when the letter of credit is acquired.

6709.5 Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Department shall be deposited by the issuing institution directly into the standby trust fund in accordance with § 6712.

6709.6 Each letter of credit shall be irrevocable with a term specified by the issuing institution.

6709.7 Each letter of credit shall provide that credit be automatically renewed for the same term as the original term, unless the issuing institution notifies the owner by certified mail, return receipt requested, of its decision not to renew the letter of credit at least one hundred twenty (120) days before the current expiration date. Under the terms of the letter of credit, the one hundred twenty (120) days shall begin on the date when the owner receives the notice, as evidenced by the return receipt.

6710 PRIVATE TRUST FUNDS

6710.1 An owner may satisfy the requirements of § 6700 by establishing a private trust fund that conforms to the requirements of this section.

6710.2 The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by an agency of the federal government or the District of Columbia.

6710.3 Each trust agreement shall be in the form prescribed by Appendix 67-8 (Trust Agreement) and shall be accompanied by a formal certification of acknowledgement in the specified form.

6710.4 The private trust fund, when established, shall be funded for the full required amount of assurance or funded for part of the required amount of assurance and used in combination with other mechanism(s) that provide the remaining required assurance.

6710.5 If the value of the trust fund is greater than the required amount of assurance, the owner may submit a written request to the Department in accordance with § 5500.4 for release of the excess.

6710.6 If other financial assurance, or combination of assurance mechanisms, as specified in §§ 6703 through 6709, is substituted for all or part of the trust fund, the owner may submit a written request to the Department in accordance with § 5500.4 for release of the excess.

6710.7 Not later than sixty (60) days after receiving a request from the owner for release of funds as specified in §§ 6710.5 or 6710.6, the Department will instruct the trustee in writing to release to the owner the excess funds in the amount specified by the Department.

6711 STANDBY TRUST FUNDS

6711.1 An owner using any of the mechanisms authorized under §§ 6706, 6708, or 6709 shall establish a standby trust fund when the mechanism is acquired.

6711.2 The trustee of a standby trust fund shall be an entity that has the authority to act as a trustee and whose trust operations are examined and regulated by an agency of the federal government or the District of Columbia.

6711.3 Each standby trust agreement shall be in the form prescribed by Appendix 67-8 (Trust Agreement), and shall be accompanied by the prescribed formal certification of acknowledgement.

6711.4 The Department will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the Department determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.

6711.5 An owner may establish a single trust fund as the depository mechanism for all funds assured in compliance with this chapter, including standby trust funds.

6712 DRAWING ON FINANCIAL ASSURANCE MECHANISM

6712.1 A guarantor, surety, or issuer of a letter of credit shall place the amount of funds specified by the Department, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if both of the following occur:

(a) The owner fails to establish alternative financial assurance within sixty (60) days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or other financial assurance mechanism; and

(b) The Department determines or suspects that a release from an UST covered by the mechanism has occurred and has notified the owner or operator, or the owner or operator has notified the Department of a release from an UST covered by the assurance mechanism.

6712.2 A guarantor, surety, or person issuing a letter of credit shall place the amount of funds specified by the Department, up to the limit of funds provided by the financial assurance mechanism, into a standby trust if any of the conditions set forth in §§ 6712.3(a), (b)(1), or (b)(2) occurs.

6712.3 The Department may draw on a standby trust fund when either of the following occurs:

(a) The Department makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under Chapter 62; or

(b) The Department has received either of the following:

(1) Certification from the owner, the third-party liability claimant(s), and the attorneys representing the owner and the third-party liability claimant(s) that a third-party liability claim should be paid. The certification shall be in the form prescribed by Appendix 67-9 (Certification of Valid Claim); or

(2) A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage that was caused by an accidental release from an underground storage tank covered by financial assurance under this chapter, and the Department determines that the owner or operator has not satisfied the judgment.

6712.4 If the Department determines that the amount of corrective action costs and third-party liability claims eligible for payment as provided in § 6712.3(b) may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment.

6712.5 The Department will pay third-party liability claims in the order in which the Department receives certifications and valid court orders under § 6712.3(b).

6713 REPLENISHMENT OF GUARANTEES, LETTERS OF CREDIT, OR SURETY BONDS

6713.1 If at any time after a standby trust is funded with funds drawn from a guarantee, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner shall do either of the following by the anniversary date of the financial mechanism from which the funds were drawn:

(a) Replenish the value of financial assurance to equal the full amount of coverage required; or

(b) Acquire another financial assurance mechanism for the amount by which funds in the standby trust have been reduced.

6713.2 For purposes of this section, the full amount of coverage required is the amount of coverage required under § 6700. If a combination of mechanisms was used to provide the assurance funds that were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

6714 CANCELLATION OR NON-RENEWAL OF FINANCIAL ASSURANCE

6714.1 Except as otherwise provided in this chapter, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail, return receipt requested, to the owner.

6714.2 Termination of a guarantee, surety bond, or letter of credit may not occur until one hundred twenty (120) days after the date on which the owner receives the notice of termination, as evidenced by the return receipt.

6714.3 Termination of insurance or risk retention group coverage, except for non-payment of premium(s) or misrepresentation by the insured, may not occur until sixty (60) days after the date on which the owner receives the notice of termination, as evidenced by the return receipt. Termination due to non-payment of premium(s) or misrepresentation by the insured may not occur until a minimum of ten (10) days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

6714.4 The provider of financial assurance shall send a copy of each notice of cancellation or termination to the Department, in accordance with § 5500.4, at the same time the notice is sent to the owner.

6714.5 If a provider of financial responsibility cancels or fails to renew for reasons other than the incapacity of the provider as specified in § 6701.6, the owner shall obtain

alternate coverage as specified in this section not later than sixty (60) days after receipt of the notice of termination.

6714.6 If an owner fails to obtain alternate coverage within sixty (60) days after receiving a notice of termination, the owner shall notify the Department of the failure in accordance with § 5500.4 and submit the following to the Department:

(a) The name and address of the provider of the financial assurance mechanism subject to termination;

(b) The effective date of termination; and

(c) The evidence of the financial assurance mechanism subject to the termination that is maintained in accordance with § 6702.

6715 BANKRUPTCY OR INCAPACITY

6715.1 Within ten (10) days after commencement of a voluntary or involuntary proceeding under Title 11 of the United States Code (Bankruptcy) naming an owner as debtor, the owner shall, in accordance with § 5500.4, notify the Department by certified mail, return receipt requested, of the commencement of the proceedings, and submit to the Department the appropriate forms listed in §§ 6702.4 through 6702.7 documenting current financial responsibility.

6715.2 Within ten (10) days after commencement of a voluntary or involuntary proceeding under Title 11 of the United States Code (Bankruptcy) naming a guarantor providing financial assurance as debtor, the guarantor shall notify the owner by certified mail, return receipt requested, of the commencement of proceedings, as required under § 6706.

6715.3 An owner who obtains financial assurances by a mechanism other than the financial test of self-insurance is deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, or letter of credit.

6715.4 An owner shall obtain alternative financial assurance, in accordance with this chapter, not later than thirty (30) days after receiving notice of the bankruptcy or incapacity of its provider of financial assurance, or the suspension or revocation of the authority of its provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, or letter of credit.

6715.5 If an owner does not obtain alternative assurance within thirty (30) days after notification of bankruptcy or incapacity, as provided in this section, the owner shall notify the Department.

APPENDIX 67-1

CERTIFICATION OF FINANCIAL RESPONSIBILITY

_____[owner]_____hereby certifies that it is in compliance with the financial responsibility requirements of 20 DCMR Chapter 67.

The financial assurance mechanism(s) used to demonstrate financial responsibility under 20 DCMR Chapter 67 are as follows:

[Type of mechanisms]

_____

[Name of issuer]

_____

[Mechanism number (if applicable)]

_____

[Amount of coverage]

_____

[Effective period of coverage]

_____

[Whether mechanism covers "taking correction action" or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases."]

_____

_____

_____

[Type of mechanisms]

_____

[Name of issuer]

_____

[Mechanism number (if applicable)]

_____

[Amount of coverage]

_____

[Effective period of coverage]

_____

[Whether mechanism covers "taking correction action" or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases."]

_____

_____

_____

[Signature of owner]

_____

[Name of owner]

_____

[Title]

_____

[Date]

_____

[Signature of witness or notary]

_____

[Name of witness or notary]

_____

[Date]

_____

APPENDIX 67-2

FINANCIAL TEST OF SELF INSURANCE
LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of_____[name and address of the owner or guarantor]. This letter is in support of the use of_____["the financial test of self-insurance" and/or "guarantee"] to demonstrate financial responsibility for _____["taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by _____["sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least_____[dollar amount] per-occurrence and _____[dollar amount] annual aggregate arising from operating (an) underground storage tank(s). Underground storage tanks at the following facilities are assured by this financial test by this _____["owner" and/or "guarantor"].

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST(s) Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List for each facility: the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to 20 DCMR § 5600.]

A _____["financial test" and/or "guarantee"] is also used by _____["owner" or "guarantor"] to demonstrate evidence of financial responsibility in the following amounts under other EPA regulations or state programs authorized by EPA under 40 CFR Parts 145 and 271:

EPA Regulation	**Amount**
Closure (§§ 264.143 and 265.143)	_____
Post-Closure Care (§§ 264.145 and 265.145)	_____
Liability Coverage (§§ 264.147 and 265.147)	_____
Corrective Action (§ 264.101(b))	_____
Plugging and Abandonment (§ 144.63)	_____
Closure	_____

Post-Closure Care	_____
Liability Coverage	_____
Corrective Action	_____
Plugging and Abandonment	_____
Total	_____

This _____["owner" or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his or her financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of 20 DCMR § 6704 are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of 20 DCMR § 6705 are being used to demonstrate compliance with the financial test requirements.]

Alternative I

1.	Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee.	$ _____	
2.	Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee.	$ _____	
3.	Sum of lines 1 and 2 ___	$ _____	
4.	Total tangible assets___	$ _____	
5.	Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] _____	$ _____	
6.	Tangible net worth [subtract line 5 from line 4].	$ _____	
		Yes	No
7.	Is line 6 at least ten million dollars ($ 10,000,000)?	____	____
8.	Is line 6 at least 10 times line 3?	____	____

9.	Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?	____	____
10.	Have financial statements for the latest fiscal year been filed with the Energy Information Administration?	____	____
11.	Have financial statements for the latest fiscal year been filed with the Rural Utilities Service?	____	____
12.	Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? [Answer "Yes" only if both criteria have been met.]	____	____

Alternative II

1.	Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee.	$_____
2.	Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test or guarantee.	$_____
3.	Sum of lines 1 and 2 _____	$_____
4.	Total tangible assets _____	$_____
5.	Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6]_____	$_____
6.	Tangible net worth [subtract line 5 from line 4]	$_____
7.	Total assets in the U.S. [required only if less than ninety percent (90%) of assets are located in the U.S.] _____	$_____

		Yes	No
8.	Is line 6 at least ten million dollars ($ 10,000,000)?	_____	_____

9.	Is line 6 at least six (6) times line 3?	_____	_____
10.	Are at least ninety percent (90%) of assets located in the U.S.? [If "No," complete line 11]	_____	_____
11.	Is line 7 at least six (6) times line 3? [Fill in either lines 12-15 or lines 16-18]	_____	_____
12.	Current Assets _____	$ _____	
13.	Current Liabilities_____	$ _____	
14.	Networking capital [subtract line 13 from line 12]	$ _____	

		Yes	No
15.	Is line 14 at least six (6) times line 3?	_____	_____
16.	Current bond rating of most recent bond issue.	_____	_____
17.	Name of rating service _____		
18.	Date of maturity of bond_____		

		Yes	No
19.	Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Utilities Service?	_____	_____

[If "No," please attach a report from an independent certified public accountant certifying that there are no material differences between the data as reported in lines 4-18 above and the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in Appendix 67-2 of 20 DCMR Chapter 67 as such regulations were constituted on the date shown immediately below.

[Signature]_____

[Name]_____

[Title]_____

[Date]_____

APPENDIX 67-3

GUARANTEE

Guarantee made this_____[date] by _____[name of guaranteeing entity], a business entity organized under the laws of the District of Columbia, herein referred to as guarantor, to the Department of Energy and Environment (Department) and to any and all third parties, and obligees, on behalf of_____[owner] of _____[business address].

RECITALS:

(1) Guarantor meets or exceeds the financial test criteria of 20 DCMR § 6703 and agrees to comply with the requirements for guarantors as specified in 20 DCMR §§ 6706.4 through 6706.8.

(2) _____[owner] owns the following underground storage tank(s) covered by this guarantee:

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST(s) Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 20 DCMR § 5600, and the name and address of the facility.]

This guarantee satisfies 20 DCMR Chapter 67 requirements for assuring funding for _____["taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from the above-identified underground storage tank(s) in the amount of _____[dollar amount] per-occurrence and _____[dollar amount] annual aggregate.

(3) _____[Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner); "On behalf of our affiliate" (if guarantor is a related firm of the owner); or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner)] _____[owner], guarantor guarantees to the Department and to any and all third parties that:

In the event that _____[owner] fails to provide alternate coverage within sixty (60) days after receipt of a notice of cancellation of this guarantee and the Director of the Department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the Director, shall fund a standby trust fund in accordance with the provisions of 20 DCMR § 6712, in an amount not to exceed the coverage limits specified above.

In the event that the Director determines that _____[owner] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with 20 DCMR Chapter 62, the guarantor upon written instructions from the Director shall fund a standby trust fund in accordance with the provisions of 20 DCMR § 6712 in an amount not to exceed the coverage limits specified above.

If _____[owner] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by _____["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the Director, shall fund a standby trust fund in accordance with the provisions of 20 DCMR § 6712 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

(4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of § 6703, guarantor shall send within one hundred twenty (120) days of such failure, by certified mail, notice to _____[owner]. The guarantee will terminate one hundred twenty (120) days from the date of receipt of the notice by _____[owner], as evidenced by the return receipt.

(5) Guarantor agrees to notify _____[owner] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code naming guarantor as debtor, within ten (10) days after commencement of the proceeding.

(6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of _____[owner] pursuant to 20 DCMR Chapters 55 through 70.

(7) Guarantor agrees to remain bound under this guarantee for so long as _____ [owner] must comply with the applicable financial responsibility requirements of the regulations under 20 DCMR Chapter 67 for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to _____[owner], such cancellation to become effective no earlier than one hundred twenty (120) days after receipt of such notice by _____[owner], as evidenced by the return receipt.

(8) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of _____[owner] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of _____[owner] arising from, and in the course of, employment by _____[owner];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by _____[owner] that is not the direct result of a release from a petroleum underground storage tank; and

(e) Bodily damage or property damage for which _____[owner] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §§ 6700.10 through 6700.17; and

(9) Guarantor expressly waives notice of acceptance of this guarantee by the Department, by any or all third parties, or by _____[owner].

I hereby certify that the wording of this guarantee is identical to the wording specified in Appendix 67-3 of 20 DCMR Chapter 67 as such regulations were constituted on the effective date shown immediately below.

[Effective date] _____

[Name of guarantor] _____

[Authorized signature for guarantor] _____

[Name of person signing] _____

[Title of person signing] _____

{Signature of witness or notary] _____

APPENDIX 67-4

CERTIFICATE OF INSURANCE

Name and address of each covered location:

_____
_____
_____

Policy number:

_____

Period of coverage [current policy period]:

_____

Address of [Insurer or Risk Retention Group]:

_____
_____

Name of insured:

_____

Address of insured:

_____

CERTIFICATION:

(1) _____[name of Insurer or Risk Retention Group], [the "Insurer" or "Group"], as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 20 DCMR § 5600 and the name and address of the facility] for _____[insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different

tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are _____[insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs, which are subject to a separate limit under the policy.

This coverage is provided under_____[policy number]. The effective date of said policy is_____[date].

(2) The ["Insurer" or "Group"] further certifies the following with respect to the insurance described in paragraph 1:

(a) Bankruptcy or insolvency of the insured shall not relieve the _____ [Insurer or Group] of its obligations under the policy to which this certificate applies.

(b) The _____["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured from any such payment made by the _____["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 20 DCMR §§ 6703 through 6710.

(c) Whenever requested by the Director, the _____["Insurer" or "Group"] agrees to furnish to the Director a signed duplicate original of the policy and all endorsements.

(d) Cancellation or any other termination of the insurance by the _____ ["Insurer" or "Group"], except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty (60) days after a copy of such written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten (10) days after a copy of such written notice is received by the insured.

[Insert for claims-made policies]:

(e) The insurance covers claims otherwise covered by the policy that are reported to the _____["Insurer" or "Group"] within six (6) months of the effective date of cancellation or non-renewal of the policy except where the new

or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

I hereby certify that the wording of this instrument is identical to the wording in Appendix 67-4 of 20 DCMR Chapter 67, and that the _____["Insurer" or "Group"] is _____["licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states"]

[Signature of Authorized Representative of Insurer] _____

[Name of person signing] _____

[Title of person signing] _____

Authorized representative of _____[name of Insurer or Risk Retention Group]

[Address of Representative] _____

APPENDIX 67-5

ENDORSEMENT

Name and address of each covered location:

_____
_____
_____

Policy number:

_____

Period of coverage [current policy period]:

_____

Address of [Insurer or Risk Retention Group]:

_____
_____
_____

Name of insured:

_____

Address of insured:

_____

ENDORSEMENT:

(1) This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 20 DCMR § 5600 and the name and address of the facility.]

For _____[insert: “taking corrective action” and/or "compensating third parties for bodily injury and property damage caused by" either “sudden accidental releases” or “nonsudden accidental releases” or “accidental releases” in accordance with

and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are _____[insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each UST or location], exclusive of legal defense costs which are subject to a separate limit under the policy]. This coverage is provided under _____[policy number]. The effective date of said policy is _____[date].

(2) The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections (a) through (e) of this paragraph 2 are hereby amended to conform with subsections (a) through (e):

(a) Bankruptcy or insolvency of the insured shall not relieve the _____ ["Insurer" or "Group"] of its obligations under the policy to which this endorsement is attached;

(b) The _____["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the _____["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 20 DCMR §§ 6703-6710;

(c) Whenever requested by the Director of the Department of Energy and Environment, _____["Insurer" or "Group"] agrees to furnish to the Director a signed duplicate original of the policy and all endorsements;

(d) Cancellation or any other termination of the insurance by the _____ ["Insurer" or "Group"], except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty (60) days after a copy of such written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten (10) days after a copy of such written notice is received by the insured.

[Insert for claims made policies]:

(e) The insurance covers claims otherwise covered by the policy that are reported to the _____["Insurer" or "Group"] within six (6) months of the effective date of the cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

I hereby certify that the wording of this instrument is identical to the wording in Appendix 67-5 of 20 DCMR Chapter 67 and that the _____["Insurer" or "Group"] is _____["licensed to transact the business of insurance or eligible to provide insurance as excess or surplus lines insurer in one or more states"].

[Signature of Authorized Representative of Insurer or Risk Retention Group]

_____

[Name of person signing] _____

[Title of person signing] _____

Authorized Representative of _____[name of Insurer or Risk Retention Group]

[Address of Representative] _____

APPENDIX 67-6

PERFORMANCE BOND

Date bond executed: _____

Period of coverage: _____

Principal: _____[legal name and business address of owner]

Type of Organization: _____[insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation (if applicable): _____

Surety(ies): _____[name(s) and business address(es)]

SCOPE OF COVERAGE:

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST(s) Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 20 DCMR § 5600, and the name and address of the facility as above.]

List the coverage guaranteed by the bond: _____
["Taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank."]

Penal Sums of Bond:

Per-occurrence $ _____
Annual aggregate $ _____
Surety's bond number: _____

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the District of Columbia Department of Energy and Environment (Department) in the above penal sums for the payment of which we bind ourselves, our heirs, executors,

administrators, successors, and assigns jointly and severally; provided, that where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Subtitle I of the Solid Waste Disposal Act, as amended, to provide financial assurance for _____
[insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above; and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully _____["'"take corrective action, in accordance with 20 DCMR Chapter 62 and the Director of the Department's instructions for," and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the tank(s) identified above, or if the Principal shall provide alternative financial assurance, as specified in 20 DCMR Chapter 67, within one hundred twenty (120) days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

This obligation does not apply to any of the following:

(a) Any obligation of _____[owner] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of _____[owner] arising from, and in the course of, employment by _____[owner];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care of, custody, or control of, or occupied by _____[owner] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which _____[owner] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a

contract or agreement entered into to meet the requirements of 20 DCMR §§ 6700.10 through 6700.17.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the Director that the Principal has failed to _____ ["take corrective action, in accordance with 20 DCMR Chapter 62 and the Director's instructions," and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform _____["corrective action in accordance with 20 DCMR Chapter 62 and the Director's instructions," and/or "third-party liability compensation"] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the Director under 20 DCMR § 6712.

Upon notification by the Director that the Principal has failed to provide alternate financial assurance within sixty (60) days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the Director has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the Director under § 6712.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statute, rules and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the one hundred twenty (120) days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Thereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in Appendix 67-6 of 20 DCMR Chapter 67 as such regulations were constituted on the date this bond was executed.

Principal

[Signature(s)] _____

[Name(s)] _____

[Title(s)] _____

[Corporate seal] _____

Corporate surety(ies)

[Name and address] _____

[State of incorporation] _____

[Liability limit] $ _____

[Signature(s)] _____

[Names(s) and title(s)] _____

[Corporate seal)] _____

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: $ _____

APPENDIX 67-7

IRREVOCABLE STANDBY LETTER OF CREDIT

_____[Name and address of issuing institution]

_____[Name and address of Director of District of Columbia Department of Energy and Environment]

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of _____[owner] of _____[address] up to the aggregate amount of _____[in words] U.S. dollars ($ _____[insert dollar amount]), available upon presentation of:

(1) Your sight draft, bearing reference to this letter of credit, No. _____; and

(2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of Subtitle I of the Solid Waste Disposal Act, as amended."

This letter of credit may be drawn on to cover _____[insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the underground storage tank(s) identified below in the amount of _____[in words] $_____[insert dollar amount] per occurrence and _____[in words] $_____[insert dollar amount] annual aggregate:

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST(s) Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 20 DCMR § 5600, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

(a) Any obligation of _____[owner] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of _____[owner] arising from, and in the course of, employment by _____[owner];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by _____[owner] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which _____[owner] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 20 DCMR §§ 6700.10 through 6700.17.

This letter of credit is effective as of _____[date] and shall expire on _____[date], but such expiration date shall be automatically extended for a period of _____[at least the length of the original term] on _____[expiration date] and on each successive expiration date, unless, at least one hundred twenty (120) days before the current expiration date, we notify _____[owner] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that _____[owner] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for one hundred twenty (120) days after the date of receipt by _____[owner], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of _____[owner] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in Appendix 67-7 of 20 DCMR Chapter 67 as such regulations were constituted on the date shown immediately below.

[Signature(s) of official(s) of issuing institution]

_____

[Title(s) of official(s) of issuing institution]

_____

[Date]

_____

This credit is subject to _____[insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

APPENDIX 67-8

TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of _____[date] by and between _____[name of owner], a _____[name of state] _____["corporation," "partnership," "association," or "proprietorship"], the "Grantor," and _____[name of corporate trustee], _____[insert "Incorporated in the state of _____" or "a national bank"], the Trustee.

Whereas, the United States Environmental Protection Agency, "EPA," an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached Schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the [insert "standby" where trust agreement is a standby trust agreement] trust agreement.

(This paragraph is only applicable to the standby trust agreement.) [Whereas, the Grantor has elected to establish _____[insert either "a guarantee," "surety bond," or "letter of credit"] to provide all or part of such financial assurance for the underground storage tanks identified herein and is required to establish a standby trust fund able to accept payments from the instrument];

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

SECTION 1. DEFINITIONS

As used in this Agreement:

(a) The term "Grantor" means the owner who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

SECTION 2. IDENTIFICATION OF THE FINANCIAL ASSURANCE MECHANISM

(This section and paragraph is only applicable to the standby trust agreement.) [This Agreement pertains to the _____[identity the financial assurance mechanism,

either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments].

SECTION 3. ESTABLISHMENT OF FUND

The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the District of Columbia Department of Energy and Environment (Department). The Grantor and the Trustee intend that no third-party have access to the Fund except as herein provided. (The following sentence is only applicable to the standby trust agreement) [The Fund is established initially as a standby to receive payments and shall not consist of any property.] Payments made by the provider of financial assurance pursuant to the Director of the Department's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the Department.

SECTION 4. PAYMENT FOR ["CORRECTIVE ACTION" AND/OR "THIRD-PARTY LIABILITY CLAIMS"]

The Trustee shall make payments from the Fund as the Director shall direct, in writing, to provide for the payment of the costs of _____[insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the tanks covered by the financial assurance mechanism identified in the Agreement.

The Fund may not be drawn upon to cover any of the following:

(a) Any obligation of _____[owner] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to any employee of _____[owner] arising from, and in the course of employment by _____[owner];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by _____[owner] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which _____[owner] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other

than a contract or agreement entered into to meet the requirements of 20 DCMR §§ 6700.10 through 6700.17.

The Trustee shall reimburse the Grantor, or other persons as specified by the Department, from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as the Director shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Director specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

SECTION 5. PAYMENTS COMPRISING THE FUND

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

SECTION 6. TRUSTEE MANAGEMENT

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his or her duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(a) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 USC §§ 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;

(b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

(c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

SECTION 7. COMMINGLING AND INVESTMENT

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC §§ 80a-1 *et seq*., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

SECTION 8. EXPRESS POWERS OF TRUSTEE

Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve Bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

SECTION 9. TAXES AND EXPENSES

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

SECTION 10. ADVICE OF COUNSEL

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

SECTION 11. TRUSTEE COMPENSATION

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

SECTION 12. SUCCESSOR TRUSTEE

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail ten (10) days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this section shall be paid as provided in Section 9.

SECTION 13. INSTRUCTIONS TO THE TRUSTEE

All orders, requests, and instructions by the Grantor to the trustee shall be in writing, signed by such persons as are designated in Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor’s orders, requests, and instructions. All orders, requests, and instructions by the Director to the Trustee shall be in writing, signed by the Director, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Director hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the Director, except as provided for herein.

SECTION 14. AMENDMENT OF AGREEMENT

This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and the Director if the Grantor ceases to exist.

SECTION 15. IRREVOCABILITY AND TERMINATION

Subject to the right of the parties to amend this Agreement as provided in Section 14, above, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the Director, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

SECTION 16. IMMUNITY AND INDEMNIFICATION

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

SECTION 17. CHOICE OF LAW

This Agreement shall be administered, construed, and enforced according to the laws of the District of Columbia, or the Comptroller of the Currency in the case of National Association banks.

SECTION 18. INTERPRETATION

As used in this Agreement, words in singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in Appendix 67-8 of 20 DCMR Chapter 67 as such regulations were constituted on the date written above.

[Signature of grantor] _____

[Name of the grantor] _____

[Title] _____

Attest:

[Signature of trustee] _____

[Name of trustee] _____

[Title] _____

[Seal] _____

Attest:

[Signature of witness] _____

[Name of witness] _____

[Title] _____

[Seal] _____

District of Columbia, _____ss:

On this _____[date], before me personally came _____ [owner] who, being by me duly sworn, did depose and say that he/she resides at _____[address] that he/s he is _____[title] of _____[corporation], the corporation described in and which executed the above instrument; that he/she knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he/she signed his/her name thereto by like order.

[Signature of notary public] _____

[Name of notary public] _____

SCHEDULE A TO PRIVATE TRUST AGREEMENT

UST Facility I.D. Number	Number of UST(s)	Name/Address of UST(s) Facility
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 20 DCMR §5600, and the name and address of the facility.]

SCHEDULE B TO PRIVATE TRUST AGREEMENT

_____
_____
_____
_____
_____

[Grantor should list here the name, title, and business address of each person with authority to issue orders, requests or instructions pertaining to this Private Trust Agreement on behalf of Grantor.]

APPENDIX 67-9

CERTIFICATION OF VALID CLAIM

The undersigned, as principals and as legal representatives of _____[owner] and _____[insert name and address of third-party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by accidental release arising from operating _____[owner's] underground storage tank should be paid in the amount of $ [_____].

[Signatures]

_____

Owner

_____

Attorney(s) for Owner

_____

(Notary)

_____

Date

[Signatures]

_____

Claimant(s)

_____

Attorney(s) for Claimant(s)

_____

(Notary)

_____

Date

CHAPTER 70 UNDERGROUND STORAGE TANKS – DEFINITIONS

7099 DEFINITIONS

7099.1 When used in the UST Regulations, the following terms and phrases shall have the meanings ascribed:

Accidental release - any release of petroleum, neither expected nor intended by the tank owner or operator, arising from operating an underground storage tank that results in the need for corrective action or compensation for bodily injury or property damage.

Act - the District of Columbia Underground Storage Tank Management Act of 1990, effective March 8, 1991 (D.C. Law 8-242; D.C. Official Code §§ 8-113.01 *et seq*.).

Agent in charge - a person designated by an owner or operator with direct supervisory responsibility for an activity or operation at a facility, such as the transfer of a regulated substance to or from any point in the facility.

Airport hydrant fuel distribution system or **airport hydrant system -** an UST system used to fuel aircraft and that operates under high pressure with large diameter piping that typically terminates into one or more hydrants or fill stands. The airport hydrant system begins where fuel enters one or more tanks from an external source, such as a pipeline, barge, rail car, or other motor fuel carrier.

Ancillary equipment - any device, including but not limited to piping, fittings, flanges, valves, and pumps, used to distribute, meter, or control the flow of regulated substances to and from an UST.

Authorized agent - a person authorized by appointment or by law to receive service of process for another person, including a registered agent.

Beneath the surface of the ground - located under the land's surface or covered with earthen materials.

Bodily injury - the meaning given to this term under applicable District of Columbia law; however, the term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

Cathodic protection - a technique to prevent corrosion of a metal surface by making the surface the cathode of an electrochemical cell. For example, a

tank system can be cathodically protected through the application of either galvanic anodes or impressed current.

Change-in-service - the transition from storing a regulated substance in an UST system to storing a non-regulated substance, such as water, in the UST system.

Chemical(s) of concern - constituents of a regulated substance that are identified for evaluation in the risk assessment process.

Class A operator - the individual who has primary responsibility to operate and maintain the UST system in accordance with applicable requirements of the Act and UST Regulations. The Class A operator typically manages resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements.

Class B operator - the individual who has day-to-day responsibility for implementing applicable regulatory requirements of the Act and UST Regulations. The Class B operator typically implements in-field aspects of operations, maintenance, and associated recordkeeping for the UST system.

Class C operator - the individual responsible for initially addressing emergencies presented by a spill or release from an UST system. The Class C operator typically controls or monitors the dispensing or sale of regulated substances.

Closure-in-place - a method of permanently closing an UST system that cannot be removed from the ground by removing all of the regulated substances left in the UST system and filling the tank with inert material.

Compatible - the ability of two (2) or more substances to maintain the respective physical and chemical properties upon contact with one another for the design life of the UST system under conditions likely to be encountered in the UST.

Consumptive use - when describing heating oil use, consumed on the premises where the UST is located.

Containment sump - a liquid-tight container that protects the environment by containing leaks and spills of regulated substances from piping, dispensers, pumps, and related components in the containment area. Containment sumps may be single walled or secondarily contained and located at the top of tank (such as a tank top or submersible turbine pump sump), underneath the dispenser (such as a under-dispenser containment sump),

or at other points in the piping run (such as a transition or intermediate sump).

Corrective action - the sequence of actions that address a release or threatened release from an UST or UST system, which include site investigation, initial response and abatement, free product removal, well installation, site assessment, development of a corrective action plan, remediation, site monitoring, and well closure.

Corrosion expert - a person who is accredited or certified as being qualified by the National Association of Corrosion Engineers, or is a registered professional engineer with certification or licensing that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.

Department - the District of Columbia Department of Energy and Environment.

Dielectric material - a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate UST systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of the UST system from one another, such as a tank from piping.

Dispenser - equipment located aboveground that dispenses regulated substances from the UST system.

Dispenser system - the dispenser and the equipment necessary to connect the dispenser to the UST system.

District - the District of Columbia.

Earthen materials - earth, soil, ground, clay, gravel, sand, silt, and rock.

Electrical equipment - underground equipment that contains dielectric fluid that is necessary for the operation of equipment, such as transformers and buried electrical cable.

Emergency generator tank - an UST that stores fuel solely for the use of emergency power generation or backup systems.

Engineering control - a physical modification to a site or facility (such as a slurry wall, cap, vapor barrier, or point of use water treatment system) to reduce or eliminate the potential for exposure to chemical(s) of concern.

Environmentally sensitive receptor - a wetland; wildlife breeding or wintering area for a species of concern; habitat for an endangered plant or animal

species; federal or local park; or other area or thing that can be adversely impacted by exposure to pollution or contamination.

Excavation zone - the volume containing the UST system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the UST system is placed at the time of installation.

Existing UST system - an UST system used to contain a regulated substance for which installation commenced on or before November 12, 1993. Installation is considered to have commenced if the owner or operator obtained all federal and District of Columbia government approvals or permits necessary to begin physical construction of the facility or installation of the tank system, and either:

(a) A continuous physical construction or installation program has begun at the facility; or

(b) The owner or operator has entered into contractual obligations for physical construction at the facility or installation of the tank system to be completed within a reasonable time and that could not be canceled or modified without substantial loss.

Exposure - an organism's contact with chemical(s) of concern that may be absorbed at the exchange boundaries (such as skin, lungs, and liver).

Exposure assessment - an assessment to determine the extent of exposure of, or potential for exposure of, receptors to regulated substances from a release from an UST based on factors such as the nature and extent of the contamination, the existence of or potential for exposure pathways (including ground or surface water contamination, air emissions, and food chain contamination), the size of the community within the likely pathways of exposure, and the comparison of expected exposure levels to the short-term and long-term health effects associated with identified contaminants and any available recommended exposure or tolerance limits for such contaminants.

Exposure pathway - the course a chemical (or chemicals) of concern takes from the source area(s) to an exposed organism. An exposure pathway describes a unique mechanism by which an individual or population is exposed to a chemical(s) of concern originating from a site. Each exposure pathway includes a source or release from a source, a point of exposure, and an exposure route. If the exposure point differs from the source, a transport medium (such as air) is also included.

Exposure route - the manner in which a chemical(s) of concern comes in contact with an organism (such as ingestion, inhalation, or dermal contact).

Facility – a location containing one (1) or more underground storage tanks .

Farm tank - a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. Farms include fish hatcheries, rangeland, and nurseries with growing operations.

Field-constructed tank - a tank constructed in the field, such as a tank constructed of concrete that is poured in the field, or a steel or fiberglass tank primarily fabricated in the field.

Financial reporting year - the latest consecutive twelve (12) month period for which any of the following reports used to support a financial test is prepared:

(a) A 10-K report submitted to the Securities and Exchange Commission;

(b) An annual report of tangible net worth submitted to Dun and Bradstreet; or

(c) Annual reports submitted to the Energy Information Administration or the Rural Utilities Service.

Flow-through process tank - a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flow-through process tanks do not include tanks used for the storage of materials prior to their introduction into the production process, or for the storage of finished products or by-products from the production process.

Free product - a regulated substance that is present as a non-aqueous phase liquid.

Gathering line - any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.

Green remediation - integrating environmentally beneficial or neutral practices into decision making, design, and implementation of remedial action, including conservation of natural resources, efficient use of energy, protection of air quality, recycling wastes, and minimizing pollution at the source.

Guarantor - any person, other than the owner, who provides evidence of financial responsibility for the underground storage tank facility.

Hazard index - the sum of two (2) or more hazard quotients for all relevant chemicals of concern and each of their exposure pathways.

Hazard quotient - the ratio of the level of exposure of a chemical of concern over a specified time period to a reference dose for that chemical of concern derived for a similar exposure period and exposure pathway.

Hazardous substance - a hazardous substance as defined in § 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC § 9601(14) (but not including any substance regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 USC §§ 6901 *et seq.*).

Hazardous substance UST system - an UST system that contains a hazardous substance, or any mixture of hazardous substances and petroleum, and which is not a petroleum UST system.

Heating oil - petroleum that is No. 1, No. 2, No. 4 (light), No. 4 (heavy), No. 5 (light), No. 5 (heavy), and No. 6 technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

Heating oil tank - an UST used for storing heating oil for consumptive use on the premises where the tank is located.

Hydraulic lift tank - a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate a lift, elevator, or other similar device.

Inert material - a substance or material that is not chemically or biologically reactive, such as cement slurry, flowable fly ash, flowable mortar, or polyurethane or expandable foam.

Initial response the action first taken to mitigate hazards to human health, safety, and the environment, including immediate or short-term abatement or containment measure to prevent the spread of a release.

Institutional control - a limitation on use of or access to a site or facility to eliminate or minimize potential exposure to one or more chemicals of concern, such as an easement, environmental covenant, zoning restriction, groundwater use restriction, or enforcement order.

Interim remedial action - ongoing action to mitigate fire and safety hazards and to prevent further migration of hydrocarbons in their vapor, dissolved, or liquid phase.

Leaking underground storage tank system or **LUST system -** an UST system from which there is a release of a regulated substance to the environment.

Legal defense cost - any expense that an owner or operator, or a provider of financial assurance, incurs in defending against claims or actions brought:

(a) By the U.S. Environmental Protection Agency, the District of Columbia, or a state to require corrective action or to recover the costs of corrective action;

(b) By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

(c) By any person to enforce the terms of a financial assurance mechanism.

Liquid trap - a sump, well cellar, or other trap used in association with oil and gas production, gathering, and extraction operations (including gas production plants) for the purpose of collecting oil, water, and other liquids. A liquid trap may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

Maintenance - the normal operational upkeep to prevent an UST system from releasing a regulated substance.

Monitoring pipe - an observation well installed in the excavation zone, and used for measuring a release of regulated substance from the tank. The term does not include a groundwater monitoring well installed outside the excavation zone and used to sample groundwater for the presence of contamination.

Motor fuel - a complex blend of hydrocarbons typically used in the operation of a motor engine, such as motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any blend containing one or more of these substances (such as motor gasoline blended with alcohol).

Natural attenuation - the reduction in the concentration(s) of chemicals of concern in environmental media due to naturally occurring physical, chemical, and biological processes (such as diffusion, dispersion, adsorption, chemical degradation, and biodegradation).

New UST system - an UST system that is or will be used to contain an accumulation of regulated substances and for which installation began after November 12, 1993.Installation is considered to have commenced if the owner or operator obtained all federal and District of Columbia government approvals or permits necessary to begin physical construction of the facility or installation of the tank system, and either:

(a) A continuous physical construction or installation program has begun at the facility; or

(b) The owner or operator has entered into contractual obligations for physical construction at the facility or installation of the tank system to be completed within a reasonable time and that could not be canceled or modified without substantial loss.

Non-aqueous phase liquid - a chemical that is insoluble or only slightly soluble in water and exists on or below the groundwater table.

Non-safe suction piping - all suction piping not meeting the definition of safe suction piping**.**

Occurrence - an accident, including continuous or repeated exposure to conditions, that results in a release from an UST. This definition is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence."

On the premises where located - with respect to heating oil USTs, located on the same property where the stored heating oil is used.

Operational life - the period beginning from when installation of an UST system has commenced until the time the UST system is permanently closed in accordance with Chapter 61.

Operator - any person in control of, or having responsibility for, the daily operation of a facility.

Overfill release- a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.

Owner -

(a) In the case of an UST in use on or after November 8, 1984, any person who owns an UST used for the storage, use, or dispensing of regulated substances; or

(b) In the case of an UST in use before November 8, 1984, but no longer in use on that date, any person who owned a tank immediately before discontinuation of its use.

Person - any individual, partnership, corporation (including a government corporation), trust, firm, joint stock company, association, consortium, joint venture, commercial entity, state, municipality, commission, political subdivision of a state, the District of Columbia government, the United States government, a foreign government, or any interstate body.

Petroleum - crude oil or any fraction of crude oil, that is liquid at standard conditions of temperature and pressure of sixty degrees (60º) Fahrenheit and fourteen and seven tenths pounds per square inch (14.7 psi) absolute.

Petroleum marketing facility - a facility at which petroleum is produced or refined, and any facility from which petroleum is sold or transferred to other petroleum marketers or to the public.

Petroleum UST system - an UST system that contains petroleum or a mixture of petroleum with *de minimis* quantities of other regulated substances. Petroleum UST systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

Pipe or piping - a hollow cylinder or tubular conduit that is constructed of non-earthen materials.

Pipeline facility - a new or existing pipe right-of-way and any associated equipment, facilities, or buildings, including gathering lines.

Point of demonstration - a location selected at or between the source and the potential point of exposure where the concentration of one or more chemicals of concern shall be at or below the determined target levels in media (for example, ground water, soil, or air).

Point of exposure - the point at which an individual or population may come in contact with one or more chemicals of concern originating from a source.

Pressurized piping - UST system piping that regularly carries a regulated substance with a force behind the flow that is greater than the ambient atmospheric pressure.

Property damage - the meaning given to this term by applicable law of the District of Columbia. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However,

exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

Provider of financial assurance - an entity that provides financial assurance to an owner or operator of an UST through one of the mechanisms listed in §§ 6703-6710, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, or trustee.

Real property owner - the owner of real property where an underground storage tank is or was located, or where contamination from an underground storage tank is discovered.

Receptors - individuals, populations, structures, utilities, wildlife, wetlands, habitats, parks, surface waters, and water supply wells that are or may be adversely affected by a release.

Regulated substance -

(a) Any hazardous substance defined in § 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC § 9601(14), but not including any substance regulated as a hazardous waste under subtitle C of title II of the Solid Waste Disposal Act, approved October 21, 1976, 42 USC §§ 6901 *et seq*.;

(b) Petroleum; or

(c) Any petroleum-based substance comprised of a complex blend of hydrocarbons, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

Release - any spill, leak, emission, discharge, escape, leach, or disposing from an UST. The term includes, but is not limited to, any release into ground water, surface water, or subsurface soils.

Release detection - determining whether a release of a regulated substance has occurred from an UST system into the environment or a leak has occurred into the interstitial space between the UST system and its secondary barrier or secondary containment around it.

Remediation or **remedial action -** any activity conducted to clean up a site where contamination by petroleum or chemicals of concern exceeds District of Columbia or federal standards for soil or water quality, or otherwise deemed necessary to protect human health, safety, and the environment. Examples include removal of contaminated soil, treatment of soil or

groundwater, or installation of engineering controls, including the use of green remediation techniques.

Repair - to restore to proper operating condition a tank, pipe, spill prevention equipment, overfill prevention equipment, corrosion protection equipment, release detection equipment, or other UST system component that has caused a release of product from the UST system or has failed to function properly.

Replace -

(a) For a tank, to remove a tank and install another tank; and

(b) For piping, to remove fifty percent (50%) or more of piping and install other piping, excluding connectors, connected to a single tank. For tanks with multiple piping runs, this definition applies independently to each piping run.

Residential tank - a tank located on property used primarily for dwelling purposes.

Responsible party -

(a) An owner or operator;

(b) A person who caused or contributed to a release from an underground storage tank system;

(c) A person who caused a release as a result of transfer of a regulated substance to or from an underground storage tank system;

(d) A person found to be negligent, including any person who previously owned or operated an underground storage tank or facility, or who arranged for or agreed to the placement of an underground storage tank system by agreement or otherwise; or

(e) The owner of real property where an underground storage tank is or was located, or where contamination from an underground storage tank is discovered if the owner or operator of the tank as defined in this chapter cannot be located or is insolvent, or if the real property owner refuses without good cause to permit the owner or operator of the tank access to the property to investigate or remediate the site.

Risk assessment - an analysis of the potential for adverse health effects from exposure to a chemical of concern to determine whether remedial action is needed or to develop target levels for remedial action.

Risk-based corrective action or RBCA - a risk-based decision making process designed to integrate risk and exposure assessments to tailor corrective action activities to site-specific conditions and risks, and to ensure that the chosen action is protective of human health and the environment.

Risk-based screening level or **screening level –** the risk-based corrective action target level for a chemical of concern developed under the Tier 1 evaluation.

Safe suction piping - suction piping designed and constructed to meet the following standards:

(a) The below-grade piping operates at less than atmospheric pressure;

(b) The below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;

(c) Only one (1) check valve is included in each suction line; and

(d) The check valve is located directly below and as close as practical to the suction pump.

Secondary containment - a release prevention and release detection system for a tank or piping. This system has an inner and outer barrier with a space in-between , also called the interstitial space, that is monitored for leaks. This term includes containment sumps when used for interstitial monitoring of piping.

Septic tank - a water-tight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from the receptacle is distributed for disposal through the soil and settled solids, and scum from the tank are pumped out periodically and hauled to a treatment facility.

Significant operational compliance inspection or **SOC inspection –** an inspection by a DOEE inspector or an approved third party to verify the compliance of an active UST facility with release detection, spill and overfill prevention, financial responsibility, recordkeeping, and operator training requirements.

Site - the area where one or more chemicals of concern have migrated, including areas outside the property boundary where an UST is or was located.

Site assessment - an evaluation of subsurface geology, hydrology, and surface characteristics to determine if a release has occurred, the levels of chemicals of concern, and the extent of the migration of chemicals of concern. The site assessment collects data on ground water quality and potential receptors, and generates information to support remedial action decisions.

Site investigation - initial testing at the location of a release or suspected release to confirm the existence of a release by sampling the soil and water around the UST system for the presence of contaminants.

Site-specific target level - risk-based remedial action target level for one or more chemicals of concern developed for a particular site under the Tier 2 evaluation.

Soil vapor - gaseous elements and compounds in the small spaces between particles in the subsurface unsaturated zone and that may be transported under pressure towards ground surface.

Source - with respect to a release from an UST, the UST, its piping, and any product contained therein.

Source area - either the location of free product or the location of the highest soil and ground water concentrations of chemicals of concern.

Stage I vapor recovery - control of gasoline vapors during UST tank refueling operations by delivery truck.

Stage II vapor recovery - control of gasoline vapors from vehicle refueling stations in accordance with 20 DCMR § 705.

Stormwater or wastewater collection system - piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water runoff resulting from precipitation, or domestic, commercial, or industrial wastewater, to and from retention areas or any areas where treatment is designated to occur. The collection of stormwater and wastewater does not include treatment except where incidental to conveyance.

Substantial business relationship - the extent of a business relationship necessary under the applicable laws of the District of Columbia to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner.

Suction piping - Underground piping that conveys regulated substances under suction, not pressure, which could be safe suction or non-safe suction.

Surface impoundment - a natural topographic depression, man-made excavation, or dike area formed primarily of earthen materials (although it may be lined with man-made materials) that is not an injection well.

Tangible net worth - the tangible assets that remain after deducting all liabilities. These assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

Tank - a stationary device designed to contain an accumulation of regulated substances and constructed of non-earthen materials (such as concrete, steel, or plastic) that provide structural support.

Target levels - numeric values or other performance criteria that are protective of human health, safety, and the environment.

Termination - with respect to Appendices 67-4 and 67-5, only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date from the retroactive date of the original policy.

Tier 0 evaluation - an analysis of levels of chemicals of concern based upon a comparison of test results from soil and water samples to the District of Columbia's standards for concentrations of chemicals of concern, as established in § 6208.

Tier 1 evaluation - a risk-based analysis conducted in accordance with the District's RBCA technical guidance to develop non-site-specific values for direct and indirect exposure pathways using conservative exposure factors and fate and transport for potential pathways and various property use categories (such as residential, commercial, and industrial uses).

Tier 2 evaluation - a risk-based analysis conducted in accordance with the District's RBCA technical guidance applying the direct exposure values established under a Tier 1 evaluation at the point(s) of exposure developed for a specific site and developing values for potential indirect exposure pathways at the points of exposure based on site-specific conditions.

Training program - any program that meets the requirements of Chapter 65 that provides information to and evaluates the knowledge of a Class A, Class B, or Class C operator about requirements for UST systems through testing,

practical demonstration, classroom or online instruction, or another approach approved by the Department.

Under-dispenser containment - containment underneath a dispenser system that will prevent leaks from the dispenser and piping within or above the under-dispenser containment from reaching soil or groundwater.

Underground area - an underground room, such as a basement, cellar, shaft, or vault, that provides enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.

Upgrade - the addition or retrofit of some systems, such as cathodic protection, lining, or spill and overfill controls, to improve the ability of an UST system to prevent the release of a regulated substance.

UST or **Underground storage tank -** one (1) or a combination of tanks, including the underground pipes that connect tanks, that is used to contain an accumulation of regulated substances, the volume of which (including the volume of connected underground pipes connected) is ten (10) percent or more beneath the surface of the ground.

UST Closure Specialist - a person performing oversight of UST closures, including tank removal, closure-in-place, inspection, and review and submittal of closure report.

UST Regulations - Chapters 55-70 of Title 20 (Environment) of the District of Columbia Municipal Regulations.

UST system or **tank system -** an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

UST System Technician - a person responsible for conducting, or providing continuous on-site supervision of, the installation, upgrade, repair, retrofit, abandonment, or removal of UST tanks.

UST System Tester - a person conducting, or providing continuous on-site supervision of, UST system tightness testing.

Voluntary remediating party - a person, who is not a responsible party, who undertakes a corrective action at a LUST site or facility.

Voluntary remediation - a corrective action performed by a person who is not a responsible party.

Wastewater treatment tank - a tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

The proposed rules are available for viewing at: https://doee.dc.gov/service/underground-storage-tank-program. Additionally, a copy of these proposed rules can be obtained for viewing at the Martin Luther King, Jr. Library, 901 G Street, N.W., Washington, D.C. 20001, during normal business hours.

All persons desiring to comment on the proposed regulations should file comments in writing no later than thirty (30) days after the publication of this notice in the *D.C. Register*. Comments should identify the commenter and be clearly marked "DOEE Underground Storage Tank Proposed Rule Comments." Comments may be (1) mailed or hand-delivered to DOEE, 1200 First Street, N.E., 5th Floor, Washington, D.C. 20002, Attention: DOEE Underground Storage Tank Regulations, or (2) sent by e-mail to ust.doee@dc.gov, with the subject indicated as "DOEE Underground Storage Tank Proposed Rule Comments."

DEPARTMENT OF HUMAN SERVICES

NOTICE OF THIRD EMERGENCY RULEMAKING

The Director of the District of Columbia ("District") Department of Human Services ("Department"), pursuant to the authority set forth in Section 31 of the Homeless Services Reform Act of 2005 ("HSRA" or "Act"), effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code § 4-756.02 (2012 Repl.)), and Mayor's Order 2006-20, dated February 13, 2006, hereby gives notice of the adoption, on an emergency basis, of the following new Chapter 79, entitled "Flexible Rent Subsidy Pilot Program", of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

The purpose of the new chapter is to establish rules to administer the District's Flexible Rent Subsidy Pilot Program and conditions of participation for enrolled households. The Flexible Rent Subsidy Pilot Program, which subsequently shall be referred to as the DC Flex Program (and "Program" throughout this rule), is a four (4) year pilot program that provides financial assistance to households to support their ability to pay monthly rental expenses, especially during periods of income volatility, in order to promote long-term housing stability. Training on budgeting and money management will be offered to households enrolled in the Program.

A Notice of Emergency and Proposed Rulemaking, was adopted on January 24, 2018, and became effective on that date, and published in the *D.C. Register* on April 27, 2018, at 65 DCR 4663. Emergency rules were subsequently published on June 1, 2018, at 65 DCR 6057. The emergency rules expired before comments could be incorporated into a final rulemaking, thereby necessitating these emergency rules.

Emergency rulemaking action, pursuant to Section 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2012 Repl.)), is necessary to allow the Department to continue to operate the Program as the Department receives and reviews comments in response to the proposed rulemaking, and to finalize the proposed rules. Therefore, taking emergency action under these circumstances will promote the immediate preservation of the health, safety, and welfare of District residents who are at risk of experiencing homelessness by permitting the Department to continue to support their efforts to maintain permanent housing. These emergency rules are identical to the emergency and proposed rules published on April 27, 2018, at 65 DCR 4663 and June 1, 2018 at 65 DCR 6057.

DHS adopted the emergency rules on September 21, 2018, and they went into effect at that time. The emergency rules shall remain in effect for not longer than one hundred and twenty (120) days from the adoption date, or until January 19, 2019, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*. If approved, the Department shall publish the effective date with the Notice of Final Rulemaking.

A new Chapter 79, FLEXIBLE RENT SUBSIDY PILOT PROGRAM, has been added to Title 29 DCMR, PUBLIC WELFARE, to read as follows:

CHAPTER 79 FLEXIBLE RENT SUBSIDY PILOT PROGRAM

7900 SCOPE

7900.1 The purpose of the Flexible Rent Subsidy Pilot Program, which subsequently shall be referred to as the DC Flex Program (and "Program" throughout this rule), is to support households that are at risk of experiencing homelessness to achieve stability in permanent housing. The Program provides financial assistance to each enrolled head of household in the instances where there is a gap between the total monthly rent expenses and the household's funds available for rent. The financial assistance is payable only to the households, with the exception noted in § 7905.11(b).

7900.2 The Department shall be responsible for the implementation of this chapter, which shall apply to all financial assistance provided through the Department pursuant to the Program.

7900.3 The Program shall operate for four years, beginning in Fiscal Year 2018.

7900.4 One person per household is eligible to enroll his or her household in the Program. This person shall be considered the head of household.

7900.5 The provisions of this chapter describe eligibility criteria; the application process; assistance determination; description of assistance provided and how it is administered; recertification requirements; and appeal procedures for the Program.

7900.6 Nothing in these rules shall be interpreted to mean that Program assistance is an entitlement. This Program shall be subject to annual appropriations and the availability of funds.

7900.7 The Department may execute contracts, grants, and other agreements as necessary to carry out the Program.

7901 ELIGIBILITY CRITERIA

7901.1 Only one person who is twenty-one (21) years old or older at the time of application per household is eligible to enroll his or her household in the Program. This person shall be considered the head of household.

7901.2 A household is composed of individuals who live in the same physical housing unit as the applying head of household, and shall include:

(a) Persons related by blood or legal adoption with legal responsibility for minor children in the household;

(b) Persons related by marriage or domestic partnership (as defined by section 2(4) of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114; D.C. Official Code § 32-701(4)), including stepchildren and unmarried parents of a common child who live together;

(c) Persons with a legal responsibility for an unrelated minor child or an unrelated adult with a disability; and

(d) Any person not included by §§ 7901.2(a)-(c), regardless of blood relationship, age, or marriage, whose history and statements reasonably demonstrate that the individuals intend to remain together in the same household and whose income contributes to total household expenses.

7901.3 An otherwise eligible person temporarily away from the housing unit due to employment, school, hospitalization, incarceration, legal proceedings or vacation shall be considered to be living in the household. A minor child who is away at school is considered to be living in the household if he or she returns to the housing unit on occasional weekends, holidays, school breaks, or during summer vacations.

7901.4 To establish initial eligibility for the Program, a household must:

(a) Reside in the District of Columbia, as defined by Section 2(32) of the Homeless Services Reform Act of 2005, effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code § 4-751.01(32)), at the time of application;

(b) Demonstrate risk of homelessness as evidenced by:

(1) Previous application for at least one emergency or temporary government-funded housing or rental assistance program administered by the District, including, but not limited to, the Emergency Rental Assistance Program, the Homelessness Prevention Program, or the Family Re-Housing and Stabilization Program, within the last forty-eight (48) months; and

(2) Having a total annual income less than or equal to thirty percent (30%) of the Median Family Income for the District, which is a periodic calculation provided by the United States Department of Housing and Urban Development; and

(c) Be headed by a person that is twenty-one (21) years old or older at the time of application, and who meets the following requirements:

(1) Has physical custody of one or more minor children;

(2) Is currently employed or has recent history of employment; and

(3) Is the lease holder for a rental unit.

7901.5 The applicant may be enrolled in a government-funded rental assistance program administered by the District at the time of application. However, if selected for the Program, no household member may be enrolled in both the Program and another District or federal government-funded rental assistance program at the same time. Enrollment in the Program shall not preclude receipt of shelter or rental assistance after participation in the Program has ended.

7902 HOUSEHOLD OUTREACH

7902.1 The Department will conduct outreach to households with an estimated high likelihood of meeting the eligibility criteria listed in § 7901, to inform these households about the Program and to determine potentially eligible households' interest in Program enrollment.

7902.2 Households that receive information about the Program shall be identified by the Department through administrative data contained in applications completed by households seeking or enrolled in government-funded housing or emergency rental assistance programs administered by the District.

7902.3 The Department will conduct outreach via the U.S. Postal Service, telephone, email, SMS text messages, or other communication means determined by the Department.

7902.4 Outreach communications will invite households interested in Program enrollment to submit an application as described in § 7903 to the Department via a web-based portal, U.S. Postal Service, or in person at a physical site determined by the Department.

7902.5 Outreach communication shall contain or provide a hyperlink to a description of the Program, the application and enrollment process, responsibilities of the Department and the Administrative Agent used to manage the Program, and Program participation requirements, including each applicant's involvement in budget and financial management activities.

7903 APPLICATION AND SELECTION PROCESS

7903.1 Each household interested in enrolling in the Program shall complete an application form provided by the Department that is signed by the head of household. An authorized representative may apply on behalf of the applying household if the applying head of household provides a written and signed

statement stating why he or she cannot personally complete the form and the name and address of the person authorized to act on his or her behalf.

7903.2 If the applicant has a disability or the authorized representative of the applicant with a disability requests assistance to complete the application, the Department shall assist such applicant or authorized representative with the application process to ensure that the applicant has an equal opportunity to submit an application.

7903.3 The Director of the Department will determine the number of applications that will be accepted for the Program, which is contingent on available funding. If at any point the Department receives additional funding for the program, the Department may reopen the application process at that time for new applications.

7903.4 Household enrollment shall follow a two-step process. The first step shall require the applying person to complete and submit a web-based or paper application to the Department as notification of his or her household's enrollment interest and self-reported eligibility in order to be selected. The second step shall require selected households to submit documentation to the Department that enables the Department or its designee to verify information on the household's application and Program eligibility criteria included in § 7901.

7903.5 The application will include questions that require the applicant to attest to the Program eligibility criteria listed in § 7901, and may also request the applicant to provide the following:

(a) Identifying information;

(b) Contact information;

(c) Household composition;

(d) Current income;

(e) Current monthly rent expense;

(f) Address of current rental unit;

(g) Consent to release information; and

(h) Any additional information deemed necessary by the Department.

7903.6 Due to limited Program availability during the pilot period, the Department will administer one or more assignment lotteries to determine which applying households are offered one of the available Program slots using the method described in § 7903.5, § 7903.7, and § 7903.8.

7903.7 The results of the Program's pilot period will be evaluated to understand its effectiveness in supporting households' long term housing stability. To increase the probability that the Program will be successful if expanded to enroll more households, the lottery will be structured so that the characteristics identified on the applications of the group of households offered a Program slot are similar to the characteristics identified on the application of all households that applied for the Program.

7903.8 After the lottery is completed, the Department will offer available Program slots to households selected by the lottery. The Department will notify selected households via the U.S. Postal Service, telephone, email or another communication mode determined by the Department. These Program slots are conditional, and are only official after the household responds to the Department's notice of the conditional offer and successfully completes the Program eligibility process described in § 7904. If a household fails to respond within the given timeframe, or after verification the household does not meet eligibility requirements for the Program, an additional household will be selected based on the method described in § 7903.10, until all slots have been filled.

7903.9 Each household selected for the Program will have thirty (30) calendar days from the date of notice to respond to the Department.

7903.10 Any household that declines the offer for the Program slot, fails to provide a response to the Department within thirty (30) calendar days of Program selection notice, or fails to meet the Program eligibility process described in § 7904, will lose their spot on the lottery result list, and the next household on the list will be offered the slot, until all slots have been filled.

7903.11 Any household that submits an application for Program enrollment will receive one or more of the following notices, as applicable:

(a) DC Flex Program: Notice of Ineligibility to Enter Lottery;

(b) DC Flex Program Lottery Results: Conditional Offer for Enrollment;

(c) DC Flex Program Lottery Results: Household Not Selected;

(d) DC Flex Program: Final Offer for Enrollment;

(e) DC Flex Program Enrollment: Unable to Verify Eligibility; and

(f) DC Flex Program Enrollment: Notice of Termination.

7903.12 Any household that submits an application for Program enrollment, but is not enrolled as a result of the processes described in § 7903.5 – 7903.10 will receive

oral and written notice via U.S. Postal Service. Written notice shall be one or more of the notices listed in § 7903.11, as applicable, which shall include:

(a) A clear statement of the client's application status, eligibility status, or termination from the Program;

(b) A clear and detailed statement of the factual basis for the action described in the notice, including the date or dates on which the basis or bases for the denial occurred;

(c) A reference to the statute, regulation, policy, or Program Rule pursuant to which the denial is being implemented;

(d) A clear and complete statement of the client's right to appeal the action through fair hearing and administrative review proceedings pursuant to § 7910, or the client's right to reconsideration pursuant to rules established by the Administrative Agent in accordance with Section 18 of the HSRA (D.C. Official Code § 4-754.32), including the appropriate deadlines for instituting the appeal or reconsideration; and

(e) A statement of the client's right, if any, to continuation of benefits pending the outcome of any appeal, pursuant to § 7910.3.

7903.13 Any household that submits an application for Program enrollment and successfully completes the application and eligibility verification processes described in §§ 7903.5 – 7903.10 and § 7904, shall receive the type of written notice from the Department listed at § 7903.11(d). This notice shall include the information listed in § 7904.9.

7903.14 Any household that submits an application for Program enrollment, is enrolled in the Program, but is terminated from Program enrollment, as described in § 7908.2, shall receive the type of written notice from the Department listed at § 7903.11(f). This notice shall include the information listed in § 7908.3.

7904 ELIGIBILITY VERIFICATION AND PROGRAM ENROLLMENT

7904.1 From each household offered a Program slot, the Department shall request documentation that will enable the Department to verify eligibility for the Program. The Department will contact each household through the U.S. Postal Service, email, telephone or other means determined by the Department.

7904.2 Documentation that the Department shall use to verify eligibility for the Program may include, but is not limited to:

(a) Birth certificates;

(b) District identification;

(c) Child custody reports;

(d) Copy of a current, valid lease agreement specifying the landlord's name and contact information, and the head of household's name;

(e) Pay stubs for the most immediate past two (2) months prior to Program application; and

(f) Earned Income Tax Credit filing for most immediate tax-year prior to Program application.

7904.3 In addition to documents listed in § 7904.2, the Department may use in-person interviews and third party information to verify Program eligibility.

7904.4 Each head of household offered a Program slot shall also sign and submit to the Department a release form, either personally or through an authorized representative, which authorizes the Department to obtain or verify information necessary to confirm Program eligibility.

7904.5 If further information is needed from the household to verify Program eligibility, the Department shall request additional information by telephone, email or US Postal Service. This request shall specify the information needed to complete the household's eligibility verification and the timeframe in which the additional documentation must be provided to the Department.

7904.6 The Department will notify the household once all requested documentation needed to verify eligibility has been received.

7904.7 If a household has not obtained and provided to the Department the requested information needed to verify eligibility for the Program within thirty (30) calendar days of the date of the Department's offer of a Program slot, the household will lose its spot on the list and a new household will be offered the subsidy, as described in Subsection § 7903.10.

7904.8 The Department shall determine the eligibility in as short a time as feasible, but not later than ten (10) business days after receipt of all requested information by the Department.

7904.9 If a household successfully completes the application and eligibility verification processes described in § 7903 and this section, the Department shall give to the applicant, directly or through an authorized representative, a written Notice of Enrollment in the Program, as listed in § 7903.11(d), which shall state:

(a) That the applicant is determined eligible and is enrolled in the Program;

(b) That receipt of Program assistance is conditioned upon the head of household's participation in all required Program activities as may be described in the Program Rules established in accordance with Section 18 of the HSRA (D.C. Official Code § 4-754.32);

(c) The length of time for which the Program's subsidy will be provided, per the applicant's successful compliance with the Program recertification criteria set forth in § 7906; and

(d) Name and contact information for the Administrative Agent that the Department will use to administer the Program.

7904.10 Upon a household's enrollment in the Program, the Department will facilitate the household's transition from any other District or federal government rent assistance program to ensure the household's compliance with the eligibility requirement set forth in § 7901.5.

7905 PROGRAM ADMINISTRATION

7905.1 The Department shall issue a competitive grant solicitation to select an Administrative Agent for the Program.

7905.2 The Department will determine what percentage of the annual allotment shall be dedicated to the Administrative Agent's allowable administrative fees, as described in § 7905.3, and the remaining total that shall be used for household financial assistance.

7905.3 The percentage of the annual allotment dedicated for the Administrative Agent's allowable administrative fees shall be used to pay for costs that are associated with the general operation of the Program and that cannot be attributed to any one enrolled household. These administrative fees may include:

(a) Staff salaries and fringe benefits;

(b) Overhead expenses, which may include, but are not limited to, supplies and IT equipment;

(c) Local travel for duties associated with program administration/oversight; and

(d) Other expenses agreed upon by the Department and Administrative Agent, consistent with District and federal law.

7905.4 The Department will refer households enrolled in the Program to the Administrative Agent.

7905.5 The Administrative Agent shall make available at least one in-person budgeting or financial management training for enrolled households within the first three (3) months of each household's enrollment into the Program, and monitor the enrolled households' participation in this training and others, if provided. If the Administrative Agent does not administer its own such training, the Administrative Agent may secure this type of training from another entity and coordinate the enrolled household's participation in this training. The Administrative Agent shall also make financial coaching or consultation opportunities available to clients in a manner approved by the Department.

7905.6 The Administrative Agent shall use the available granted funds to set up an escrow account and checking account for each enrolled household. The escrow account shall be solely administered by the Administrative Agent on behalf of the head of household. The checking account shall be a joint account administered by the Administrative Agent and head of household.

7905.7 The Administrative Agent shall assist the head of household to secure checks or a debit card linked to the checking account in the name of the head of household.

7905.8 The Administrative Agent will receive seven thousand two hundred dollars ($7,200) per year for each household enrolled in the Program. A year shall be defined as a twelve (12) month cycle, with the first month of the year dependent on the household's enrollment in the program. Based on the availability of funds, the Department reserves the right to adjust, by rule, the amount of funding provided to each enrolled household.

7905.9 Upon a household's enrollment into the Program, the Administrative Agent shall transfer seven thousand two hundred dollars ($7,200), or a different amount established by rule pursuant to § 7905.8, into an escrow account it has established and will solely administer on behalf of that head of household. The Administrative Agent shall then transfer funds from the escrow account into the household's checking account each month so that funds available to the household equal the total cost for one month's rent amount, per terms of the household's lease.

7905.10 Each month, the head of household can access the full amount available in the checking account (if needed), or a lesser amount needed to bridge any gap between their monthly income available for rent and their actual monthly rent expenses. A head of household may choose not to use any of the available funds. Any amount not used in one month rolls over and is available for future use throughout the year.

7905.11 If a household meets the Program Recertification requirements described in § 7906, does not owe rental arrears on their unit, and has Program funds remaining at the end of the Program year, the household may:

(a) Apply all of the remaining funds for use in the next annual Program year cycle, or

(b) Withdraw up to five hundred dollars ($500) of the remaining funds for other household expenses and apply the remaining funds for use in the next annual Program year cycle.

7905.12 If the household has funds remaining at the end of the Program pilot period and does not owe rental arrears on their unit, the household may determine how the funds are used. The Department will not regulate how these funds are spent or saved.

7905.13 Table 1 below provides an example of the process described in § 7905.9 – 7905.12.

At the beginning of the Program, Year 1, an annual total lump sum of seven thousand two hundred dollars ($7,200) is deposited into the escrow account for Household X. The monthly rent total for Household X is $1,600. Over the twelve (12) month year, the Administrative Agent transfers funds from the escrow account as necessary to maintain a balance of $1,600 in the joint checking account held with Household X. Household X's monthly income fluctuates, and in some months there is not enough money to pay the total rent amount. In the months when Household X's available income is less than the total rent amount of $1,600, the Household uses funds available in its checking account. At the end of Year 1, Household X has a remaining balance of four hundred dollars ($400).

Table 1: Year 1- Monthly Rent Amount = $1,600

	Savings (Escrow) Balance	Amount of Program Subsidy Transferred to Checking Account	Amount Accessible by Household via Checking Account	Amount of Program Subsidy Used by Household	Amount Paid by Household	Amount Remaining in Checking Account at End of Month
Month 1	$7,200	$1,600	$1,600	$1,000	$600	$600
Month 2	$5,600	$1,000	$1,600	$1,000	$600	$600
Month 3	$4,600	$1,000	$1,600	$500	$1,100	$1,100
Month 4	$3,600	$500	$1,600	$300	$1,300	$1,300
Month 5	$3,100	$300	$1,600	$0	$1,600	$1,600
Month 6	$2,800	$0	$1,600	$0	$1,600	$1,600
Month 7	$2,800	$0	$1,600	$600	$1,000	$1,000
Month 8	$2,800	$600	$1,600	$400	$1,200	$1,200
Month 9	$2,200	$400	$1,600	$400	$1200	$1,200
Month 10	$1,800	$400	$1,600	$800	$800	$800
Month 11	$1,400	$800	$1,600	$1,600	$0	$0
Month 12	$600	$600	$600	$200	$1400	$400

7905.14 Table 2 below provides a continuance of the example shown in Table 1. Household X does not owe rental arrears on their unit and decides to add the remaining four hundred dollars ($400) from Year 1 to the total amount deposited into Household X's escrow account for the following year, Year 2. The addition of the four hundred dollars ($400) from Year 1 is reflected in the escrow balance of Year 2, Month 1. The Year 2 starting balance equals the seven thousand two hundred dollars ($7,200) of the annual Program assistance, plus the four hundred dollars ($400) carried over from Year 1.

Table 2: Year 2- Monthly Rent Amount = $1,600

	Savings (Escrow) Balance	Amount of Program Subsidy Transferred to Checking Account	Amount Accessible by Household via Checking Account	Amount of Program Subsidy Used by Household	Amount Paid by Household	Amount Remaining in Checking Account at End of Month
Month 1	$7,600*	$1,600	$1,600	$400	$1,200	$1,200
Month 2	$6,000	$400	$1,600	$400	$1,200	$1,200
Month 3	$5,600	$400	$1,600	$400	$1,200	$1,200
Month 4	$5,200	$400	$1,600	$0	$1,600	$1,600
Month 5	$4,800	$0	$1,600	$0	$1,600	$1,600
Month 6	$4,800	$0	$1,600	$1,600	$0	$0
Month 7	$4,800	$1,600	$1,600	$1,600	$0	$0
Month 8	$3,200	$1,600	$1,600	$1,200	$400	$400
Month 9	$1,600	$1,200	$1,600	$600	$1,000	$1,000
Month 10	$400	$400	$1,400	$400	$1,200	$1,000
Month 11	$0	$0	$1,000	$800	$800	$200
Month 12	$0	$0	$200	$200	$1,400	$0

7905.15 With the exception of end of year funds, the only eligible payee on the account will be the landlord of the unit the household lives in. The Administrative Agent will be responsible for monitoring account activity to ensure the head of household is using checking account funds to pay the landlord on record.

7905.16 The landlord must have a business license and a Certificate of Occupancy for the household's unit that is in good standing.

7905.17 The household's rental unit may be subject to required inspections as part of the requirement to be legally licensed and registered in the jurisdiction. The Department may offer or require additional inspections as part of the Program.

7906 RECERTIFICATION REQUIREMENTS

7906.1 To remain eligible for the Program, each enrolled household shall complete a recertification process annually.

7906.2 A household shall remain eligible for the Program if the household continues to meet requirements set forth in §§ 7901.1- 7901.3 and continues to be eligible for services under the Continuum of Care.

7906.3 Additionally, the household shall meet the following to remain eligible for the Program:

(a) Has a total annual income less than or equal to the recertification income limit, based on the United States Department of Housing and Urban Development's Median Family Income Limits for the Washington DC Metropolitan Region, to be published by DHS not less than annually. The recertification limit shall not be less than thirty percent (30%) of Family Median Income, but may be higher, as allowable by local statute;

(b) Is headed by a person that is twenty-one (21) years old or older, and who meets the following requirements:

(1) Has physical custody of one or more minor children, and / or one or more youth that continues to reside in the household;

(2) Is currently employed or has recent history of employment; and

(3) Is the lease holder for a rental unit; and as the lease holder, is in good standing with all of the explicit obligations of their rental agreement, and is not subject to any form of sanction, suspension and disciplinary action by their landlord.

(c) Has not accessed any other forms of emergency, temporary, or permanent government-funded rental assistance during the Program assistance period, including, but not limited to, Emergency Rental Assistance Program, Homelessness Prevention Program, Family Re-Housing and Stabilization Program assistance, or DCHA subsidies.

7906.4 The Administrative Agent shall conduct a recertification assessment of each household to confirm the household meets the Program's recertification standards.

7906.5 If a household does not meet the recertification requirements set forth in this section, the Department will provide written notice described in § 7903.11(f) to the household via email or U.S. Postal Service, which will specify the recertification requirements the household did not meet during its recertification assessment.

7907 RELOCATION

7907.1 At any point during the Program, a household may choose to relocate to a new unit that better meets the household's needs. The household shall be responsible

for updating the Administrative Agent and providing appropriate documentation of the new lease agreement. The Administrative Agent shall not approve the payment of funds to a new landlord until it has received appropriate documentation of the new lease.

7908 TERMINATION FROM PROGRAM

7908.1 Termination pursuant to this section refers to a termination of Program assistance only and does not provide the Administrative Agent or the Department with any authority to interfere with a household's tenancy rights under the lease agreement as governed by Title 14 of the District of Columbia Municipal Regulations.

7908.2 The Administrative Agent shall adopt Program Rules to provide additional guidance on the DC Flex Program. In accordance with these Program Rules, which shall be signed by households at the time of Program enrollment, the Department or Administrative Agent may terminate Program assistance to a household when the household:

(a) Provides false or fraudulent information to the Department or Administrative Agent to support their eligibility determination;

(b) Uses Program funds for any purpose other than rent payment to the landlord listed on the lease agreement provided to the Administrative Agent;

(c) Makes payments from their Program checking account in an amount in excess of their monthly rent amount, thereby overdrawing their account;

(d) Ceases to be a leaseholder on an eligible housing unit;

(e) Ceases to be a leaseholder in good standing; or

(f) Fails to meet recertification criteria, as outlined at § 7906.

7908.3 If a household is terminated from the Program, the Administrative Agent shall give to the household, personally or through an authorized representative, a written Notice of Termination at least fifteen (15) days before the effective date of the termination, which shall state:

(a) The household is being terminated;

(b) The effective date of the termination;

(c) The reason or reasons for the termination, including the date or dates on which the basis or bases for the termination occurred;

(d) The statute, regulation, or program rule under which the termination is being made;

(e) That the household has a right to appeal the termination through a fair hearing and administrative review, including deadlines for requesting an appeal; and

(f) That the household has a right to continuation of Program assistance pending the outcome of any fair hearing requested within fifteen (15) days of receipt of written notice of a termination, as described in § 7910.

7909 SUMMARY OF ADMINISTRATIVE AGENT RESPONSIBILITIES

7909.1 The Administrative Agent is responsible for the following:

(a) Establishing an escrow and checking account for each household enrolled in the Program;

(b) Delivering directly, or coordinating with another entity to offer periodic budgeting or financial literacy training to each household and monitor the household's participation in these trainings;

(c) Monitoring each household's monthly payment activity;

(d) Providing each household with general referrals and reminders about resources available within the community;

(e) Reviewing the eligibility of each household to ensure that the household remains eligible per the recertification standards outlined in § 7906;

(f) If applicable, updating the name of each household's landlord in the instance where a household moves to a new housing unit, or the landlord on a lease changes;

(g) Assisting the Department with program evaluation activities, including reasonable data collection, providing administrative records, and making staff available for interviews;

(h) Submitting to the Department quarterly reports, at the individual household level and aggregate level, that include information listed in § 7908.2 and § 7908.3; and

(i) Other tasks agreed upon by the Department and Administrative Agent.

7909.2 The Administrative Agent shall submit to the Department a formal quarterly report that may include, but is not limited to, the following for each enrolled household:

(a) Frequency in which each household accessed the full monthly rent limit;

(b) Average amount of funds accessed from each household's checking account each month; and

(c) Participation in budget or financial planning classes.

7909.3 The Administrative Agent shall submit to the Department a formal quarterly report that shall include, but is not limited to, the following for the cohort of enrolled households:

(a) Payment activity of the households for the current quarter;

(b) Trend analysis that shows the payment activities of the households over the previous quarter(s), where applicable;

(c) Average and median amounts of the Program subsidy used by the households monthly;

(d) Addresses of participating households and other descriptive statistics identified or requested by the Department; and

(e) Household attrition from the Program.

7909.4 The Administrative Agent shall submit reports to the Department via a method determined by the Department.

7910 FAIR HEARING AND ADMINISTRATIVE REVIEW

7910.1 An applying household or participating Program household shall have ninety (90) calendar days following the receipt of a written notice described in §§ 7903.11(a), (c), (e), or (f) to request a fair hearing, in accordance with the hearing provisions in Section 26 of the HSRA (D.C. Official Code § 4-754.41), for the action that is the subject of the written notice.

7910.2 Upon receipt of a fair hearing request, the Department shall offer the petitioner household or its authorized representative an opportunity for an administrative review in accordance with Section 27 of the HSRA (D.C. Official Code § 4-754.42), except that if an eviction is imminent, the Department shall take all reasonable steps to provide an expedited administrative review to maximize resolution of the appeal.

7910.3 In accordance with Section 9(a) of the HSRA (D.C. Official Code § 4-754.11(a)(18)), any household that requests a fair hearing within fifteen (15) days of receipt of written notice of a termination pursuant to § 7908 shall have the right to the continuation of Program benefits pending a final decision from the fair hearing proceedings.

7911 DEFINITIONS

7911.1 The terms and definitions in 29 DCMR § 2599 are incorporated by reference in this chapter.

7911.2 For the purposes of this chapter, the following additional terms shall have the meanings ascribed:

Administrative Agent – an organization that receives Flexible Rent Subsidy Pilot Program funds and is authorized to administer the Program's services.

Authorized representative – an individual who is at least eighteen (18) years of age, who is acting responsibly on behalf of the applicant, and has sufficient knowledge of the applicant's circumstances to provide or obtain necessary information about the applicant, or a person who has legal authorization to act on behalf of the applicant.

District or federal government rent assistance – assistance paid to the tenant or the housing provider during the Program assistance period for the purpose of reducing the tenant's rent or assisting with back rent.

Good Standing – rental status achieved by a household when the household has complied with all of the explicit obligations of their rental agreement, and is not subject to any form of sanction, suspension and disciplinary action.

Median Family Income - the periodic calculation provided by the United States Department of Housing and Urban Development, adjusted for family size without regard to any further adjustments made by the United States Department of Housing and Urban Development for the purposes of the programs it administers. This calculation is used to determine a household's eligibility for the Program.

Minor – a child under eighteen (18) years of age.

Youth – a person who is under twenty-five (25) years of age.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The District of Columbia Board of Elections, pursuant to the authority set forth in the District of Columbia Election Code of 1955, approved August 12, 1955, as amended (69 Stat. 699; D.C. Official Code § 1-1001.05(a)(14) (2016 Repl.)), hereby gives notice of emergency and proposed rulemaking action to adopt amendments to Chapter 5 (Voter Registration), in Title 3 (Elections and Ethics) of the District of Columbia Municipal Regulations (DCMR).

The purpose of the amendments to Chapter 5 is to provide means for voters who are victims of covered offenses or covered employees, as defined in the Address Confidentiality Act of 2018, effective July 3, 2018 (D.C. Law 22-118; 65 DCR 5064 (May 11, 2018)), to make their voter records confidential.

Emergency action to adopt these rules is necessary so that victims of covered offenses and covered employees can take action to make their voter records confidential. Adoption of these rules is necessary for the immediate preservation of the public peace and welfare of District residents, in accordance with D. C. Official Code § 2-505(c) (2016 Repl.).

The Board adopted these emergency rules at its regularly scheduled meeting on Friday, December 14, 2018, at which time the amendments became effective. The emergency rules shall remain in effect until April 13, 2019 (one hundred and twenty (120) days from the adoption date), unless superseded by publication of a Notice of Final Rulemaking in the *D.C.* Register.

Chapter 5, VOTER REGISTRATION, of Title 3 DCMR, ELECTIONS AND ETHICS, is amended as follows:

Subsection 510.9 of Section 510, VOTER REGISTRATION INFORMATION, is amended to read as follows:

510.9 A registered qualified elector's address shall be considered public information unless made confidential. A registered qualified elector's address may be made confidential under any of the following circumstances:

(a) The registered qualified elector, or his or her representative, presents a copy of a court order to the Registrar directing the confidentiality of the qualified elector's address;

(b) The registered qualified elector, or his or her representative, presents the Registrar with reasonable written evidence demonstrating that the registered voter has at any time been a victim of a covered offense or covered employee, as defined in the "Address Confidentiality Act of 2018" (D.C. Law 22-118). This evidence may include employment, court, law enforcement, medical or social service records; or

(c) In the determination of the Registrar of Voters, the registered qualified elector is an individual of significant public stature and public disclosure of the elector's address would cause an unwarranted invasion of privacy.

A new Subsection 510.10 is created to read as follows:

510.10 If a registered qualified elector's address is made confidential pursuant to this section at least forty-five (45) days before an election, the elector's address shall be immediately removed from all voter records available for public inspection, with the exception of the poll book available in any voting place. If the registered qualified elector's address is made confidential fewer than forty-five (45) days before an election, the address shall be removed as soon as practicable. Any record made confidential pursuant to this section shall remain confidential for a period of five years from the date the address is made confidential, unless a shorter period of time is specified by court order or the elector makes a written request to remove his or her record from confidential status.

All persons desiring to comment on the subject matter of this proposed rulemaking should file written comments by no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with the Office of the General Counsel, Board of Elections, 1015 Half Street S.E., Suite 750, Washington, D.C. 20003. Please direct any questions or concerns to the Office of the General Counsel at 202-727-2194 or ogc@dcboe.org. Copies of the proposed rules may be obtained at cost from the above address, Monday through Friday, between the hours of 9:00 a.m. and 4:00 p.m.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2018-103
December 19, 2018

SUBJECT: Investigations of Deaths of People Served by the Department on Disability Services

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(11) (2016 Repl.), it is hereby **ORDERED** that:

1. The Chief Medical Examiner, pursuant to the Establishment of the Chief Medical Examiner Act of 2000, effective October 19, 2000 (D.C. Law 13-172; D.C. Official Code § 5-1401 *et seq.* (2012 Repl. & 2017 Supp.)), shall, at the discretion of the Chief Medical Examiner and in accordance with District law and regulations, take jurisdiction of bodies and investigate deaths of persons with intellectual and developmental disabilities who were receiving services and support from the Department on Disability Services or any successor agency.

2. Nothing in this Order shall be deemed to affect the Chief Medical Examiner's duties and responsibilities under the District of Columbia Developmental Disabilities Fatality Review Committee, as set forth in Mayor's Order 2009-225, dated December 22, 2009.

3. **RESCISSION:** Mayor's Order 2013-057, dated March 14, 2013, is rescinded.

4. **EFFECTIVE DATE:** This Order shall become effective immediately.

MURIEL BOWSER
MAYOR

ATTEST: _____
KIMBERLY BASSETT
INTERIM SECRETARY OF THE DISTRICT OF COLUMBIA

DC COMMISSION ON THE ARTS AND HUMANITIES

NOTICE OF FUNDING AVAILABILITY

FY 2020 General Operating Support Grants

The DC Commission on the Arts and Humanities (CAH) announces the availability of its general operating support grants for fiscal year 2020. General operating support grants are awarded on a competitive basis to arts, humanities, arts education and service organizations that are headquartered in the District of Columbia and whose sole function is to exhibit or present in the arts and humanities or arts education or to provide technical assistance for District artists, arts educators and humanities practitioners. Levels of funding support are determined by organizational budget range and are described in the guidelines for the program.

CAH provides grants, programs and educational activities that encourage diverse artistic expressions and learning opportunities, so that all District of Columbia residents and visitors can experience the rich culture of our city.

Organizations must be incorporated in the District, headquartered with a land address in DC and have 501(c)(3) status for at least one year prior to the application period in addition to other eligibility criteria listed in the program's guidelines. Applicants must also be registered as a District of Columbia nonprofit business in good standing with the DC Department of Consumer and Regulatory Affairs (DCRA), Corporation Division, the Office of Tax and Revenue (OTR), the Internal Revenue Service (IRS), and the Department of Employment Services (DOES).

All eligible applications are reviewed through a competitive process. CAH will publish evaluation criteria and eligibility requirements in its forthcoming grant guidelines.

The Request for Applications (RFA) will be available electronically beginning January 16, 2019 on the CAH website at http://dcarts.dc.gov/**. Applicants may only apply online. The deadline for applications is February 15, 2019.**

For more information, please contact:

David Markey
Arts Education Coordinator
DC Commission on the Arts and Humanities
200 I (EYE) St. SE,
Washington, DC 20003
(202)724-5613
david.markey@dc.gov

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUSINESS AND PROFESSIONAL LICENSING ADMINISTRATION

SCHEDULED MEETINGS OF BOARDS AND COMMISSIONS

January 2019

CONTACT PERSON	BOARDS AND COMMISSIONS	DATE	TIME/ LOCATION
Grace Yeboah Ofori	Board of Accountancy	8	9:00 am-12:00pm
Stacey Williams	Board of Appraisers	16	9:00 am-4:00 pm
Avis Pearson	Board Architects and Interior Designers	25	9:00 am-1:00 pm
Andrew Jackson	Board of Barber and Cosmetology	7	10:00 am-2:00 pm
Sheldon Brown	Boxing and Wrestling Commission	17	7:00-pm-8:30 pm
Andrew Jackson	Board of Funeral Directors	3	1:00pm-4:00 pm
Avis Pearson	Board of Professional Engineering	24	10:00 am-1:30 pm
Brittani Strozier-Daise	Real Estate Commission	8	9:00 am-1:00 pm
Jennifer Champagne	Board of Industrial Trades	15	1:00pm-3:30 pm
	Asbestos Electrical Elevators Plumbing Refrigeration/Air Conditioning Steam and Other Operating Engineers		

Dates and Times are subject to change. All meetings are held at 1100 4th St., SW, Suite E-300 A-B Washington, DC 20024. For further information on this schedule, please contact the front desk at 202-442-4320.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

NOTICE OF PUBLIC MEETING

DC Board of Accountancy
1100 4th Street SW, Room E300
Washington, DC 20024

MEETING AGENDA

Tuesday, January 8, 2019 (Tentative)
9:00 AM

1. Call to Order – 9:00 a.m.
2. Members Present
3. Staff Present
4. Comments from the Public
5. Review of Correspondence
6. Accept Meeting Minutes,
7. Executive Session - Pursuant to § 2-575(4) (a), (9) and (13) the Board will enter executive session to receive advice from counsel, review application(s) for licensure and discuss disciplinary matters.
8. Old Business
9. New Business
10. Adjourn
11. Next Scheduled Board Meeting – February 1, 2019

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

District of Columbia Board of Architecture, Interior Design & Landscape Architecture
1100 4th Street, S.W., Room 390
Washington, D.C. 20024
January 25, 2019

AGENDA

1. Call to Order - 9:30 a.m.

2. Attendance (Start of Public Session)

3. Comments from the Public

4. Motion - Executive Session (Closed to the Public) to consult with an attorney pursuant to D.C. Official Code § 2-575(b) (4) (A); D.C. Official Code § 2-575(b) (9) and (13) to discuss complaints/legal matters, applications and legal counsel report.

5. Minutes - Draft, December 14, 2018

6. Vote – Review of Applications

7. Vote - Review of Complaints/Legal Matter

8. Old Business
   a. Status of Subcommitte/Design Forums, Gallaudet University, March 2019

9. New Business

10. Review of Correspondence

11. Adjourn

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

NOTICE OF PUBLIC MEETING

DC Board of Funeral Directors
1100 4th Street SW, 3rd floor conference room
Washington, DC 20024

Meeting Agenda
Thursday, January 3, 2019
1:00 p.m.

1. Call to Order – 1:00 p.m.
2. Members Present
3. Staff Present
4. Comments from the Public
5. Review of Correspondence
6. Applications for Licensure
7. Executive Session (Closed to the Public)
8. Old Business
9. New Business
10. Adjourn

Next Scheduled Board Meeting – February 7, 2019

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

District of Columbia Board of Industrial Trades
1100 4th Street, S.W., Room 300
Washington, D.C. 20024

NOTICE OF PUBLIC MEETING

AGENDA - Draft
January 15, 2019

1. Call to Order/Attendance – 1:00 p.m.

2. Minutes – Draft, December 18, 2018

3. Comments from the Public

4. Executive Session (Closed to the Public) to consult with an attorney pursuant to D.C. Official Code §2-575(b)(4)(A); D.C. Official Code 2-575(b)(9) to discuss complaints/legal matters, applications and legal counsel report.

5. Recommendations

6. Old Business

7. New Business

8. Adjourn

Next Regularly Scheduled Board Meeting, February 19, 2019
1100 4th Street, SW, Room 300B, Washington, DC 20024

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

NOTICE OF PUBLIC MEETING

District of Columbia Board of Professional Engineers
1100 4th Street SW, Room 380
Washington, DC 20024

AGENDA

January 24, 2019 ~ Room 300
9:30 A.M. (Application Review by Board Members)

10:00 A.M.

1) Call to Order – 10:00 A.M.

2) Attendance

3) Executive Session - **Pursuant to § 2-575(4) (a), (9) and (13) the Board will enter executive session – Closed to the Public**
   - Deliberation over applications for licensure
   - Review complaints and investigations

4) Comments from the Public
5) Review of Minutes

6) Recommendations
   - Applications for Licensure
   - Legal Committee Report

7) Old Business

8) New Business

9) Adjourn

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

NOTICE OF PUBLIC MEETING

DC Board of Real Estate Appraisers
1100 4th Street SW, 3rd floor conference room
Washington, DC 20024

Meeting Agenda
Wednesday, January 16, 2019
10:00 a.m.

1. Call to Order – 10:00 a.m.
2. Members Present
3. Staff Present
4. Comments from the Public
5. Review of Correspondence
6. Applications for Licensure
7. Executive Session (Closed to the Public)
8. Old Business
9. New Business
10. Adjourn

Next Scheduled Board Meeting – February 20, 2019

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

NOTICE OF PUBLIC MEETING

D.C. Boxing and Wrestling Commission
1100 4th Street SW, Room E200
Washington, DC 20024

MEETING AGENDA

January 17, 2019
7:00 PM.

1. Motion - Executive Session (Closed to the Public) to consult with an attorney pursuant to D.C. Official Code § 2-575(b)(4)(A); D.C. Official Code § 2-575(b)(9) to discuss complaints/legal matters, applications and legal counsel report.

2. Call to Order – 7:00 p.m.

3. Members Present

4. Staff Present

5. Comments from the Public

6. Review of Correspondence

7. Approval of Minutes

8. Old Business

9. New Business

10. Adjourn

11. Next Scheduled Board Meeting – February 21, 2019 at 7:00 p.m.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OCCUPATIONAL AND PROFESSIONAL LICENSING DIVISION

District of Columbia Real Estate Commission
1100 4th Street SW, Room E300 A-B
Washington, DC 20024

MONTHLY PUBLIC MEETING AGENDA

Tuesday, January 08, 2019
10:00 AM

1. Call to Order – 10:00 a.m. (Public Session)

2. Attendance (Public Session)

3. Executive Session (Closed to the Public) to consult with an attorney pursuant to D.C. Official Code § 2-575(b) (4) (A); D.C. Official Code § 2-575(b) (9) (13) (14) to deliberate upon a decision in an adjudication action or proceedings.

    A. Legal Committee Recommendations
    B. Review – Applications for Licensure

4. (Public Session)- 10:00 am

5. Comments from the Public

6. Minutes- Draft, 12/11/2018

7. Recommendations
    A. Review- Applications for Licensure
    B. Legal Committee Report
    C. Education Committee Report
    D. Budget Report
    E. Correspondence

8. Old Business

9. New Business

10. Adjourn

Next Scheduled Commission Meeting –February 12, 2019
1100 4th Street, SW, Meeting Rom 300 A-B
Washington, DC 20024

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
LICENSING AND PERMITTING DIVISION
OFFICE OF THE SURVEYOR

NOTICE OF AN OPPORTUNITY TO SUBMIT COMMENTS
ON THE PROPOSED MODIFICATION OF THE PLAN
OF THE PERMANENT SYSTEM OF HIGHWAYS

The District of Columbia Office of the Surveyor, pursuant to §9-101.06 of the D.C. Official Code, gives notice of an opportunity to submit comments on the proposal to remove the unimproved and unused portion of 39th Street NW located on Lot 801 in Square 1823 from the Plan of Permanent System of Highways.

A map showing the proposed modification is in the file in the Office of the Surveyor at 1100 4th Street SW, Room E-340, Washington DC 20024. The file number is S.O. 18-41885. This map may be examined during business hours, from 8:30 am to 4:15pm Monday through Friday.

Persons wishing to submit comments should mail them to the Office of the Surveyor. Copies of comments will be submitted to the Council of the District of Columbia.

For further information, you may contact Roland F. Dreist, Jr., Surveyor of the District of Columbia at (202)442-4699.

OFFICE OF DISABILITY RIGHTS

DC COMMISSION ON PERSONS WITH DISABILITIES (DCCPD)
COMMISSION MEETING

Thursday, December 20th, 2018 at 10:00 a.m. to 11:15 a.m.

***All Commission Meetings are available and open to the public to attend**

Location: Teleconference

Call-In Number: (866) 628-2987
Passcode: 8488992

All reasonable accommodation requests must be made at least five (5) business days prior to the scheduled meeting date. Please contact julia.wolhandler@dc.gov or 202-727-2890
AGENDA:

10:00 a.m. Welcome and Call to Order – Kamilah Martin-Proctor

10:02 a.m. Commissioners Roll-Call – Dr. Denise Decker

10:04 a.m. Public Members Roll-Call – Dr. Denise Decker

10:06 a.m. Reminder that all public comments and questions will be taken at the end of the meeting – Julia Wolhandler

10:08 a.m. Approval of November 2018 Commission Meeting Minutes (Formal Vote)

10:10 a.m. Updates:
- Joint holiday party DCCPD and DD Council – Julia Wolhandler
- Open Movie Captioning Requirement Act Public Hearing - Jarvis Grindstaff
- DCFHV Accessibility Advisory Committee – Terrance Hunter
- Developmental Disabilities Council –
- Anti-Bullying Campaign – Gerry Counihan
- Other Updates by Commissioners – Open to all Commissioners

10:20 a.m. Standing Committees:
- Policy and Planning Committee
- Events and Outreach Committee
- Evaluation and Monitoring Committee

10:30 a.m. Public Comment Period

11:15 a.m. Adjourn

DEPARTMENT OF ENERGY AND ENVIRONMENT

PUBLIC NOTICE

AIR QUALITY TITLE V OPERATING PERMIT AND GENERAL PERMIT FOR SAINT ELIZABETHS HOSPITAL EAST CAMPUS

Notice is hereby given that the District of Columbia Department of Behavioral Health has applied for a facility-wide Title V air quality permit pursuant to the requirements of Title 20 of the District of Columbia Municipal Regulations, Chapters 2 and 3 (20 DCMR Chapters 2 and 3) to operate the following emission units and miscellaneous sources of air emissions at Saint Elizabeths Hospital - East Campus, located at 1100 Alabama Avenue SE, Washington DC 20032:

- Two (2) 6.0 MMBtu/hr dual-fuel boilers;
- Two (2) 1.0 MMBtu/hr dual-fuel hot water heaters;
- Two (2) 0.6 MMBtu/hr dual-fuel hot water heaters;
- Two (2) 2,000 kWe Katolight emergency generators;
- Two (2) 8,000-gallon underground storage for diesel/No. 2 fuel oil;
- Miscellaneous kitchen equipment all fired by natural gas and with heat input ratings less than 5 MMBTU/hr; and
- One (1) wet cooling tower.

The contact person for the facility is Mr. Alvin D. Venson, Director of Facilities, at (202) 299-5457 or alvin.venson@dc.gov.

The following is an estimate of overall potential emissions from the facility:

FACILITY-WIDE EMISSIONS SUMMARY [TONS PER YEAR]	
Pollutants	**Potential Emissions**
Oxides of Sulfur (SO_x)	0.16
Oxides of Nitrogen (NO_x)	51.86
Total Particulate Matter, including condensables (PM Total)	2.88
Volatile Organic Compounds (VOCs)	1.64
Carbon Monoxide (CO)	16.27
Total Hazardous Air Pollutants (HAPs)	0.865
Lead (Pb)	0.000602

Saint Elizabeths Hospital-East Campus has the potential to emit 51.86 tons per year (TPY) of oxides of nitrogen (NO_x). This value exceeds the major source threshold in the District of Columbia of 25 TPY of NO_x. As such, pursuant to 20 DCMR 300.1(a), the source is subject to Chapter 3 and must obtain an operating permit in accordance with that regulation and Title V of the federal Clean Air Act.

The Department of Energy and Environment (DOEE) has reviewed the permit application and related documents and has made a preliminary determination that the applicant meets all applicable air quality requirements promulgated by the U.S. Environmental Protection Agency (EPA) and the District. Therefore, draft permit No. 031-R2 has been prepared.

The application, the draft permit and associated Fact Sheet and Statement of Basis, and all other materials submitted by the applicant [except those entitled to confidential treatment under 20 DCMR 301.1(c)] considered in making this preliminary determination are available for public review during normal business hours at the offices of the Department of Energy and Environment, 1200 First Street NE, 5th Floor, Washington DC 20002. Copies of the draft permit and related fact sheet are available at http://doee.dc.gov/service/public-notices-hearings.

A public hearing on this permitting action will not be held unless DOEE has received a request for such a hearing within 30 days of the publication of this notice. Interested parties may also submit written comments on the permitting action.

Comments on the draft permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
Department of Energy and Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
stephen.ours@dc.gov

No comments or hearing requests submitted after January 28, 2019 will be accepted.

For more information, please contact John C. Nwoke at (202) 724-7778 or john.nwoke@dc.gov.

FRIENDSHIP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Friendship Public Charter School is seeking bids from prospective candidates to provide:

- General Contractor/Construction Company services to build a Middle School, approximately 35,594 square foot multi-level facility at Friendship Public Charter School- Southeast Elementary site in ward 8- Anacostia DC. Friendship has engaged an Architect to develop construction documents and specifications to meet the programmatic needs. The selected contractors will be required to construct the approved designs no later than July 31, 2020 in time for the 2020/2021 school year.

- General Contractor/Construction Company services with experience building football fields. The field would be approximately 73,625 square foot, (synthetic turf), facility at Friendship Public Charter School-Collegiate Academy site in ward 7-DC. Friendship has engaged an Architect to develop construction documents and specifications to meet the programmatic needs. The selected contractors will be required to construct the approved designs no later than October 1, 2019 for the 2019/2020 school year.

The full scope of work will be posted in a competitive Request for Proposal that can be found on FPCS website at http://www.friendshipschools.org/procurement/. Proposals are due no later than 4:00 P.M., EST, **Thursday, January 31th, 2019.** No proposals will be accepted after the deadline. Questions can be addressed to ProcurementInquiry@friendshipschools.org

DEPARTMENT OF HEALTH (DC HEALTH)

PUBLIC NOTICE

The District of Columbia Board of Psychology ("Board") hereby gives notice of its regular meetings for the calendar year 2019, pursuant to § 405 of the District of Columbia Health Occupation Revision Act of 1985 (D.C. Official Code § 3-1204.05 (b) (2012 Repl.)).

In 2019, the Board will continue to hold its regular meeting on a quarterly basis; however, the meeting date will be on the second Tuesday of each quarter beginning in January 2019. The meeting will be held from 2:30 PM to 5:30 PM and will be open to the public from 2:30 PM until 3:00 PM to discuss various agenda items and any comments and/or concerns from the public. In accordance with § 575(b) of the Open Meetings Act of 2010 (D.C. Official Code § 2-575(b) (2016 Repl.)), the meeting will be closed from 3:00 PM to 5:30 PM to plan, discuss, or hear reports concerning licensing issues, ongoing or planned investigations of practice complaints, and or violations of law or regulations.

Subsequent meetings for the calendar year will be held at the same time on the following dates:

April 9, 2019
July 9, 2019
October 8, 2019

The meeting will be held at 899 North Capitol Street, NE, Second Floor, Washington, DC 20002. Visit the Department of Health's Events webpage at www.doh.dc.gov/events to view the agenda.

DISTRICT OF COLUMBIA HOUSING AUTHORITY

BOARD OF COMMISSIONERS

2019 Public Meeting Schedule

1133 NORTH CAPITOL STREET, NORTHEAST
WASHINGTON, D.C. 20002-7599
202-535-1000

The regular meetings of the Board of Commissioners of the District of Columbia Housing Authority are held in open session on the second Wednesday of each month. The following dates and times of the meetings are for the year 2019. All meetings are held at 1133 North Capitol Street, NE, Washington, DC 20002 unless otherwise indicated.

February 13, 2019	DCHA - 1133 North Capitol St., NE	1:00 p.m.
March 13, 2019	DCHA - 1133 North Capitol St., NE	1:00 p.m.
April 10, 2019	Greenleaf 203 N St., SW, WDC 20024	1:00 p.m.
May 8, 2019	Sibley Plaza 1140 N Capitol St., NW, WDC 20002	1:00 p.m.
June 12, 2019	DCHA - 1133 North Capitol St., NE	1:00 p.m.
July 10, 2019	Fort Lincoln 3400 Banneker Dr., NE, WDC 20018	1:00 p.m.
September 11, 2019	DCHA - 1133 North Capitol St., NE	1:00 p.m.
October 9, 2019	Woodland 2311 Ainger Pl., SE, WDC 20020	1:00 p.m.
November 13, 2019	Potomac Gardens 1225 G St., SE WDC 20003	1:00 p.m.
December 11, 2019	Annual & Regular meeting DCHA - 1133 North Capitol St., NE	1:00 p.m.

KIPP DC PUBLIC CHARTER SCHOOLS

REQUEST FOR PROPOSALS

Project Management Services

KIPP DC is soliciting proposals from qualified vendors for Project Management Services. The RFP can be found on KIPP DC's website at www.kippdc.org/procurement. Proposals should be uploaded to the website no later than 5:00 PM EST, on January 9, 2019. Questions can be addressed to kevin.mehm@kippdc.org.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-52

December 26, 2017

VIA ELECTRONIC MAIL

G. Harold Christian

RE: FOIA Appeal 2018-52

Dear Mr. Christian:

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"), on the grounds that the Office of the Chief Financial Officer ("OCFO") failed to respond to your July 24, 2017 request for records identifying agency codes with corresponding agency names.

This Office contacted OCFO on December 11, 2017, and notified the agency of your appeal. On December 12, 2017, OCFO provided this Office with its response to your appeal.[1] OCFO's response asserts that the information you seek is already publically available online and provides links to the information. OCFO claims that providing you with the links to the information satisfies your request.

Since your appeal was based on OCFO's failure to respond to your request, and OCFO has now responded by providing links to responsive information, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to assert any challenge, by separate appeal to this Office, to the substantive response that OCFO sent you.[2]

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: Aaron Droller, Assistant General Counsel, OCFO (via email)

[1] A copy of OCFO's response is attached.
[2] We note, upon initial review, that the links OCFO provided appear to satisfy your request.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-53

December 26, 2017

VIA ELECTRONIC MAIL

Alexander J. Brittin

RE: FOIA Appeal 2018-53

Dear Mr. Brittin:

This letter responds to the administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Office of Contracting and Procurement ("OCP") failed to respond to your November 3, 2017 request for certain records.

This Office contacted OCP on December 12, 2017, and notified the agency of your appeal. OCP responded on December 19, 2017, advising us that it responded to your request on December 19, 2017.

Since your appeal was based on OCP's failure to respond to your request, and the agency has now responded, your appeal is hereby dismissed on the grounds that it is moot.

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: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-54

December 27, 2017

VIA ELECTRONIC MAIL

Mr. Blaine Pardoe

RE: FOIA Appeal 2018-54

Dear Mr. Pardoe:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested from MPD under DC FOIA.

Background

On November 15, 2017, you submitted a request to MPD for records related to unsolved homicides known as "the Freeway Phantom murders" from the 1970's. On or around November 30, 2017, MPD granted your request in part, releasing a reward notice, news article, and incident report. MPD denied your request in part, withholding its investigative documents on the basis that the records are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3(A)(i)") because disclosure of the investigatory records compiled for law enforcement purposes would interfere with enforcement proceedings. MPD's denial indicated that the unsolved homicide cases are considered open investigations. Additionally, MPD stated that disclosure of its investigative records would impede enforcement efforts by enabling witnesses or suspects to conform future testimony based on the facts in the investigative records. Finally, MPD noted that only two of the six murders you sought records for were investigated by MPD; the remaining four were investigated by police in Maryland.

On appeal, you challenge MPD's partial denial of your FOIA request, declaring that approximately 46 years have passed since the crimes occurred, and you do not believe that disclosure of the investigative records would hinder law enforcement efforts. Further, you argue that you are a bestselling true crime author, and attention from writing about the unsolved homicides may facilitate law enforcement efforts by bringing new leads. Finally, you assert that you would be satisfied by reviewing redacted copies of the investigative file or copies of a note left by the alleged killer.

On December 20, 2017, MPD responded to your appeal in a letter to this Office in which it reasserted its position that the records are protected from disclosure by Exemption 3(A)(i).[1] In support of this position, MPD proffered that its investigation into the murders is ongoing and that release of the requested records could adversely affect MPD's enforcement efforts by informing any suspects or witnesses on the direction of the investigation and enabling them to conform testimony to escape culpability. MPD's response also described the categories of withheld documents, claiming that disclosure of any of the records could impede its enforcement efforts.

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, DC FOIA creates the right "to inspect … and … copy any public record of a public body . . ." *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

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), and 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).

Exemption 3(A)(i) protects from disclosure investigatory records that are compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. The purpose of the exemption is to prevent "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 124, 232 (1978). "[S]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, [the investigatory record exemption] applies." *See Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted). Conversely, when an agency fails to establish that the documents sought relate to an ongoing investigation or would jeopardize a future law enforcement proceeding, the investigatory records exemption does not protect the agency's decision. *Id.*

On appeal, you argue that due to the age of the records any harm of disclosure would be minimal, and responsive records should be disclosed to bring attention and new leads. The records you seek here were compiled for the law enforcement purpose of investigating homicides, and MPD has asserted that its criminal investigation pertaining to the homicides is ongoing. As a result, MPD has met the threshold requirements for invoking Exemption 3(A)(i), and our analysis turns on whether disclosure would interfere with enforcement proceedings.

[1] MPD's response is attached for your reference.

Your belief that the cases are cold does not overcome the purpose of Exemption 3(A)(i), which is to protect releasing investigatory details that could interfere with law enforcement efforts. *See Dickerson v. DOJ*, 992 F.2d 1426, 1432 (6th Cir. 1993) (finding that an investigation into 1975 disappearance remained ongoing and therefore was still "prospective" law enforcement proceeding.) MPD maintains that disclosing the records you requested could reveal the direction of its ongoing investigations and allow suspects to avoid detection, arrest, and prosecution. In light of the statutory purpose of Exemption 3(A)(i), we find that MPD properly withheld from disclosure the investigatory records you requested.[2]

Conclusion

Based on the foregoing, we affirm MPD's decision and hereby dismiss your appeal.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

[2] Although MPD's application of Exemption 3(A)(i) is justifiable, we note that this exemption, like others, is discretionary. Due to the age of the cases, MPD may determine that the benefits of disclosure outweigh the potential harm to ongoing law enforcement proceedings. MPD, as the agency responsible for the ongoing investigation, is in the best position to assess the potential impact of disclosure. Therefore, MPD may elect to disclose or continue to withhold its investigative records related to the unsolved homicides.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-55

January 2, 2018

VIA ELECTRONIC MAIL

Mr. P.J. Goel

RE: FOIA Appeal 2018-55

Dear Mr. Goel:

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 Department of General Service's ("DGS") response to your request under the DC FOIA.

Background

On December 14, 2017, you submitted a FOIA request to DGS for records pertaining to "Section 1.4, 2.6, and 3.5." of a "Bidder/Offeror Certification Form" for a specified pricing proposal. These sections ask:

> (Section 1.4) If your company, its principles, shareholders, directors, or employees own an interest or have a position in another entity in the same or similar line of business as the Bidder/Offeror, please describe the affiliation in detail.
> (Section 2.6) Has any current or former owner, partner, director, principal or any person in a position involved in the administration of funds or currently or formerly having the authority to sign, execute or approve bids, proposals, contracts or supporting documentation on behalf of the Bidder/Offeror with any entity: Been suspended, cancelled, terminated or found non-responsible on any government contract, or had a surety called upon to complete an awarded contract.
> (Section 3.5**)** Has the bidder been disqualified or proposed for disqualification on any government permit or license?

On December 15, 2017, DGS withheld the responsive information pursuant to D.C. Official Code §2-534 (a)(1) ("Exemption 1").[1]

On appeal, you assert that Section 8 of the form required the bidder to identify whether the bidder believed its responses to other sections of the form were exempt under DC FOIA. You

[1] Exemption 1 exempts from disclosure "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would results in substantial harm to the competitive position of the person from whom the information was obtained."

further argue that DGS should disclose the form if the bidder answered that it did not believe the answers to the form were exempt from DC FOIA. Additionally, you argue that some of the information you seek, relating to company ownership, is a matter of public record and should not be withheld. To support this argument, you attached screenshots of such information being public on a Department of Consumer and Regulatory Affairs website. Further, in a phone call to this office, you indicated that you are seeking the requested information to support your belief of the existence of fraud.

This Office contacted DGS on December 15, 2017, and notified the agency of your appeal. On December 27, 2017, DGS provided this Office with a response to your appeal.[2] DGS reaffirmed its use of Exemption 1 and argued that the release of the redacted information would likely result in competitive harm because "[r]elease of this information to the public/competitors and use of this information as a marketing campaign against a business will directly affect a business' ability to successfully compete for contracts and substantially harm the competitive position of the bidder." Additionally, DGS has asserted that the portions of Section 1.4 and 3.5 that were withheld are exempt under the personal privacy exemption, Exemption 2. [3]

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.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

To withhold information under Exemption 1, the information must be: (1) a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1). The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit

[2] A copy of DGS's response is attached.
[3] Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

has also instructed that the terms "commercial" and "financial" used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Exemption 1 has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan,* 830 F.2d 1132, 1152 (D.C. Cir. 1987); s*ee also, Washington Post Co. v. Minority Business Opportunity Com.,* 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army,* 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep't of the Air Force,* 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so. [citations omitted]").

Competitive Harm

In *Washington Post Co.,* the court considered on appeal the withholding of a "business profile" that included:

> depth information regarding their corporate structure and by-laws, the financial structure and management of this enterprise, the ownership of stock in the company, and whether the company is certified as a minority business in any other jurisdiction. Individuals associated with the enterprise must reveal their other business interests. Each enterprise must provide information regarding any prior government contracting experience, as well as any history of debarment on its part or on the part of its principals, partners or stockholders.

560 A.2d 517, 519-20 (D.C. 1989).

This "business profile" is similar in kind to the document you requested of DGS, and as with DGS, the agency at issue in *Washington Post Co*. initially withheld the entire document. The Court of Appeals remanded the matter to the District Court to reconsider the segregability of portions of the "business profile," noting the soundness of the government's concession that "not all of the materials submitted in or with the . . . business profiles was exempt." *Id.* at 522. The only portion of the "business profile" that the Court of Appeals identified as clearly exempt was a "marketing techniques" portion that is dissimilar to the record at issue here. *Id.* Unfortunately, there is no subsequent case history that shows what the District Court decided on remand.

In evaluating the "business profile," the Court of Appeals highlighted "marketing techniques" as information which, if disclosed, could cause "substantial competitive harm." The Court did not address ownership structure or history of government contracting experience, which are at issue here. Generally, pricing details and a company's proprietary processes for operation are

considered the type of information that could cause substantial competitive harm if released.[4] This type of information does not appear to be at issue here.

It is unclear from DGS's response how revealing the information in sections 1.4, 2.6, and 3.5 could cause "substantially competitive harm" to the company that provided the information. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 41 (D.D.C. 1997) (holding that submitter had failed to demonstrate that it would suffer competitive harm from release of information incorporated into government contract, court notes importance of opening government procurement process to public scrutiny) (reverse FOIA suit).

DGS argues that release of the information could be used "as a marketing campaign against a business [that] will directly affect a business' ability to successfully compete for contracts and substantially harm the competitive position of the bidder." DGS's Response at 3. This is not, however, the type of harm contemplated by Exemption 1. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (rejecting "unfavorable publicity" as basis of competitive harm.)[5]

Exemption Not Asserted by Company

You have argued on appeal that a portion of the record you requested specifically asked the bidder whether the information is exempt from disclosure under DC FOIA. You argue that if the bidder asserted in the form that it did not consider any of the information it provided to be exempt, DGS cannot now override the bidder's assertion and claim that the information would cause the bidder commercial harm if released. DGS, in turn, has argued that its FOIA Officer is authorized to make the final determination as to whether information is exempt from disclosure,

---

[4] *See Treatment of Animals v. U.S. Dep't of Agric.*, No. CIV. 03 C 195-SBC, 2005 U.S. Dist. Lexis 10586, at *7 (D.D.C. May 24, 2005) ("insights into the company's operations, give competitors pricing advantages over the company, or unfairly advantage competitors in future business negotiations."); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976). (finding that insights into the operational strengths and weaknesses of a business allow others to engage in "[s]elective pricing, market concentration, expansion plans, . . . take-over bids[,] . . . bargain[ing] for higher prices … unregulated competitors would not be similarly exposed.").

[5] *See also Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997) (denying competitive harm claim for disclosure that would cause "unwarranted criticism and harassment" inasmuch as harm must "flow from competitors' use of the released information, not from any use made by the public at large or customers"), *appeal dismissed*, No. 97-5357 (D.C. Cir. Feb. 2, 1998); *Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n*, No. 96 5152, 1997 WL 578960, at *4 (W.D. Ark. Feb. 5, 1997) (declaring that court "cannot condone" use of FOIA "as shield[] against potentially negative, or inaccurate, publicity") (reverse FOIA suit), *aff'd*, 133 F.3d 1081 (8th Cir. 1998); Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 415 n.2 (D.D.C. 1997) (opining that it is "questionable whether the competitive injury associated with 'alarmism' qualifies under Exemption 4," because competitive harm does not encompass "adverse public reaction").

and that the bidder's perspective on whether the information it provided is exempt is not dispositive.

We agree with DGS to an extent. In the context of DC FOIA, the bidder does not have authority to determine whether records are subject to the deliberative process, or to waive the personal privacy interests of persons described in the DGS form. Ultimately, these are determinations that DGS must make. Similarly, if the bidder wished to assert an overly broad use of exemptions, then DGS could of course override the bidder's determination of the applicability of exemptions.

However, given the above-discussed lack of clear "substantial competitive harm" to the bidder with respect to the withheld information, the opinion of the bidder is persuasive. Disclosure would appear to be appropriate if the bidder failed to assert that release of the form would cause it "substantial competitive harm" when directly asked. *Herrick v. Garvey*, 298 F.3d 1184, 1194 (10th Cir. 2002) ("where the submitter or owner of documents held by the government grants the government permission to loan or release those documents to the public, those documents are no longer "secret" for purposes of Exemption 4. In such a situation, FOIA creates an obligation for the government to release the documents."). Here, DGS has withheld the bidder's answer to whether the bidder believed the submitted information to be protected commercial information. Instead, without revealing the bidder's thoughts on its own competitive position vis-à-vis this information, DGS has advanced a competitive harm claim on behalf of the bidder. Competitive harm claims advanced solely by agencies are frequently rejected by courts.[6]

For these reasons, we remand this matter to DGS to consider the bidder's answer to question 8 – whether the bidder believes the information is subject to any FOIA exemptions – and afford it great weight.

Personal Privacy

[6] *See, e.g., N.C. Network for Animals v. USDA*, No. 90-1443, *slip op*. at 8-9 (4th Cir. Feb. 5, 1991) (finding "evidence presented by" agency "insufficient to support" its burden, remanding case, and noting absence of sworn affidavits or detailed justification for withholding from submitters); *Newry Ltd. v. U.S. Customs & Border Prot. Bureau*, No. 04-02110, 2005 WL 3273975, at *4 & n.8 (D.D.C. July 29, 2005) (rejecting competitive harm argument advanced solely by agency), *reconsideration granted* (D.D.C. Mar. 30, 2006) (upholding competitive harm argument following agency's submission of supplemental declarations, including one from submitter); *Pentagon Fed. Credit Union v. Nat'l Credit Union Admin*., No. 95-1475-A, slip op. at 4-5 (E.D. Va. June 7, 1996) (rejecting competitive harm argument, noting failure of agency even to give notice to submitters who, in turn, ultimately provided sworn declarations to requester explicitly stating that disclosure would not cause them harm); *Wiley Rein & Fielding v. U.S. Dep't of Commerce*, 782 F. Supp. 675, 676 (D.D.C. 1992) (rejecting competitive harm argument, ordering disclosure, and emphasizing that "no evidence" was provided to indicate that submitters objected to disclosure), *appeal dismissed as moot*, No. 92-5122 (D.C. Cir. Mar. 8, 1993); *Brown v. Dep't of Labor*, No. 89-1220, 1991 U.S. Dist. LEXIS 1780, at *7 (D.D.C. Feb. 15, 1991) (denying competitive harm claim, ordering disclosure, and noting failure of submitters to object to disclosure), *appeal dismissed*, No. 91-5108 (D.C. Cir. Dec. 3, 1991).

On appeal, DGS has asserted that the withheld information in sections 1.4 and 2.6 are protected by Exemption 2. Summarily, we conclude that section 2.6 is not covered by Exemption 2, as it does not identify any persons but instead asks in the aggregate if any of a company's personnel has been "suspended, cancelled, terminated or found non-responsible on any government contract, or had a surety called upon to complete an award contract." To the extent that the names of such individuals were identified, that information could be redacted pursuant to Exemption 2. As to section 1.4, we note that corporate entities do not possess privacy rights. Accordingly, whether a company owns another company would not be information protected by Exemption 2. *FCC v. AT&T Inc.*, 562 U.S. 397, 409-410 (2011). Additionally, to the extent that one's business ownership is a matter of public record, such information is not protected by Exemption 2. On remand, DGS shall review the applicability of Exemption 2 in accordance with these guidelines and with its obligation under DC FOIA to release segregable information.

Conclusion

Based on the foregoing, we remand DGS's decision. DGS shall, within 10 days, review the withheld information and release responsive material consistent with the guidance in this decision. You may challenge DGS's subsequent response by separate appeal.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Camille Sabbakhan, General Counsel, DGS (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-56

January 3, 2018

VIA ELECTRONIC MAIL

Mr. Carlo Bruni

RE: FOIA Appeal 2018-56

Dear Mr. Bruni:

This letter responds to the administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Office of Contracting and Procurement ("OCP") failed to respond to your November 8, 2017 request for certain records.

This Office contacted OCP on December 18, 2017, and notified the agency of your appeal. OCP responded on December 29, 2017, advising us that it responded to your request on the same date.[1]

Since your appeal was based on OCP's failure to respond to your request, and the agency has now responded, your appeal is hereby dismissed on the grounds that it is moot; provided, that you are free to challenge OCP's substantive response by separate appeal to 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: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

[1] OCP's response is attached.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-57

January 4, 2018

VIA ELECTRONIC MAIL

Mr. Martin Austermuhle

RE: FOIA Appeal 2018-57

Dear Mr. Austermuhle:

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 Office of the Deputy Mayor for Planning and Economic Development ("DMPED") improperly withheld records you requested under the DC FOIA.

Background

On November 27, 2017,[1] you submitted a request to DMPED for records DMPED submitted to Amazon detailing any incentives offered to encourage Amazon to locate its second headquarters in the District. On December 13, 2017, DMPED granted your request in part and disclosed a majority of the records it submitted to Amazon. DMPED denied your request in part and withheld six pages of responsive records pursuant to D.C. Official Code §§2-534 (a)(1) ("Exemption 1") and (a)(4) ("Exemption 4").

On appeal, you challenge DMPED's application of both Exemptions 1 and 4. You assert that Exemption 1's protection applies only to trade secrets and commercial or financial information obtained from outside the government, whereas you are seeking financial incentives offered by the District, not from outside parties. As a result, you believe Exemption 1 should not apply. Additionally, you assert that Exemption 4 is not applicable because, as a threshold requirement, it applies only to "inter-agency or intra-agency" documents. Since DMPED's proposal was submitted to Amazon, you contend that it is not an "inter-agency or intra-agency" document. Further, you argue that because DMPED's proposal to Amazon is neither predecisional nor deliberative, it is not protected by the deliberative process privilege under Exemption 4. Finally, you maintain that disclosure is in the public interest because the District's proposed incentives involve taxpayer funds.

[1] DMPED's response states that the date of the request was September 22, 2017; however, according to FOIAXpress the request was submitted on November 27, 2017.

This Office contacted DMPED on December 19, 2017, and notified the agency of your appeal.[2] On January 2, 2017, DMPED provided this Office with a response to your appeal, including a *Vaughn* index and a copy of the withheld documents for our *in camera* review.[3] In its response, DMPED reasserted its withholdings under Exemptions 1 and 4. Regarding Exemption 1, DMPED asserts that the proposal it submitted to Amazon includes commercial offers and incentives from private entities. DMPED also claims that the private entities face competition in their respective fields, and release of the commercial information would cause them and the District competitive harm. DMPED further claims that the commercial information associated with the District is inextricably intertwined with commercial information associated with the private entities, such that segregated disclosure of the District's information is not possible. With respect to Exemption 4, DMPED asserts that the common interest doctrine applies to satisfy the "inter-agency or intra-agency" document requirement. DMPED argues that the withheld records are predecisional and deliberative because the District may negotiate with Amazon and change its incentives. Finally, DMPED claims that revealing its incentives would weaken the District's competitive position to attract Amazon and potentially impair the District's ability to attract other new businesses as well.

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.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

Exemption 1

Exemption 1 protects from disclosure "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would results in substantial harm to the competitive position of the person from whom the information was obtained." To withhold information under Exemption 1, the information must be: (1) a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1). The D.C. Circuit has defined a trade

[2] DMPED requested and was granted an extension to respond to the appeal.
[3] A copy of DMPED's response and *Vaughn* index are attached.

secret, for the purposes of the federal Freedom of Information Act, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms "commercial" and "financial" used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Documents prepared by the government can be protected under Exemption 1 to the extent that they contain summaries or reformulations of information supplied by a source outside the government. *See, e.g., OSHA Data Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 (3d Cir. 2000) (finding that individual component data supplied by private-sector employers was protected commercial information); *Gulf & W. Indus. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979); *Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007).

Exemption 1 has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); s*ee also, Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so. [citations omitted]").

Here, you allege that the incentives offered directly from the District should not be protected under Exemption 1; however, DMPED asserts that the commercial and financial information contained in its proposal to Amazon is inextricably linked to information provided by private entities. After reviewing the records *in camera*, we find that a majority of the withheld information involves incentives offered solely by the District and should be disclosed.

Of the six pages that DMPED withheld, the first page is a title page that does not contain any protected information. The second and third pages describe how Amazon would benefit from an "incentive program" under the District's tax laws. These tax benefits, which include abatements, credits, and reductions, are available to any entity that satisfies certain statutory criteria. Accordingly, we find nothing proprietary about this "incentive program." There is one section of page 2, however, that may be protected from disclosure. This section contains estimates and calculations as to the benefits that Amazon might receive under the District's tax laws. These values appear to have been calculated by the District, in which case they would not be protected by Exemption 1. If the estimated values were provided by private entities, the values would potentially be protected from disclosure.

The fourth page consists of six columns describing additional incentives. Again, a majority of the potential incentives appear to be offered exclusively by the District, and, as a result, are not protected by Exemption 1. The fifth column on the page is the only column that may be

protected by Exemption 1, as it references incentives and concepts developed by private entities. Nevertheless, it is unclear based on the incentive descriptions whether actual competition exists or whether the private entities would be competitively harmed by disclosure of the incentives mentioned in this column.

The fifth page appears to contain incentives offered to Amazon by private entities who have partnered with the District. DMPED's generalized assertions that these entities face competition in their respective fields and would suffer competitive harm if the information were disclosed are insufficient to warrant protection under Exemption 1. The sixth page of the document was released in the public version of the District's bid, with the exception of one text box that we reviewed *in camera*. The text box consists of a summary of the "unique features" offered in the proposal. Only two of the features tangentially relate to private entities and are potentially exempt from disclosure for the reasons previously discussed.

Exemption 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 predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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*.

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

Exemption 4 has also been applied to include protections available in civil discovery for "trade secret or other confidential research, development, or commercial information" under Rule 26(c)(1)(G) of the Federal and District of Columbia Superior Court Rules of Civil Procedure. The basis for this protection is to prevent disclosure of confidential commercial information that would place the government at a disadvantage or endanger the consummation of a contract.

Federal Open Market Committee v. Merrill, 443 U.S. 340, 360 (1979). If the government documents sought in a request "contain sensitive information not otherwise available, and if immediate release of these [documents] would significantly harm the Government's monetary functions or commercial interests, than a slight delay in [release] . . . would be permitted under Exemption [4]." *Id.*

Here, the withheld information has been supplied to Amazon, an entity outside of the government. Therefore, in order for either the deliberative process privilege or commercial information privilege of Exemption 4 to apply, an exception must exist to the threshold requirement that the withheld records involve "inter-agency or intra-agency" documents. Two recognized exceptions are the consultant corollary and the common interest doctrine. 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 consultant 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 common interest doctrine applies when an agency collaborates with a private litigation partner in a case. *See, e.g., Hunton & Williams v. DOJ*, 590 F.3d 272, 288 (4th Cir. 2010).

Neither the consultant corollary nor the common interest doctrine applies here. Amazon is not acting as a consultant on behalf of the District; rather, it is in the adverse position of selecting from among multiple locations where to locate its second headquarters, while maximizing the incentives it receives from the location. Further, this matter does not involve litigation, and Amazon is not the District's litigation partner. DMPED's assertion that the common interest doctrine applies to contract awards outside of a litigation context appears to be without basis.[4]

The documents that DMPED submitted to Amazon are neither predecisional nor deliberative under Exemption 4. Even if the District's proposed incentives are renegotiated at a later point, the offer that DMPED submitted to Amazon constitutes the final version of DMPED's initial proposal. Moreover, there is no evidence before us suggesting that Amazon is prohibited from sharing with one jurisdiction the incentives offered by another for leverage purposes. Therefore, potential competitive harm from disclosure may not exist, rendering Exemption 4 further inapplicable.

Conclusion

Based on the foregoing, we remand DMPED's decision. Within 5 business days from the date of this decision, DMPED shall review the documents it withheld and disclose to you nonexempt portions in accordance with the guidance in this decision.

[4] DMPED cites *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979) in support of its common interest argument. While this case holds that the government's commercial information may be withheld from disclosure prior to the award of a contract, it does not involve the common interest doctrine. Further, the commercial information in *Federal Open Market Committee* was not shared outside of the agency that created it, so the threshold requirement that the information involve "inter-agency or intra-agency" documents was not at issue.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Molly Hofsommer, Esq., FOIA Officer, DMPED (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-58

January 10, 2018

VIA ELECTRONIC MAIL

Mr. Shuntay Brown

RE: FOIA Appeal 2018-58

Dear Mr. Brown:

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"), on the grounds that the District of Columbia Water and Sewer Authority ("DC Water") failed to respond to your November 17, 2017[1] request for records regarding the date a lead test was ordered.

This Office contacted DC Water on December 26, 2017, and notified the agency of your appeal. On December 27, 2017, DC Water provided you with a response to your request, stating that its Department of Water Quality Services searched its records and no responsive records were found.

Since your appeal was based on DC Water's failure to respond to your request, and DC Water has now responded, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to assert any challenge, by separate appeal to this Office, to the substantive response that DC Water sent you. We note that DC Water's response appears to describe an adequate search for records.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Victoria Fleming, FOIA Officer, DC Water (via email)

[1] Your request was initially submitted as a FOIA appeal on November 13, 2017; however, the determination of FOIA Appeal 2018-32 issued on November 17, 2017, found that your submission was actually a new FOIA request to DC Water.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-59

January 12, 2018

VIA ELECTRONIC MAIL

Mr. Guillermo Rueda

RE: FOIA Appeal 2018-59

Dear Mr. Rueda:

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"), on the grounds that the Department of Consumer and Regulatory Affairs ("DCRA") failed to adequately respond to your request for certain records.

Background

On November 17, 2017, you submitted a request to DCRA seeking "photos, inspection reports and the name of the inspector that determined the site is secure," relating to a specified address. On December 14, 2017, DCRA provided you with 5 responsive documents.

On December 28, 2017, you appealed DCRA's response – stating that you believed the response was "non-responsive" because it did not include information relating to "[a]n inspection . . . made on 11/15/17."

This Office notified DCRA of your appeal, and it responded on January 9, 2018.[1] In its response, DCRA described its process of searching for responsive records, which the agency started on November 20, 2017. DCRA's response indicates that it used the date it began searching for records as the "cut-off" date for it search, such that records generated after that date would not be included in the search. DCRA's response indicates that the November 15, 2017, inspection noted in your appeal had not yet been entered into DCRA's system by the November 20, 2017, "cut-off" date. As a result, this inspection was not included in DCRA's December 14, 2017 response. Nevertheless, DCRA's response to this appeal included an attachment containing responsive information relating to the November 15, 2017 inspection that was not available when DCRA began its search.

[1] A copy of DCRA's response is attached for your reference.

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.

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).

The crux of your appeal is your belief that DCRA should have included records from a November 15, 2017 inspection in response to your November 17, 2017 request. 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).

Here, DCRA described the search it conducted in response to your request. DCRA indicated that by November 20, 2017, your request had been sent to the appropriate divisions within DCRA for processing. The result of this search produced 5 responsive records. Your primary contention on appeal is that this search should have included records relating to a November 15, 2017, inspection. DCRA's response on appeal indicates that those records were not yet in DCRA's database at the time it conducted its search on November 20, 2017. *See Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on date of request); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) (recognizing that records created after date-of-search "cut-off" date "are not covered by [plaintiff's] request"); *Bonner v. U.S. Dept. of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (finding that, "[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing"). Nonetheless, DCRA has attached these records in response to this appeal, which you were carbon copied of on January 9, 2018.

We accept DCRA's representation that it provided to you all responsive records in its possession at the time that it processed your request. As a result, we reject your argument that DCRA's response was not responsive.

Conclusion

Based on the foregoing, we affirm DCRA's response to your request, insofar as the searches it conducted were adequate.

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: Erin Roberts, FOIA Officer, DCRA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-60

January 11, 2018

VIA ELECTRONIC MAIL

Mr. Carlo Bruni

RE: FOIA Appeal 2018-60

Dear Mr. Bruni:

This letter responds to the administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Office of Contracting and Procurement ("OCP") failed to respond to your November 27, 2017 request for performance evaluations of a Department of Health program.

This Office contacted OCP on December 28, 2017, and notified the agency of your appeal. OCP also responded on December 28, 2017, advising us that it responded to your request on the same date.[1] In its response, OCP asserted that it does not maintain responsive records and your request should be submitted to the Department of Health.

Since your appeal was based on OCP's failure to respond to your request, and the agency has now responded, your appeal is hereby dismissed on the grounds that it is moot.

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: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

[1] OCP's response is attached.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-61

January 12, 2018

VIA ELECTRONIC MAIL

Mr. Elliott Tucker

RE: FOIA Appeal 2018-61

Dear Mr. Tucker:

This letter responds to the administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Office of Contracting and Procurement ("OCP") provided you with nonresponsive documents to your November 13, 2017 request for records related to the soccer stadium at Buzzard Point.

This Office contacted OCP on December 28, 2017, and notified the agency of your appeal. OCP responded on January 8, 2018, confirming that it initially responded to your request on December 1, 2017, with nonresponsive documents.[1] OCP's response further states that it sent you the correct attachment responding to your FOIA request on December 11, 2017, which asserted that it did not maintain any responsive records and that your request should be submitted to the Department of General Services and the Office of the City Administrator.

Your appeal was based on OCP's initial, incorrect response to your request, and the agency subsequently corrected its response to assert that it does not maintain responsive records. Your appeal asserts no information to contradict OCP's assertion that the agency does not maintain responsive records. As a result, we affirm OCP's amended response to your request.

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: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

[1] OCP's response is attached.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-62

January 11, 2018

VIA ELECTRONIC MAIL

Ms. Joyce Briscoe

RE: FOIA Appeal 2018-62

Dear Ms. Briscoe:

This letter responds to the administrative appeal that 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 appeal you challenge the Fire and Emergency Medical Services Department's ("FEMS") denial of your December 18, 2017 request for records related to an ambulance pick up. Your submission did not appear to state a basis for your appeal other than asserting your belief that the Office of the Attorney General was required to approve your request.

This Office contacted FEMS on December 28, 2017, and notified the agency of your appeal. FEMS responded on December 29, 2017, advising us that it previously responded to your request by informing you that certain verification documents were required to grant your request, because the records sought involve medical information protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPPA").[2] D.C. Official Code § 2-534(a)(6) exempts from disclosure information that is protected by other statues, including HIPPA.

The basis for your appeal is unclear; the Office of the Attorney General is not required to approve your FOIA request. Instead, FEMS instructed you that your request could be granted if you submit the appropriate verification documents. Without appropriate verification, the information you seek is protected from disclosure under HIPPA. Absent appropriate verification, we affirm FEMS's decision to withhold the records your requested pursuant to D.C. Official Code § 2-534(a)(6).

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.

[1] You submitted your FOIA appeal to the Office of the Inspector General; however, your appeal was transferred to this Office, which adjudicates administrative FOIA appeals on behalf of the Mayor.
[2] FEMS's response is attached.

Respectfully,

Mayor's Office of Legal Counsel

cc: Angela Washington, Information and Privacy Officer, FEMS (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-63

January 16, 2018

VIA ELECTRONIC MAIL

Mr. Christopher Schiano

RE: FOIA Appeal 2018-63

Dear Mr. Schiano:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly withheld records responsive to your request under the DC FOIA.

Background

On December 19, 2017, you submitted a request to the MPD for the time cards of a detective from January 21, 2017 to the present. MPD denied your request on December 27, 2017, on the basis that disclosure of the time cards would constitute an unwarranted invasion of personal privacy pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2").

You appealed MPD's denial, arguing without citation that time sheets are public documents and not subject to exemptions. You assert further that there is public interest in the requested information because the detective worked on investigating arrests made on Inauguration Day. Finally, you assert that the requested records would reveal "how much money is the White House asking the city to spend to continue to investigate the inauguration."

This Office notified MPD of your appeal on December 29, 2017. MPD responded to this Office on January 8, 2018, reaffirming its position that individual detective's time sheets are personnel files protected from disclosure pursuant to Exemption 2.[1] MPD further argues that there is a sufficient privacy interest involved in the time sheets to warrant protection from disclosure. Finally, MPD asserts that there is no public interest in disclosing these records.

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

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

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.

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).

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). Courts have consistently held that an employee's time sheets involve a sufficient privacy interest to warrant protection. *See e.g., Berger v. IRS*, 487 F. Supp. 2d 482, 505 (D.N.J. 2007) (finding an individual employee's time sheets are protected from disclosure); s*ee also Morales v. Pension Benefit Guar. Corp.*, No. 10-1167, 2012 U.S. Dist. LEXIS 9101, at *12 (D. Md. Jan. 26, 2012). Your assertion that time sheets are public records is contrary to relevant case law. *See also* D.C. Official Code § 2-536. As a result, we agree with MPD's assertion that the detective's time sheets are protected under Exemption 2.

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.

You argue that the release of the requested records "does not constitute 'a clearly unwarranted invasion of personal privacy,'" because the records are "the only avenue [you] are aware of to

begin to calculate a hard figure as to how much taxpayer funds have been spent to date on the inauguration day prosecutions." From this you conclude that the records are of "public and journalistic value" because they would allow you to compare the "cost of damages done" on Inauguration Day to the "cost of the hours at the US Attorney's Office is asking the District's police to spend investigating the case." Lastly, you argue, without citation, that because "the Office of Police Complaints pointed out First amendment issues with police conduct" that there is a "public interest in transparency surrounding these events." These public interest arguments do not comport with the "public interest" as contemplated by DC FOIA.

We find that the release of an individual detective's time sheets would not shed light on MPD's performance of its statutory duties. *See Berger*, 487 F. Supp. 2d at 505. Further, it is unclear how a year's worth of time sheets from an individual detective could shed light on "First amendment issues with police conduct." Due to the absence of a relevant countervailing public interest, we find that the detective's time sheets are protected from disclosure pursuant to Exemption 2.

Conclusion

Based on the foregoing, we affirm MPD's decision. 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-64

January 29, 2018

VIA ELECTRONIC MAIL

Ms. Sarah Wilson

RE: FOIA Appeal 2018-64

Dear Ms. Wilson:

This letter responds to the administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Metropolitan Police Department ("MPD") improperly denied your December 8, 2017 request for records related to homeless encampment clearings, including records related to arrests or detentions made during the clearings. MPD denied your request on December 13, 2017, and referred you to the Department of Human Services for responsive records.

This Office received your appeal on January 16, 2018, and asked MPD to provide us with a response. MPD responded on January 23, 2018, and advised us that after receiving your appeal it reconsidered its original response and will provide you with non-exempt responsive records, including body-worn camera footage.[1] Since your appeal was based on MPD's denial of your request, and the agency has stated that it will now grant your request, we consider your appeal to be moot and hereby dismiss it without prejudice. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

[1] MPD's response is attached.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-65

January 31, 2018

Mr. Stuart Chapman

RE: FOIA Appeal 2018-65

Dear Mr. Chapman:

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 Office of the State Superintendent of Education ("OSSE") failed to respond to a request you made under DC FOIA.

Background

On October 13, 2017, you submitted a request under the DC FOIA to OSSE seeking:

> For each fall semester since August 2011 to present, for which private schools in the District of Columbia were paid tuition for children's attendance pursuant to the DC Pre-K Enhancement and Expansion Program, which is a result of the Pre-K Enhancement and Expansion Amendment Act of 2008 (D.C. Law 17-202; D.C. Official Code 38.271.01 et seq.), please identify the year and the child's birthday, the name of the school to which the tuition was paid, and a means chosen by you to confidentially identify such students such as by initials, number, or code.

Subsequently, you appealed to this Office asserting that your request had been constructively denied. Your appeal alleges that OSSE did not respond to your request – though your appeal references communications between you and OSSE's FOIA Officer. On appeal, you assert without citation or explanation that OSSE is "trying to hide a situation where they are sending out hundreds of thousands of dollars to area schools without proper compliance." You aver that you seek the requested records to "see if ANY exceptions have been made in the past" so that you can "move for relief for the more-than-$20,000 that [you] are currently paying for" child care. Your appeal clarifies that you "are not asking for anything that will identify anybody."

OSSE responded to your appeal in a January 30, 2018 letter to this Office. OSSE's response explained that it was providing to you responsive information from its enrollment audit for the 2016-2017 and 2017-2018 school years. This responsive information is in the form of a list of birthdays; OSSE withheld the names of the community-based organizations ("CBOs") so as to prevent cross-referencing that could reveal the personally identifiable information of children. OSSE explained that its enrollment audit recently moved to a new data system, from which OSSE retrieved the most recent information. OSSE further explained that it was only able to

retrieve 2016-2017 data from its older data system, Quick Base. OSSE was not able to retrieve earlier data from Quick Base, which is the only database likely to contain responsive records.

You responded to OSSE's response, stating "we will be continuing our appeal" . . . "I continue to wonder why they are withholding, without justification or explanation, that data, which would be used for compliance with the law." You also stated that you planned to respond further and that you believed OSSE's "partial response does NOT dispose of [your] appeal." Nonetheless, the record before this Office is sufficient for us to render a decision.

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), and 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).

There are four primary issues in this matter: (1) the constructive denial of your request; (2) the adequacy of OSSE's search; (3) the withholdings made pursuant to an exemption under DC FOIA; (4) and OSSE's lack of obligation to create records that suit your personal needs.

Constructive Denial

You submitted your request to OSSE on October 13, 2017. OSSE's response indicates that your request was submitted on December 15, 2017. In either event, OSSE failed to provide the requested records within the 15 days prescribed by D.C. Official Code § 2-532 (c)(1). It is unclear from the record before this Office if OSSE sought an extension to respond to your request by "written notice . . . setting forth the reasons for extension and expected date for determination," as contemplated by D.C. Official Code § 2-532 (d)(1). In either event, because OSSE did not provide you with a final response by the time you filed your appeal on January 16, 2018, this Office finds that OSSE constructively denied your request. D.C. Official Code § 2-532(e).

Upon receipt of your appeal, OSSE finished conducting a search and provided to you responsive records for some of the years that you requested. Because your appeal is based on a lack of initial response from OSSE, this Office would normally dismiss this matter as moot. However, because

you appear to be challenging the adequacy of OSSE's search by asserting your belief that additional data exists, we will review OSSE's substantive response to your request.

Adequacy of Search

DC FOIA requires only that, under the circumstances, a search is 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).

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 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.*

Here, OSSE identified new and old data systems used to store enrollment audit information as the record repositories likely to contain records responsive to your request. OSSE searched the new system and retrieved data for the 2017-2018 school year. Additionally, OSSE searched the old data system, Quick Base, and was only able to retrieve data from the 2016-2017 school year. In communications with this Office, OSSE represented that earlier data does not exist in either of the databases, which are the repositories most likely to contain responsive records. Notwithstanding your belief that earlier information exists, we find that OSSE has conducted an adequate search under DC FOIA.

Withholding For Privacy

Summarily, we agree with OSSE's implied assertion of D.C. Official Code § 2-534(a)(2) to withhold the names and personally identifiable information of persons identified in the documents, including the names of the CBOs. Because of the small sample size within each organization, pairing names of CBOs to student birthdates could be used to reveal the students' personally identifiable information. As a result, we affirm OSSE's withholdings that were made pursuant to the exemption.

Creating New Records

An adequate search does not require FOIA officers to act as personal researchers on behalf of requesters. *See, e.g., Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters…"); *Lamb v. IRS*, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

To the extent that enrollment data for previous school years of data is not retrievable, as OSSE has represented, your request could be interpreted a request for OSSE to create a new record. OSSE has no obligation under FOIA to create a new record or to answer interrogatories. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009).

Conclusion

Based on the foregoing, we affirm OSSE's decision insofar as it has conducted an adequate search for the documents you requested.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Mona Patel, FOIA Officer, OSSE (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-67

January 23, 2018

VIA ELECTRONIC MAIL

Ms. Claudia Barber

RE: FOIA Appeal 2018-67

Dear Ms. Barber:

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 allege that the Office of Administrative Hearings ("OAH") refused and failed to respond to a request you submitted under the DC FOIA.

Background

On November 18, 2017, you submitted a request for all correspondence between OAH and the Commission on Selection and Tenure ("COST") during 2016 and 2017 and all correspondence from OAH that pertained to you during 2016 and 2017. On the same day, OAH asked you to clarify your request pursuant to 1 DCMR § 402.4. You refused to clarify or narrow the terms of your request and asserted that your request was sufficiently narrow for OAH to process. On December 5, 2017, OAH exercised its right to an extension pursuant to D.C. Official Code § 2-532(d)(2) due to the volume of records involved in your request.[1] On December 27, 2017, OAH communicated to you the reason for the delay pursuant to 1 DCMR § 405.5.

Your appeal was received by this Office on January 8, 2018.[2] On the same day, this Office contacted OAH and notified the agency of your appeal. Your appeal states that you are "appealing [OAH's] refusal and failure to produce anything." On January 9, 2018, OAH responded, explaining that it was still awaiting search results from the Office of the Chief Technology Officer ("OCTO") and would provide you with a fee estimate once it was fully aware of the scope of responsive records.

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

[1] November 18th was a Saturday in 2017; therefore, the deadline for OAH to respond to your request, after invoking a 10 business day extension, was December 27, 2017.
[2] You attempted to submit your appeal earlier; however, the appeal was not properly submitted.

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.

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).

You assert that the basis of your appeal is OAH's refusal and failure to produce anything in response to your request. Under D.C. Official Code § 2-532(e), when an agency fails to fulfill a request within the time requirements established in D.C. Official Code §§ 2-532(c) and (d), the request may be deemed denied. As a result of OAH not producing records to you by December 27, 2017, you had the right to appeal the deemed denial of your request.

In reviewing your constructive denial, we find that your request necessitated a voluminous search, as you are seeking all records concerning you and all correspondence between two agencies over a two-year period. OAH initially requested that you narrow your request and subsequently informed you on multiple occasions of the status of your request. OAH explained to you the reason for its delay - that it is still awaiting from OCTO the search results of your voluminous request. Consequently, OAH never refused to respond to your request.

Conclusion

Your appeal was based on your contention that OAH refused and failed to respond to your request. Pursuant to D.C. Official Code § 2-537(a)(2), the Mayor may order the disclosure of a public record if it has been wrongfully withheld. Here, OAH has not withheld any records; rather, it appears to be processing your request and has represented that it will review and disclose non-exempt records to you once it receives them from OCTO.[3] Given this representation, we consider your appeal to be moot and hereby dismiss it without prejudice. You are free to challenge OAH's forthcoming substantive response by separate appeal to this Office.

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.

[3] OAH may charge you fees to recoup costs incurred by your request. *See* 1 DCMR § 408. In light of the large number of documents anticipated, we recommend that OAH create and share with you a fee estimate based on the total number of documents OCTO retrieves. Further, OAH may require advance payment of fees if it determines that the cost of the fees will exceed $250, pursuant to D.C Official Code § 2-532(b-3).

Respectfully,

Mayor's Office of Legal Counsel

cc: Shawn Nolen, Attorney Advisor, OAH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeals: 2018-68 & 2018-69

February 1, 2018

VIA ELECTRONIC MAIL

Ms. Mary Sabio

RE: FOIA Appeal 2018-68, 2018-69

Dear Ms. Sabio:

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"), on the grounds that the Office of the Chief Financial Officer ("OCFO") improperly responded to your requests under the DC FOIA.

Background

On December 15, 2017, OCFO responded to a FOIA request you had submitted[1], denying a portion of a request you submitted for records relating to sexual harassment and discrimination complaints filed against a named employee. OCFO withholding of the complaint records relied on D.C. Official Code § 2-534(a)(2) ("Exemption 2").[2]

On December 19, 2017, you filed a subsequent request to OCFO for similar documents, along with payroll records. On January 12, 2018, OCFO responded to your second request by providing responsive payroll records, and by reiterating your appeal rights as to the previously denied complaint records.

On January 18, 2018, you filed an appeal challenging the December 15, 2017, denial of complaint records, and the formatting of payroll records provided in the January 12, 2018 response[3]. The appeal of the two denial records was docketed as two appeals, though this decision will address both. Your appeal argues that because the target of the complaint records you seek is deceased that no privacy interest exists that can justify OCFO's withholding.
This Office notified OCFO of your appeal on January 18, 2018. OCFO responded to this Office on January 25, 2018, reaffirming its position that the email address should be redacted pursuant

[1] There was not a dated copy of this request attached to your appeal.
[2] Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
[3] OCFO's response to this appeal indicates that it will be providing to you the salary histories in the format that you requested. We consider this portion of your appeal to be moot and will not address it further.

to Exemption 2.[4] OCFO's response asserts that death diminishes but does not completely remove a privacy interest. OCFO further argues that that there is no public interest in disclosing allegations made against an individual employee, as it does not shed light on the agency's performance of its statutory duties.

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.

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).

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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Courts have consistently held that personal email addresses involve a sufficient privacy interest to warrant protection. *See Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010) (finding that lobbyists' email addresses should be protected from disclosure unless they are the only way to identify the individuals in question); s*ee also Pinson v. Lappin*, 806 F. Supp. 2d 230, 234 (D.D.C. 2011), *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 523 (S.D.N.Y. 2010) (holding that work email addresses of low level government employees were properly withheld).

On appeal, you argue that the named employee:

> is deceased and therefore it is improper for these materials to be withheld by asserting the exemption protecting private personnel information. If [the employee] was alive, an argument could be made that the balancing test of privacy interest versus the operations of the DC lottery has been made and that the privacy interest was greater. But this obviously is not the case here since [the

[4] A copy of OCFO's response is attached.

> employee] is deceased. . . a privacy exemption cannot be exerted for a deceased person.

On this point, we find OCFO's citations to be persuasive, that:

> In considering the privacy rights of the deceased, "one's own … interest in privacy ordinarily extend beyond one's death." *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001. Rather, the privacy interest of an individual may only be diminished, not eliminated, if that individual is deceased. *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) ("We have recognized that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased"); *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) ("The fact of death, therefore, while not requiring the release of identifying information, is a relevant factor to be taken into account in the balancing decision whether to release information").

That the named employee is deceased is not dispositive of whether the documents must be released. Instead, we find that the deceased employee does have at least a *de minimis* privacy interest in the complaint records, which consist of allegations, pursuant to Exemption 2. *See Skinner*, 806 F. Supp. 2d at 113.

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.

Aside from arguing that no personal privacy interest is associated with personnel records of a deceased employee, you have not articulated a public interest in favor of disclosure that is relevant to DC FOIA. You argue that the deceased employee was not effective as his job and terminated employees who were effective, but it is unclear how this ties to the withheld record. Further, it is unclear how the contents of a complaint made against the employee's individual conduct would reveal anything about the agency's performance of its statutory duties. In the absence of a relevant countervailing public interest, we find that the complaint is protected from disclosure pursuant to Exemption 2.

Conclusion

Based on the foregoing, we affirm OCFO's decision. 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Chaia Morgan, Assistant General Counsel, OCFO (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-70

February 6, 2018

VIA ELECTRONIC MAIL

Ms. Sydney Householder

RE: FOIA Appeal 2018-70

Dear Ms. Householder:

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 timeframe that the Office of the Chief Technology Officer ("OCTO") applied to your FOIA request.

Background

On January 3, 2018, you submitted a request to OCTO for five categories of records. The first three categories of the request pertained to contracts for projects to increase internet access. The remaining two categories related to records of meetings that you allege OCTO held regarding the internet access projects. On January 9, 2018, OCTO acknowledged receipt of your request only with respect to the two parts related to non-contractual records of meetings. On Saturday, January 20, 2018, based on a response you received from a FOIA request you submitted to another agency,[1] you contacted OCTO and asked that it process the first three parts of your request as well. On Monday, January 22, 2018, OCTO responded that it would process the three parts as a new request.

This Office received your appeal on January 23, 2018, and contacted OCTO for its response. Your appeal asserts two arguments. You claim that the timeframe for processing your request should start on the date you submitted the request (January 3, 2018) rather than the date OCTO claims it received the request (January 9, 2018). Additionally, you argue that the timeframe to process all five parts of your request should have begun on January 3, because there was no valid reason for OCTO to ignore the first three parts of your request until January 22nd.

[1] Prior to submitting your FOIA request to OCTO, you sent the same request to the Office of Contracting and Procurement ("OCP"). OCP responded to your request on January 19, 2018, stating that it had no responsive records and suggesting that you ask OCTO for records pertaining to the "non-contractual portion of your request."

OCTO responded to your appeal on January 26, 2018.[2] In its response, OCTO states that the timeframe to process FOIA requests starts on the date an agency receives a request rather than the date on which a requester submits it. OCTO also indicates that its FOIA Officer did not receive your request until January 9th. Additionally, OCTO asserts that its reason for initially processing only two parts of your request was based on your own instructions via phone and email; namely, you advised OCTO on December 6, 2017, via email, that you intended to submit a FOIA request to OCTO seeking a response to only the two non-contractual parts of a request that you had previously submitted to OCP. Additionally, OCTO argues that you misinterpreted OCP's response because you claim that OCP informed you that OCTO would possess all the documents responsive to your request, but OCP's response states only that you should contact OCTO for the non-contractual portions of the request.

On January 31, 2018, OCTO provided you with its response to the two parts of your request pertaining to non-contractual records stating that it did not possess any responsive records and that the Department of Small and Local Business Development might possess responsive records. On the same day, OCTO also provided you with a partial response to the three parts of your request pertaining to contractual records. OCTO's partial response included assertions that it had not found any contractual records responsive to your request and that it would need additional information regarding your request to search further.

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.

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).

Your appeal is based solely on OCTO's characterization of the date on which it received your request. This Office's jurisdiction is limited to "review[ing] the public record to determine whether [a record] may be withheld from public inspection." D.C. Official Code § 2-537(a). Under D.C. Official Code § 2-532(e), when an agency fails to fulfill a request within the time requirements established in D.C. Official Code §§ 2-532(c) and (d), the request may be deemed

[2] A copy of OCTO's response is attached.

denied.[3] As a result, the timeframe of your request is only relevant for the purposes of an administrative appeal if it constitutes a deemed denial.

Because OCTO has provided responses to all categories of your request, the issue of whether OCTO constructively denied your request by failing to respond within a certain time period is now moot. We note that, pursuant to D. C. Official Code § 2–532(c)(1), the timeframe for processing a FOIA request begins upon the date an agency receives a request rather than the date a requester submits it. However, the activity log on the FOIAXpress portal indicates that OCTO personnel did receive your request on January 3, 2018, the same date that you submitted it. Additionally, we note that OCTO's initial decision to process only two parts of your request was based on a reasonable interpretation of your communications that you were only seeking OCTO's response to certain parts of your request and that the remaining portion of the request was pending with OCP.

Conclusion

Based on the foregoing, we consider your appeal to be moot and hereby dismiss it without prejudice. You are free to challenge OCTO's substantive responses to your request by separate appeal to this Office.

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: Niquelle Allen, FOIA Officer, OCTO (via email)

[3] Your appeal was unripe when it was submitted on January 23, 2018, because even if the timeframe for processing your request began on January 3, 2018, your request could not be deemed denied pursuant to D.C. Official Code §§ 2-532(c) until January 25, 2018.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-71

February 9, 2018

VIA ELECTRONIC MAIL

Mr. Scott B. Cryder

RE: FOIA Appeal 2018-71

Dear Mr. Cryder:

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"), on the grounds that the Office of the Chief Financial Officer ("OCFO") did not adequately respond or search for records responsive to your request for information regarding the Office of Tax and Revenue ("OTR")[1] and the Real Property Tax Appeals Commission ("RPTAC").

Background

On November 3, 2017, you submitted a request to OCFO for six categories of records of interaction and coordination between OTR and RPTAC. On November 16, 2017, OCFO responded to your request by providing you with 14 pages of responsive records. OCFO's response did not indicate how the records it disclosed related to the six categories of your request. Additionally, OCFO's response did not indicate that any records were withheld.

This Office received your appeal on January 26, 2018, and contacted OCFO for its response. Your appeal asserts that OCFO's 14-page disclosure is inadequate based on the five-year scope of your request. Specifically, you state that the records disclosed by OCFO demonstrate that additional records should exist because the disclosure clearly contains partial email chains. Additionally, you assert that your request would promote the public interest of understanding the District's handling of real property assessments.

On February 2, 2018, OCFO contacted this Office, stating that its initial search had included only current employees. OCFO claimed that it had subsequently identified former employees whose emails would likely contain responsive records and that it would search and review those emails and provide you with additional non-exempt responsive documents as they became available.

[1] OTR is an office within OCFO.

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).

The primary issue in this appeal is your belief that additional responsive records exist beyond those that OCFO has disclosed; therefore, we consider whether or not OCFO conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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 statements cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

On appeal, you have claimed that additional responsive records should exist based on the emails provided in OCFO's initial disclosure. OCFO has acknowledged that additional emails exist and that it intends to disclose those records to you. However, emails were only one category of the six-category request that you submitted to OCFO. It does not appear that OCFO has: (1) made a determination regarding the locations of the other five categories of records you requested; (2) communicated to you this determination(s); and (3) described the search(es) it conducted for the other categories of records. Therefore, OCFO has not demonstrated that it has conducted a reasonable search pursuant to your request.

Conclusion

Based on the foregoing, we remand this matter to OCFO. Within 10 business days from the date of this decision, OCFO shall identify the relevant locations of records for each category or your request and describe the results of its search. If OCFO's forthcoming searches result in retrieving additional responsive records, OCFO shall disclose to you non-exempt portions in accordance with DC FOIA. You are free to challenge OCFO's forthcoming substantive response by separate appeal to 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: Tracye Y. Peters, FOIA Officer, OCFO (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-72

February 15, 2018

VIA ELECTRONIC MAIL

Ms. Natasha Rodriguez

RE: FOIA Appeal 2018-72

Dear Ms. Rodriguez:

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"), on the grounds that the Department of Health ("DOH") failed to respond to your request for records related to rabies reports and other diseases tested for in cats.

This Office contacted DOH on February 2, 2018, and notified the agency of your appeal. DOH responded on February 9, 2018.[1] In its response, DOH indicated that it did not respond to your request due to an administrative error. DOH advised us that it would continue to process your request and disclose responsive information as quickly as possible.

As a result, we remand this matter to DOH to complete its search, and to disclose to you any non-exempt records within 10 business days from the date of this decision. You may challenge DOH's subsequent response by separate appeal to 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: Ed Rich, Senior Assistant General Counsel, DOH (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-74

February 20, 2018

VIA ELECTRONIC MAIL

Ms. Loretta Townsend

RE: FOIA Appeal 2018-74

Dear Ms. Townsend:

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 Metropolitan Police Department ("MPD") failed to adequately respond to a request you submitted under the DC FOIA.

Background

On October 5, 2017, MPD received your request for employment records related to your client, a former MPD employee. The request also sought copies of documents that MPD sent to your client's potential employers regarding her tenure at MPD.

MPD placed your request on hold to verify that you had authorization from your client to receive the employment records sought. On January 8, 2018, after you provided your client's authorization, MPD responded to your request indicating that it had conducted a search and no responsive records were found.

This Office received your appeal on February 5, 2018, and notified MPD on the same day, requesting its response. Your appeal asserts your belief that MPD's response is in error and states that your client wishes to know how MPD's records characterize her separation from employment. On February 12, 2018, MPD responded, stating that its Human Resources Division conducted a search for records pursuant to your request and no responsive records were located. MPD characterized your request as seeking employment documents the MPD released to other "law enforcement agencies that are considering [your] client for employment."[1] MPD's response further suggested that you contact its Human Resources Division to address your concerns about how it communicates to prospective employers.

[1] A copy of MPD'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).

The primary issues in this appeal are your beliefs that responsive records should exist and that MPD did not conduct an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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 statements cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

You assert that MPD should possess your client's employment records because she was previously employed by MPD. Your request sought your client's employment records, including documents MPD sent to prospective employers. Based on its responses to your request and to this appeal, MPD appears to have narrowly construed your request as seeking only records MPD sent to your client's prospective employers. MPD identified its Human Resources Division as the location where responsive records would be held. However, MPD has not provided an adequate description of its search or given an explanation as to why there would be no employment records for a former employee. As a result, MPD has not demonstrated that it has conducted a reasonable search pursuant to your request.

Conclusion

Based on the foregoing, we remand this matter to MPD. Within 10 business days from the date of this decision, MPD shall conduct a search for your client's employment records and describe the results of its search. If MPD's forthcoming searches result in retrieving additional responsive records, MPD shall disclose to you non-exempt portions in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-75

February 20, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Weinstein

RE: FOIA Appeal 2018-75

Dear Mr. Weinstein:

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"), on the grounds that the Department of Consumer and Regulatory Affairs ("DCRA") improperly withheld records in response to your request under the DC FOIA.

Background

On November 28, 2017, you submitted a request to DCRA for records relating to "the vacant building determination" of a particular address. DCRA responded on February 5, 2018, denying your request and informing you that it was withholding 10 responsive documents to protect personal privacy pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2").[1]

You appealed DCRA's denial, arguing that personal information could be redacted, as has been done in previous requests to DCRA, instead of the documents being withheld in their entirety. This Office notified DCRA of your appeal on February 5, 2018. DCRA responded to this Office on February 12, 2018, reaffirming its position that the records were properly withheld pursuant to Exemption 2.[2] DCRA's response asserts that there is a privacy interest because the records concern a residential address. Additionally, DCRA asserts that there is no public interest in disclosing the withheld records.

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

[1] Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
[2] A copy of DCRA's response is attached.

records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534.

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).

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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994); *see also* FOIA Appeal 2017-133, FOIA Appeal 2017-149.

Having conducted an *in camera* review of the withheld records, we agree that there is a *de minimis* privacy interest associated with records pertaining to a specified residential address. *See Skinner*, 806 F. Supp. 2d at 113.

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.

District law requires DCRA to, *inter alia*, determine whether a building is vacant or blighted, notify a building owner of this designation, and advise the owner of his or her right to appeal the designation. D.C. Official Code § 42-3131.11. The withheld records reflect DCRA's performance of these statutory duties. Although we recognize DCRA arguments that there is a

privacy interest associated with the records, it appears that there is a public interest in the withheld documents as well.

The public interest in the records at issue is evident from several provisions of D.C. Official Code § 2-536, the statute describing information that must be made public. Of most relevance is D.C. Official Code § 2-536(a)(5), which states that the following must be made public:

> Correspondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party.

.

The withheld documents contain a delinquency determination notice, a notice of vacant building response requirements, and a vacant building exemption approval. These documents constitute correspondence from a public body (DCRA) relating to its enforcement responsibilities (determining whether a building is blighted) and consequently the rights the District has (reclassifying the building for tax purposes) and the building owner has (appealing the determination) with respect to the determination. As a result, we find that there is a public interest in some of the withheld records that outweighs the privacy interest associated with the records.

D.C. FOIA requires agencies to reasonably segregate public records to the extent possible. D.C. Official Code § 2-534(b). Instead of withholding an entire document, an agency should make discrete redactions to privileged information where necessary. While D.C. Official Code § 2-536 designates certain information as required to be made public, it does so "[w]ithout limiting the meaning of other sections of this subchapter." As a result, DCRA properly withheld some of the documents you requested (e.g., financial information, utility bills), and this information should remain withheld or redacted.

Conclusion

Based on the foregoing, we remand this matter to DCRA. Within 10 days, DCRA shall review the withheld documents, make redactions in accordance with the guidance in this decision, and release the withheld records. 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.

Sincerely,

Mayor's Office of Legal Counsel

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-76

February 27, 2018

VIA ELECTRONIC MAIL

Mr. P.J. Goel

RE: FOIA Appeal 2018-76

Dear Mr. Goel:

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 Department of General Service's ("DGS") response to your request under the DC FOIA.

Background

On December 15, 2017, you submitted a FOIA request to DGS for records pertaining to Solicitation No: DCAM-17-CS-0123. Specifically, you sought the "Full electronic submissions of all bidders" including "Price Volumes," "as well as DGS technical panel evaluators [sic] review of each bid and score for each bidder." Your request states your belief that "There should be no privileged information on the bids unless the bids were specifically marked as exempt[.]" You provided a copy of your passport card with the request.

On January 31, 2018, DGS granted your request in part and denied it in part. DGS redacted and withheld some records pursuant to D.C. Official Code §2-534 (a)(2) ("Exemption 2"),[1] D.C. Official Code §2-534 (a)(4) ("Exemption 4"),[2] and D.C. Official Code §2-534 (a)(6) ("Exemption 6").[3]

On February 11, 2018 you submitted this appeal, in which you assert your suspicion that "a panelists [sic] committed fraud from the District. . . ." Without further explanation, you assert that "[b]ased on the debriefing, one of the panelists appears to have lied and then created a libelous situation by propagating her lie about Goel Services in front of others." Your appeal also indicates that you have referred this matter "to the OIG and the FBI." Lastly, your appeal

[1] Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
[2] Exemption 4 exempts from disclosure "[i]nter-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[.]"
[3] Exemption 6 exempts from disclosure "[i]nformation specifically exempted from disclosure by statute . . ."

questions whether DGS's FOIA Officer is "as well acting or implicit is [sic] the crimes that are occurring . . ." In a subsequent email message sent to this Office, you attached an article and complained that DGS's response ". . . is just like Trumps [sic] on Friday – It is unacceptable, leads to unaccountability, hides the truth, is deceitful and with the intent to hide a crime and major errors that have been committed . . ." Your email states your belief that the underlying matter "should be referred to the OIG," and that "if DGS will not be held accountable, it will end up in the Washington Post."

This Office contacted DGS on February 12, 2018, and notified the agency of your appeal. On February 20, 2018, DGS provided this Office with a response to your appeal.[4] DGS reaffirmed its use of Exemptions 2, 4, and 6, providing legal citations and explanations for its reliance on these exemptions for each category of withheld records. Further, DGS determined upon review of your appeal that additional disclosures relating to the successful bid were warranted. DGS asserted that it would provide you with these documents.

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.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

This decision shall review the three exemptions DGS invoked in redacting documents responsive to your request to determine whether the agency's partial denial was proper.

Disclosure Prohibited by Other Law

DGS redacted portions of the records it provided you under Exemption 6. Exemption 6 protects from disclosure records which are specifically exempted from disclosure by a statute other than DC FOIA. D.C. Official Code § 2-534(a)(6). In documents it provided to you, DGS redacted tax identification numbers under Exemption 6, pursuant to D.C. Official Code § 47-1805.04 ("it shall be unlawful . . . to divulge or make known in any manner . . . any other federal, state, or local income tax information either submitted by the taxpayer or otherwise obtained").

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

In FOIA Appeal 2016-75R, this Office found that pursuant to Exemption 6, 26 U.S.C. § 6103 is a federal statute that prevents disclosure of EINs[5]. Under 26 U.S.C. § 6103(a), tax return information, including the tax payer identifying number, is deemed confidential, and unless otherwise authorized by the U.S. Code, no officer or employee of any state, including the District of Columbia, who has access to return information shall disclose any return information obtained by him in any manner in connection with his service as an employee. 26 U.S.C. §§ 6103(a), (b)(5), (b)(6). This prohibition extends to corporations as well as individuals. *See* 26 U.S.C. § 7701(a)(14). The statute leaves no discretion as to whether tax information may be disclosed. Accordingly, the tax identification numbers were properly redacted by DGS under Exemption 6.

Deliberative Process

Exemption 4 of DC FOIA 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 predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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.

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

Here, DGS withheld responsive documents pursuant to Exemption 4 under the deliberative process privilege. The withheld documents are inter-agency documents used to evaluate and score bids to assist the Chief Contracting Officer in making a final decision. Notwithstanding your repeated allegations of a crime and a cover up that you believe has disadvantaged your company in a particular bidding process, we find that the documents DGS withheld pursuant to

[5] An Employer Identification Number ("EIN") is also known as a Federal Tax Identification Number, and is used to identify a business entity.

Exemption 4 are the very type of documents contemplated by the deliberative process privilege. If an agency's pre-decisional bid evaluations were shared with an unsuccessful bidder, the agency would be discouraged from being candid in its deliberations, which would harm any future decision making process. As a result, we affirm DGS's use of Exemption 4.

Personal Privacy

DGS indicates that it redacted from disclosure individuals' names, driver's license numbers, and resumes pursuant to Exemption 2. It appears from your appeal that you are not challenging these redactions. However, since DGS has or will be providing further disclosures to you, we note that DGS appropriately invoked Exemption 2 to withhold information such as names, driver's license numbers, and resumes of the unsuccessful bidders, which would constitute an unwarranted invasion of privacy if disclosed.

Conclusion

Based on the foregoing, we affirm DGS's decision.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: C. Vaughn Adams, Senior Assistant General Counsel, DGS (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-77

February 27, 2018

VIA ELECTRONIC MAIL

Ms. Victoria D. Baranetsky

RE: FOIA Appeal 2018-77

Dear Ms. Baranetsky:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly withheld records responsive to your request under the DC FOIA.

On November 27, 2017, your organization submitted a FOIA request to MPD for records related to police escorts for foreign governments or dignitaries for a period between 2016 and 2017. The request noted that your organization was fine with MPD redacting names of individuals in its disclosure. On December 11, 2017, MPD denied the request, asserting that responsive records were exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(D) ("Exemption 3(D)").

You appealed MPD's denial, asserting that Exemption 3(D) was not applicable to the request and that it was improper for MPD to entirely withhold responsive records rather releasing segregable portions with redactions. This Office notified MPD of your appeal on February 13, 2018, and requested that it respond. MPD responded on February 22, 2018,[1] indicating that it disclosed a number of responsive records with portions of the records redacted pursuant to Exemption 3(D).[2] MPD advised us that it would reconsider its application of Exemption 3(D) and provide you with an additional response.

Exemption 3(D) provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes… but only to the extent that the production of such records would . . . (D) Disclose the identity of a confidential source…." On its face, your request does not appear to involve records that would fall under the protection of Exemption 3(D). Further, MPD has not demonstrated that the records you seek are investigatory records or that the records involve the

[1] A copy of MPD's response is attached.
[2] MPD's assertion that it provided redacted records contradicts your appeal, MPD's initial denial letter, and the online portal, FOIAXpress, all of which state that your organization's request was denied in full. Our decision is not affected by this contradiction; however, MPD should confirm whether or not its indented disclosures reached your organization.

identity of confidential sources. As a result, we find MPD's denial based on Exemption 3(D) to be improper.

We hereby remand this matter to MPD to complete its review of the responsive records, and to disclose to you any non-exempt portions within 7 business days from the date of this decision. If MPD redacts portions of the records it discloses to you, it shall provide a reasonable explanation of the basis for the redactions. You may challenge MPD's subsequent response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-78

March 7, 2018

VIA ELECTRONIC MAIL

Ms. Clare Garvie

RE: FOIA Appeal 2018-78

Dear Ms. Garvie:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to perform an adequate search in response to your request for records related to MPD's use of facial recognition technology ("FRT").

In a letter dated December 18, 2017, you submitted a request to MPD for nine categories of records pertaining to FRT. On January 8, 2018, MPD denied your request, stating that it was unable to locate responsive records. MPD's denial asserted that the reason it had no responsive records was because it had not acquired FRT.

On February 14, 2018, this Office received your appeal and asked MPD for its response. On appeal you assert that MPD uses FRT in its investigations; therefore, an adequate search should produce responsive records. Your appeal includes exhibits demonstrating that an investigating officer entered a photograph of a suspect's face into "an MPD database that has facial recognition software" to determine the identity of the suspect.

On February 22, 2018, MPD requested an extension to respond to your appeal. On March 1, 2018, MPD advised us that it is awaiting a response from its software vendor to determine whether information regarding the FRT system is exempt from disclosure. On March 7, 2018, MPD asserted that it had conducted an additional search which located responsive records.

Based on the information provided in your appeal and MPD's subsequent statements, it is apparent that MPD's initial search was not adequate. MPD now represents that it has completed a search that resulted in responsive records; however, it is unclear to this Office whether MPD's search sufficiently addressed the nine categories of your request.

Based on the foregoing, we remand this matter to MPD. Within 10 business days from the date of this decision, MPD shall identify the relevant locations for records for each category of your request and describe the results of its search to you. Further, MPD shall disclose to you non-

exempt portions of responsive records in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-79

March 1, 2018

VIA ELECTRONIC MAIL

Mr. Shuntay Brown

RE: FOIA Appeal 2018-79

Dear Mr. Brown:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") failed to respond to your January 10, 2018 request for the payment history of a specified address.

This Office contacted DCHA on February 14, 2018, and notified the agency of your appeal. DCHA responded on February 22, 2018, advising us that it had not responded to your original request because the request had not been received by the agency's FOIA Officer, due to it being caught in an automated spam filter. DCHA further informed this Office that it has since conducted a search and provided you with documents responsive to your request.[1]

Because your appeal was based on DCHA's failure to respond to your request, and the agency has now responded, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to assert any challenge, by separate appeal to this Office, to the substantive response DCHA sent you.

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: Mario Cuahutle, Associate General Counsel, DCHA (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-80

March 6, 2018

VIA ELECTRONIC MAIL

Ms. Valerie Jablow

RE: FOIA Appeal 2018-80

Dear Ms. Jablow:

This letter responds to the administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"), on the grounds that the Department of General Services ("DGS") improperly responded to your October 13, 2017 request for records related to Fletcher-Johnson Middle School. On December 19, 2017, after agreeing to waive fees related to your request, DGS informed you that it would review and produce to you non-exempt, responsive documents on a rolling basis beginning on December 27, 2017. Your appeal is based in part on the delay, and in part on specific redactions DGS made to an email chain it produced to you.

This Office received your appeal on February 20, 2018, and asked DGS to provide us with a response. DGS responded on March 1, 2018, and advised us that after receiving your appeal it reconsidered its original response and provided you with an unredacted copy of the email chain cited to in your appeal.[1] Part of your appeal was based on DGS's redaction of an email chain, and the agency has stated that it has since produced an unredacted copy; therefore, we consider that portion of your appeal to be moot and hereby dismiss it.

Additionally, DGS responded to your accusation that the delay in its production amounted to a constructive denial. DGS noted that after it received your request, it properly asked you to clarify the terms of your request and then properly requested an extension to respond. In accordance with 1 DCMR § 405.5, DGS: (1) explained to you the reason for the delay in its response – the voluminous number of records to be reviewed; and (2) advised you as to the date on which it would complete its production - 12 weeks from December 27, 2017. DGS addressed your concerns that you have received fewer documents than DGS predicted you would at this point, by explaining that the number is below the projected amount because many of the documents initially flagged as responsive in the email search have, after review, been determined to be non-responsive to your request. Nonetheless, you filed this appeal pursuant to D.C. Official Code § 2-532(e) on the basis that DGS has constructively denied your request.

[1] DGS's response is attached.

We agree that your October 13, 2017 request has not been completed in the statutory timeframe, and as a result has been constructively denied. Therefore, we remand this matter to DGS to complete its search by March 21, 2018.

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: C. Vaughn Adams, Senior Assistant General Counsel, DGS (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-81

March 9, 2018

VIA ELECTRONIC MAIL

Mr. G. Harold Christian

RE: FOIA Appeal 2018-81

Dear Mr. Christian:

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"), on the grounds that the Office of the Chief Financial Officer ("OCFO") improperly denied your request for information related to property tax credits.

Background

On December 11, 2017, you submitted a request to OCFO for records of all property tax credit balances that had not been refunded or forfeited between January 1, 2015, and December 11, 2017. On December 28, 2017, OCFO responded to your request by providing you with responsive records. Following OCFO's response, you wrote to OCFO asserting your belief that additional records should exist because OCFO's response did not cover the full time period specified in your request and did not address several categories of the information requested. It appears OCFO did not disclose any additional records thereafter.

This Office received your appeal on February 23, 2018, and contacted OCFO for its response. You assert on appeal that OCFO's disclosure should have included records for the whole time period specified in your initial request. You also claim that OCFO provided no basis for withholding records; therefore, you assert that it was improper for OCFO not to have disclosed records responsive to all of the categories of information you requested.

On February 27, 2018, OCFO emailed this Office and you acknowledging that 3,904 property accounts contained information responsive to your request. OCFO also stated that it would provide you with a fee estimate for its review of the responsive records. You responded to OCFO on the same day clarifying that you wanted the records in an electronic format, not printed copies. On March 2, 2018, OCFO stated that to provide the records in an electronic format, it was necessary to print screenshots of the accounts and scan the prints to PDF. On the same day, you responded that you were requesting the records in an XLS format rather than PDF screenshots. Also on March 2, 2018, OCFO sent this Office a fee estimate of $5003.80 for your

request.[1] On March, 8, 2018, OCFO sent you and this Office a clarification that its fee estimate reflected the cost of search and review, not printing or copying. On the same day, you responded that you had not received a fee estimate from OCFO. OCFO did not present this Office with any documentation that it provided its fee estimate to you.

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.

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).

The primary issues in this appeal involve the adequacy of OCFO's search, the format of its disclosure, and its fee estimate. Based on the information provided in your appeal and OCFO's subsequent correspondence, it is apparent that OCFO's initial search was not adequate. OCFO now represents that it has completed its search for responsive records; however, due to the voluminous amount of responsive records it retrieved, OCFO is requiring from you a pre-payment of fees to process the request.

The issue of fees relates to the format of disclosure. D.C. Official Code § 2-532(a-1) states that records will be provided "in any form or format requested by the person, provided that the person shall pay the costs of reproducing the record in that form or format." However, agencies are not required to satisfy formatting requests if they lack technological capacity. *See, e.g., Milton v. DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (holding that an agency did not have to produce telephone conversation because it lacked the technological capacity to redact exempt portions of the recordings); *LaRoche v. SEC*, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy a FOIA request when it could not readily reproduce records sought in searchable electronic format requested).

[1] The fee calculation estimated that OCFO would spend an average of 3 minutes to review and prepare each of the 3904 accounts, totaling 11,712 minutes or 195.2 hours. At an average hourly rate of $127 for 5 employees consisting of program specialists and accounting technicians, the total cost of 39.04 hours for 5 employees would be $4958.08. OCFO's estimate contained a rounding error that 5 employees would take 39.4 hours to complete 195.2 hours of work rather than 39.04.

Here, you assert that the records you seek are readily producible by OCFO in XLS format. OCFO maintains that disclosure would require a process of printing, reviewing, and scanning screenshots to PDF that would take an average of 3 minutes per account. OCFO has not directly addressed whether it has the technological capacity to readily produce the data of 3,904 accounts into an XLS format. It is also unclear from OCFO's correspondence if the processing of the accounts requires review to determine whether information is exempt from disclosure under DC FOIA (e.g. personal information pursuant to D.C. Official Code §2-534(a)(2) or tax information pursuant to D.C. Official Code §2-534(a)(6) and D.C. Official Code § 47-1805.04). As stated in your appeal, if portions of responsive records are exempt from disclosure, OCFO must provide an adequate description of the reason for denying such portions.

D.C. Official Code § 2-532(b-3) provides that an agency may require advance payment of a fee when the fee will exceed $250. Since OCFO's fee estimate exceeds $250, it may require payment before disclosing responsive records. OCFO's fee estimate appears reasonable if the processing method it describes is necessary. *See Manning v. United States DOJ*, 234 F. Supp. 3d 26 (D.D.C. 2017) (finding that substantial weight is given to an agency declaration absent contrary evidence or evidence of bad faith). Based on OCFO's correspondence, it is unclear why the multistep process of printing and scanning is necessary rather than producing the information electronically. To justify its decision, OCFO must describe why its multistep process is necessary for its disclosure (e.g., due to its technological capacity based on the way the records are stored or to ensure protection of exempt information).

Conclusion

Based on the foregoing, we remand this matter to OCFO. Within 5 business days from the date of this decision, OCFO shall provide you with its fee estimate and a justification of its method for processing your request, including an explanation of whether it can readily produce the records in XLS format. If OCFO's fee estimate exceeds $250, it shall disclose non-exempt portions of the responsive records after receiving your payment. This constitutes the final decision of this Office. You are free to challenge OCFO's forthcoming substantive response by separate appeal to 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: Tracye Y. Peters, FOIA Officer, OCFO (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-82

March 14, 2018

VIA ELECTRONIC MAIL

Mr. Gregory Luce

RE: FOIA Appeal 2018-82

Dear Mr. Luce:

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"), on the grounds that the Department of Health ("DOH") failed to respond to your January 23, 2018 request for records related to the loss or destruction of pre-adoptive birth certificates.

This Office contacted DOH on February 28, 2017, and notified the agency of your appeal. DOH responded on March 8, 2018, advising us that its Vital Records Division conducted a search for records responsive to your request.[1] DOH asserted further that its search took a long time due to the timeframe of the request. Also on March 8, 2018, DOH informed you that the search conducted by its Vital Records Division did not result in any responsive documents.

Since your appeal was based on DOH's failure to respond to your request, and the agency has provided a response, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge DOH's response, by separate appeal to 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: Edward Rich, Senior Assistant General Counsel, DOH (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-83

March 16, 2018

VIA REGULAR MAIL

Mr. Justin Mitchell

RE: FOIA Appeal 2018-83

Dear Mr. Mitchell:

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 Office of the Chief Medical Examiner ("OCME") improperly withheld records responsive to your request under the DC FOIA.

Background

On January 26, 2018, you submitted a request to the OCME for autopsy reports concerning an individual who died on November 5, 2015. OCME responded on February 20, 2018, and informed you that it would be withholding all responsive records pursuant to D.C. Official Code § 5-534(a)(2).

In the instant appeal, you challenge the withholding of the autopsy materials, because you believe that the "public interest supersedes privacy concerns." In your appeal, you argue that the autopsy materials should be released because the decedent was a "player in global affairs," and a "public figure. [The decedent] was a close adviser to Vladimir Putin at a time when Russia-US relations became increasingly acrimonious." You allege that the death was "under mysterious circumstances" and allude to "stories alleging . . . cover-up." You further allude to speculation that the decedent was "murdered" and note that OCME changed the declared cause of death of the decedent "[m]onths later." You conclude your appeal by offering that although "[i]t could very well be that there is nothing amiss at all . . . and [the decedent] did in fact die accidentally due to several drunken falls," that by releasing the autopsy material OCME could help "the rest of the country move on from this story for good."

On March 2, 2018, we notified OCME of your appeal and asked for a response. OCME responded on March 5, 2018. In its response, OCME reasserted that withholding the records was proper pursuant to D.C. Official Code § 5-534(a)(2). Further, OCME cited to FOIA Appeal 2017-19, a previous DC FOIA Appeal decision, which concluded that the release of autopsy reports would constitute an unwarranted invasion of privacy and that death does not extinguish

an individual's privacy rights. OCME explained in its response that responsive documents were withheld pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2").[1]

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).

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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See*, e.g., *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). For the same reasons that personally identifiable information raises a substantial privacy interest for a citizen, the medical findings contained in an autopsy report raise a substantial privacy interest for a decedent. Indeed, in FOIA Appeal 2009-13 and FOIA Appeal 2017-19, it was recognized that autopsy reports were properly withheld under DC FOIA pursuant to Exemption 2, and that a decedent still maintains privacy rights in death, as recognized by the federal Health Insurance Portability and Accountability Act.

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. You contend that the decedent described in the autopsy report was a "player in global affairs" who was "murdered" under "mysterious circumstances" and that as a result the release of

[1] Exemption 2 prevents disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

the autopsy report could "help . . . the rest of the country move on from this story for good." This is not a cognizable public interest under DC FOIA. The "public interest" in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

> 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.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

Under DC FOIA, being a "story" that the public finds interesting is not the same as furthering the "public interest." Your appeal primarily focuses on the individual importance of the decedent and not the propriety of OCME's performance of its duties. As a result, it is not clear how disclosing the decedent's autopsy would reveal any information about OCME's conduct as an agency. On the other hand, OCME has established that there is more than a *de minimis* privacy interest associated with the decedent's autopsy - a medical file that describes the intimate details of the decedent's mortal remains. When there is a privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *See, e.g., Beck*, 997 F.2d at 1494. As a result, we find that OCME properly withheld the records you requested under Exemption 2.

Conclusion

Based on the foregoing, we affirm OCME's decision and hereby dismiss your appeal. 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Mikelle L. DeVillier, General Counsel, OCME (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-84

March 16, 2018

VIA ELECTRONIC MAIL

Mr. James Nani

RE: FOIA Appeal 2018-84

Dear Mr. Nani:

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"), on the grounds that the Office of the Chief Financial Officer ("OCFO") did not adequately respond or search for records responsive to your request for information related to a property tax penalty.

Background

On January 29, 2018, you submitted a request to OCFO identifying a property that was assessed penalties and asked for "all records that explain and articulate these penalties, when they were assessed, why, how, if they were paid, if those bills are outstanding and any communications related to those penalties." On March 1, 2018, OCFO responded to your request stating only, "Our research resulted in finding no records responsive to your request."

This Office received your appeal on March 5, 2018, and notified OCFO for its response. Your appeal includes a tax bill for the property at issue and asserts that based on the penalty assessment in the tax bill, a diligent search by OCFO should have produced responsive records.

On March 13, 2018, OCFO provided this Office with its response to your appeal.[1] In its response, OCFO states that the penalty was due to an assessment by a Business Improvement District ("BID"). OCFO asserts further that BIDs are managed by the Department of Small and Local Business Development, not OCFO. OFCO explains that the penalty was assessed for late payment of a BID assessment and that the penalty was paid. OCFO submitted a screenshot to this Office, which OCFO claims demonstrates that the penalty was paid. OCFO asserts that its statement – there were no records responsive to your request – was accurate, because the assessment was imposed by a BID, not within its purview.

Despite OCFO's assertion, we find that its initial response to your request was not adequate. The response did not provide a description of the search OCFO conducted or an explanation as to why OCFO determined that it did not maintain responsive records. Additionally, OCFO's

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

response did not inform you of your appeal rights as required by D.C. Official Code § 2-533(3). OCFO's response to your appeal provides a partial explanation as to why it does not maintain records responsive to the request "that explain and articulate" the penalties assessed to the property, because the penalties were assessed by a BID which is managed by another agency.

Your request also asks for information related to the payment of the penalty. OCFO provided this Office with a screenshot of its records, which OCFO asserts demonstrates that the assessed penalty was paid. The screenshot indicates that OFCO does maintain responsive records related to payment, contrary to its assertion. Absent an explanation that the information provided to this Office does not constitute a record, as defined by D.C. Official Code § 2-502(18), or a valid exemption under DC FOIA, OCFO's responsive records should be disclosed to you.

Based on the foregoing, we remand this matter to OCFO. Within 5 business days from the date of this decision, OCFO shall identify the relevant locations for records for payment category of your request and describe the results of its search to you. Further, OCFO shall disclose to you non-exempt portions of responsive records in accordance with DC FOIA. You are free to challenge OCFO's forthcoming substantive response by separate appeal to 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: William Bowie, Senior Counsel, OCFO (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-85

March 22, 2018

VIA ELECTRONIC MAIL

Ms. Natasha Rodriguez

RE: FOIA Appeal 2018-85

Dear Ms. Rodriguez:

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"), on the grounds that the Department of Health ("DOH") failed to respond to your February 2, 2018 request for records related to an animal control services contract.

This Office contacted DOH on March 8, 2018, and notified the agency of your appeal. DOH also responded on March 8, 2018, apologizing for its delay and asserting that it provided you with a response on the same day. DOH's response indicated that responsive records would be maintained by another agency, the Office of Contracting and Procurement.

Since your appeal was based on DOH's failure to respond to your request, and the agency has provided a response, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge DOH's response, by separate appeal to 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: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-86

March 22, 2018

VIA ELECTRONIC MAIL

Ms. Natasha Rodriguez

RE: FOIA Appeal 2018-86

Dear Ms. Rodriguez:

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"), on the grounds that the Department of Health ("DOH") failed to respond to your February 1, 2018 request for records related to statistics and reports for activity of animal control officers.

This Office contacted DOH on March 8, 2018, and notified the agency of your appeal. DOH responded on March 13, 2018, apologizing for its delay and asserting that it provided you with a response on March 12, 2018. DOH's response consisted of seven pages of animal control statistics.

Since your appeal was based on DOH's failure to respond to your request, and the agency has provided a response, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge DOH's response, by separate appeal to 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: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-87

March 22, 2018

VIA ELECTRONIC MAIL

Natasha Rodriguez

RE: FOIA Appeal 2018-87

Dear Ms. Rodriguez:

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"), on the grounds that the Department of Health ("DOH") failed to respond to your February 1, 2018 request for financial spreadsheets pursuant to an animal control contact.

This Office contacted DOH on March 8, 2018, and notified the agency of your appeal. DOH responded on March 14, 2018, apologizing for its delay and asserting that it provided you with a response on the same day. DOH's response consisted of six pages of invoices.

Since your appeal was based on DOH's failure to respond to your request, and the agency has provided a response, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge DOH's response, by separate appeal to 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: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-88

March 27, 2018

VIA ELECTRONIC MAIL

Martin Austermuhle

RE: FOIA Appeal 2018-88

Dear Mr. Austermuhle:

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"), on the grounds that the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") failed to respond to your January 25, 2018 request for a non-disclosure agreement ("NDA") and emails regarding the NDA.

This Office contacted DMPED on March 13, 2018, and notified the agency of your appeal. On March 15, 2018, DMPED requested an extension to respond to your appeal. On March 27, 2018, DMPED provided its response to your initial request. DMPED's response disclosed 16 pages of partially redacted emails and asserted that it was withholding the NDA.

Since your appeal was based on DMPED's failure to respond to your request, and the agency has provided a response, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge DMPED's response, by separate appeal to 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: Molly Hofsommer, Esq., FOIA Officer, DMPED (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-89

March 29, 2018

VIA ELECTRONIC MAIL

Ms. Brenda Zwack

RE: FOIA Appeal 2018-89

Dear Ms. Zwack:

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"), challenging the response provided by the Department of Corrections ("DOC") to your request.

Background

On November 15, 2017, you submitted a FOIA request that states in part: "For the period including the last twelve months, please identify the total number of reported assaults of DOC staff members by juveniles."

On February 16, 2018, DOC denied your request. DOC advised you that it was not obligated by DC FOIA to answer questions for you.

On March 15, 2018, you appealed DOC's denial. In your appeal, you stated your belief that "no exemptions apply to protect this information from disclosure" and your belief that "DOC did not make a complete disclosure in response" to your request. In support of this, you attached a report of an incident to show that at least one incident happened "within the requested time period."

This Office notified DOC of your appeal. On March 23, 2018, DOC responded. DOC's response reiterates that DOC does not already maintain a log of the information you requested and is not obligated to create one for you. Nevertheless, DOC answered the substance of the question posed in your request and appeal.

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).

The primary issue raised in your appeal is whether DOC is obligated to create a record for you that it does not already maintain. DOC has indicated that it does not maintain a log that tracks the information you requested; we accept this representation. You do not indicate your basis for believing a log tallying incidents of assaults exists. Your request does not appear to seek all records relating to incidences of assault, but instead requests that DOC "identify the total number." An adequate search does not require FOIA officers to act as personal researchers on behalf of requesters. *See, e.g.*, *Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters…"); *Frank v. DOJ*, 941 F. Supp. 4, 5 (D.D.C. 1996) (an agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions").

Your request and appeal closely resembles an interrogatory – e.g. "identify the total number." DOC was not obligated to answer your questions concerning the frequency of an occurrence. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."); *see also* FOIA Appeal 2014-41; FOIA Appeal 2017-36; FOIA Appeal 2017-95. The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). Nonetheless, it appears that DOC has answered your question on appeal.

Conclusion

Based on the foregoing, we affirm DOC's decision. 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: Oluwasegun Obebe, Records, Information & Privacy Officer, DOC (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-90

April 2, 2018

VIA ELECTRONIC MAIL

Mr. Paul Havenstein

RE: FOIA Appeal 2018-90

Dear Mr. Havenstein:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested from MPD under DC FOIA.

On August 21, 2017 and January 23, 2018, you submitted requests to MPD on behalf of your client for records related to an internal affairs report. The first request included a signed authorization from your client informing MPD that it could release responsive records to you. On February 16, 2017, MPD denied your requests claiming that disclosure was prevented by D.C. Official Code § 2-534(a)(2), which exempts records from disclosure that would constitute a clearly unwarranted invasion of personal privacy.

This Office contacted MPD on March 19, 2018, and notified the agency of our appeal. Your appeal challenges MPD's withholding because you assert that disclosure would not constitute a "clearly unwarranted" invasion of personal privacy. You also claim that disclosure of the records would benefit the public interest, because the records may demonstrate that a plaintiff who filed a civil lawsuit against your client had changed her story.

On March 29, 2017, MPD sent this Office its response to your appeal.[1] MPD asserts that its FOIA staff contacted you, and you agreed to use another method, in lieu of the FOIA process, to obtain the information you seek. This Office notes that a private litigation interest typically does not constitute a public interest in the context of DC FOIA.

Since your appeal was based on MPD's withholding in response to your FOIA request, and MPD asserts that you agreed not to pursue your FOIA request, we consider your appeal to be moot. If you feel MPD's representation of your agreement is incorrect, you are free to assert your challenge, by separate appeal to this Office.

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

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-91

April 2, 2018

VIA ELECTRONIC MAIL

Mr. Evan Lambert

RE: FOIA Appeal 2018-91

Dear Mr. Lambert:

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"), challenging the response the Office of the Chief Financial Officer ("OCFO") provided to your request.

Background

On February 9, 2018, you submitted a FOIA request for records "that detail the number of sexual harassment complaints made by employees of the D.C. Lottery Board between February 2013 and present. I would also like any documents that detail whether or not these complaints resulted in settlements and if so, the total dollar value of each."

On March 5, 2018, OCFO denied your request. OCFO's response indicated that documents concerning claims of sexual harassment are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"). In follow up correspondence, you clarified that you were not interested in underlying claims but instead a document that kept track of agency totals of sexual harassment claims and corresponding settlement values. OCFO advised you that it was not obligated by DC FOIA to answer questions for you and did not respond to your question whether a log of sexual harassment claims exists.

On March 19, 2018, you appealed OCFO's denial. In your appeal, you state that the purpose of your request "is to quantify a problem of national interest based upon the ongoing #MeToo and Time's Up movements." You argue that there is a public interest in the documents and that providing summary information would not compromise the personal privacy of anyone involved.

This Office notified OCFO of your appeal. On March 26, 2018, OCFO responded. OCFO's response reiterates that OCFO believes that complaints of sexual harassment are protected by Exemption 2. OCFO's response included a Vaughn index listing a single item, which corresponded to a heavily redacted email chain and attached documents. This email chain and attached documents appear to be concerning a single complaint of sexual harassment, and do not appear to be responsive to your request. In follow up communications with this Office, OCFO indicated that it does not maintain any log or list of sexual harassment claims or settlements.

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).

The primary issue raised in your appeal is whether withheld records are protected by the personal privacy exemption, Exemption 2. OCFO's initial denial and response on appeal indicate that OCFO is withholding complaint records pursuant to Exemption 2. In responding to this Office, OCFO's Vaughn index and corresponding documents appear to relate only to the particulars of one specific complaint. These records appear to be non-responsive to you request, as your request does not seek all records relating to incidences of harassment. Indeed, in emails to OCFO you clarified that "I think maybe my request was understood to mean I was looking for the actual details of each case, which I am not. I'm only seeking to learn how many (the number of) complaints that exist and how many resulted in settlements and the total dollar amounts." OCFO's initial denial to you and its subsequent response to this Office do not make clear whether a document logging the number of harassment claims and settlements is being withheld pursuant to Exemption 2, or whether no such responsive documents exists. Prior to filing your appeal, when you asked OCFO to clarify this point, OCFO "did not respond." *See* March 26, 2018 Declaration.

To address this lack of clarity, this Office contacted OCFO. OCFO clarified that no such log or list exists that keeps track of the data that you requested. We accept OCFO's representation that it does not maintain a record keeping track of the total number of harassment claims and corresponding settlements.[1] Therefore, notwithstanding OCFO's denial letter, it appears that OCFO is not withholding records because no responsive records exist. As a result, the issue is whether OCFO is obligated to create a record for you that it does not already maintain.

You do not indicate your basis for believing a log tallying incidents and settlements exists. An adequate search does not require FOIA officers to act as personal researchers on behalf of requesters. *See, e.g., Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters…");

[1] We note that pursuant to 1 DCMR § 407.3, OCFO should have notified you in its denial letter that the "requested record cannot be located. . ."

Frank v. DOJ, 941 F. Supp. 4, 5 (D.D.C. 1996) (an agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions").

Your request, while framed as a request for records, closely resembles an interrogatory – e.g. "the number of" and "the total dollar amounts." OCFO is not obligated to answer your questions concerning the frequency of an occurrence. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."); *see also* FOIA Appeal 2014-41; FOIA Appeal 2017-36; FOIA Appeal 2017-95. The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). You narrowly requested records that "detail the number of sexual harassment complaints" and "documents that detail whether or not these complaints resulted in settlements and if so, the total dollar value of each." OCFO is not obligated to compile this information for you.

Conclusion

Based on the foregoing, we affirm OCFO's decision. 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: Chaia Morgan, Assistant General Counsel, OCFO (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-92

April 2, 2018

VIA ELECTRONIC MAIL

Mr. Jeff Stachewicz

RE: FOIA Appeal 2018-92

Dear Mr. Stachewicz:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") sent a nonresponsive attachment in response to your request for an awarded contract.

This Office contacted DCHA on March 20, 2018, and notified the agency of your appeal. DCHA responded on March 23, 2018, advising us that on March 15, 2018, the agency inadvertently attached the wrong document in response to your FOIA request from February 22, 2018.[1] DCHA stated further that it resent its response with the correct attachment on March 19, 2018.[2]

Because your appeal was based on DCHA's incorrect disclosure in response to your request, and the agency has now sent the correct document, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to assert any challenge, by separate appeal to this Office, to the substantive response DCHA sent you.

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: Mario Cuahutle, Associate General Counsel, DCHA (via email)

[1] A copy of DCHA's response is attached.
[2] It appears from the timestamps on the emails that DCHA sent the correct attachment before you submitted your appeal to this Office.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-93

April 4, 2018

VIA ELECTRONIC MAIL

Marco Guzman

RE: FOIA Appeal 2018-93

Dear Mr. Guzman:

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"), on the grounds that the Office of Tax and Revenue ("OTR")[1] improperly withheld records responsive to your request for OTR's field audit manuals and training materials related to audits.

Background

On February 23, 2018, you submitted a request, on behalf of the organization Tax Analysts, to OTR for "[a]ll field audit manuals and audit training manuals that were used by your agency … [and] training materials or continuing education materials related to audits." On March 8, 2018, OTR denied to your request, asserting that: (1) OTR would not disclose its policies and procedures manuals because they were being updated; (2) OTR did not possess an audit desk manual or CFE training manual; and (3) training manuals received by OTR from third parties would not be released due to copyright protections.

This Office received your appeal on March 20, 2018, and contacted OTR for its response on March 22, 2018. Your appeal characterizes OTR's response as identifying four categories of records: (1) policies and procedures manuals; (2) an audit desk manual; (3) a CFE training manual; and (4) training manuals from a third party. Since OTR asserted that records responsive to categories 2 and 3 did not exist, your appeal was initially limited to categories 1 and 4,[2] OTR's policies and procedures manuals and training manuals from a third party, respectively. You challenge OTR's withholding of its policies and procedures manuals on the grounds that OTR's reason for withholding the manuals (they are being updated) is improper. You also assert that it is improper for OTR to withhold records due to copyright concerns.

On March 27, 2018, OTR responded to your appeal. OTR's response included a 261-page document titled "Audit Division Financial Policies & Procedures Manual," which OTR asserts is responsive to categories 2 and 4 of your request. OTR also claims that records responsive to

[1] OTR is an office within the Office of the Chief Financial Officer ("OCFO").
[2] Your appeal was broadened after OTR's response.

categories 1 and 3 of your request are exempt from disclosure pursuant to 1 DCMR §§ 406.2(c)(5), which protects records from disclosure that could reveal investigative techniques and procedures not generally known outside the government, and (d), which prevents disclosure of inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[3]

On March 28, 2018, you replied to OTR's response. Your reply notes an apparent contradiction between OTR's initial response to your request and its response to your appeal; OTR initially stated that it did not maintain records responsive to categories 2 and 3, but in response to your appeal OTR provided records responsive to category 2 and asserted exemptions regarding category 3. Your reply challenges OTR's application of the deliberative process privilege pursuant to D.C. Official Code § 2-534(4) ("Exemption 4"), arguing that the fact that "policies and procedures manuals" were being updated is not a valid reason for OTR to withhold the manuals in their current form. Further, you claim that OTR has not demonstrated that it can withhold records in their entirety pursuant to D.C. Official Code § 2-534(a)(3)(E) ("Exemption 3(E)"); instead, you assert that OTR should disclose records with limited redactions made to portions that could harm enforcement efforts by disclosing investigative techniques and procedures not generally known outside the government.

On April 4, 2018, this Office contacted OTR to clarify which records had been disclosed and which were being withheld, because the document that OTR disclosed following your appeal, its "Audit Division Financial Policies & Procedures Manual," appeared to be also responsive to category 1 (policies and procedures manuals) even though OTR's email transmitting the document indicated that it was not. OTR confirmed that the document was responsive to category 1. OTR stated that the only responsive records that it has withheld from you are training materials from third parties. OTR claimed that it identified these materials to you in phone conversations and emails after you filed your appeal.

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.

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).

[3] The language of 1 DCMR §§ 406.2(c)(5) and (d) mirror FOIA exemptions under D.C. Official Code § 2-534(a)(3)(E) and (4), respectively.

The issues to address in this appeal are: (1) whether OTR can withhold policies manuals pursuant to the deliberative process privilege under Exemption 4 when it is in the process of creating updated versions; (2) whether OTR can withhold records related to its auditing policies and procedures in their entirety pursuant to Exemption 3(E); and (3) whether OTR can withhold third party records due to copyright protections. Most of these issues appear to be resolved by OTR's correspondence and disclosure following your appeal; however, it is unclear whether all issues presented in your appeal have been resolved, due OTR's ambiguous descriptions and OTR's explanations not matching your ascribed record categories.

The 261-page document that OTR disclosed to you appears to satisfy categories 1 and 2 (and in part category 4) of your request.[4] The document also identifies some of the third party training materials (category 4), which OTR uses, particularly resources from the Multistate Tax Commission. OTR also provided additional information regarding category 3 in email correspondence to you after you filed your appeal. In specific, OTR indicated that it does not have a Certified Fraud Examiner ("CFE") manual but uses training materials from a Texas organization.[5] As a result, it appears that OTR has provided all the responsive records in its possession other than licensed training materials from third parties. Nevertheless, this Office will address the exemptions raised by OTR in the event that additional records exist.

This Office agrees with your arguments regarding the deliberative process privilege under Exemption 4. The fact that OTR is updating new versions of the responsive manuals does not mean the manuals are protected in their current form under Exemption 4. While draft versions of the updated manuals themselves would likely fall under the protection of Exemption 4, existing manual(s) clearly would not. If OTR withheld under Exemption 4 any existing audit manuals in effect at the time of your request, it should disclose them to you.

Similarly, this Office agrees with your analysis regarding Exemption 3(E). In order to assert Exemption 3(E) protection, an agency must specifically demonstrate how disclosure of the investigative technique or procedure could allow for circumvention of enforcement. *See, e.g.*, Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011). OTR has not provided any detail to justify withholding documents in their entirety pursuant to Exemption 3(E). Based on subsequent conversations, it appears that OTR may have asserted the exemption without actually withholding any information. If OTR withheld any records pursuant to Exemption 3(E), it must articulate which specific technique(s) or procedure(s) could allow for circumvention of enforcement if disclosed, and disclose the remaining segregable portions of the responsive records with redactions made only to exempt portions of the records.

Regarding OTR's copyright claims, the guidance you cite does not appear to be directly relevant to the materials at issue. DC FOIA does allow protection of commercial information obtained from outside the government to the extent the disclosure would result in competitive harm under

[4] Despite the fact OTR's initial correspondence indicated that it was responsive to categories 2 and 4.

[5] Based upon your categorization of the requested materials, records responsive to category 3, CFE materials, are also third party training materials under category 4.

D.C. Official Code § 2-534(a)(1) ("Exemption 1"). Organizations that charge fees for access to copyrighted materials would suffer competitive harm if the government disclosed the materials under FOIA. *See, e.g.*, Gilmore v. DOE, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998). Subsequent to your appeal, OTR advised you of the sources from which it obtains training materials. If the materials are availed to consumers for a fee, OTR's disclosure would result in competitive harm to the organizations that provide the information. As a result, OTR may withhold third party training materials pursuant to Exemption 1.

Conclusion

Based on the foregoing, we affirm in part and remand in part OTR's response. Within 10 business days from the date of this decision, OTR shall clarify to you whether it withheld any records pursuant to Exemptions 1, 3(E), and 4. If OTR identifies any previously withheld responsive records, it shall disclose to you non-exempt portions in accordance with the guidance of this decision and DC FOIA. With respect to any responsive copyrighted training material, OTR may continue to withhold such material if its disclosure would result in competitive harm to the organization from which the material was obtained.

This constitutes the final decision of this Office; however, you are free to challenge OTR's forthcoming response by separate appeal to 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: Tracye Y. Peters, FOIA Officer, OTR (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-94

April 5, 2018

VIA ELECTRONIC MAIL

Mr. Mike Melvin

RE: FOIA Appeal 2018-94

Dear Mr. Melvin:

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").

On February 15, 2018, you submitted a request to Department of Health ("DOH") for "The contract/agreement and any attachments or addenda signed between the District of Columbia Board of Nursing and the corporation CE Broker of Jacksonville, Florida that allows CE Broker to operate as a continuing education services tracking broker for District of Columbia Board of Nursing licensees." You specified January 1, 2007, to February 14, 2018 as the date range for DOH to search for the requested records.

DOH granted your request on March 19, 2018, providing you with the requested contract, dated August 10, 2017. On March 22, 2018, you filed this appeal, in which you restated the substance of your request but changed the date range to "the time frame for this contract/agreement is July 2007, but may be earlier or later than that date."

This Office contacted DOH on March 22, 2018, and notified the agency of your appeal. On March 28, 2018, DOH provided you with the requested contract, dated April 5, 2005. On April 3, 2018, DOH's responded to the appeal and indicated to this Office that the two contracts provided to you represent all of the documents between the parties cited in your request that match the subject matter of your request.

This Office's jurisdiction is limited to reviewing a District agency's denial of the right to inspect public records. *See* D.C. Official Code § 2-537. Here, at no point did DOH deny you access to a public record. DOH provided you with what you initially requested. You changed the terms of your request when you appealed DOH's response, and DOH then provided you with a document responsive to your subsequent request. As a result, we hereby dismiss your appeal.

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: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-95

April 10, 2018

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2018-95

Dear Mr. Mulhauser:

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").

On February 2, 2018, you submitted a request to the Department of Health ("DOH") for records since January 1, 2016, that contain "any of eight types of count or tally, numerical data about the implementation of a statute." The statute identified in your request is the Death with Dignity Act of 2016 (the "Act"), which is codified at D.C. Official Code § 7-661.01 *et seq*.

On March 22, 2018, DOH denied your request. DOH indicated that the agency "does not have any information that would be responsive to your request." DOH further indicated that D.C. Official Code § 7-661.16 would exempt from disclosure any responsive information. DOH acknowledged that the information you requested corresponds to the categories of information that DOH is mandated to report under D.C. Official Code § 7-661.07, but which DOH has not yet issued. DOH's response did not cite to D.C. Official Code § 2-534 (6) ("Exemption 6"), which allows for the withholding of records pursuant to another District statute.

Your appeal contends that DOH's denial that it has any responsive information "seems unlikely" and that "[i]f a search has found not a single record showing, at any point in time, any of the eight kinds of numerical tallies requested . . . it was probably incomplete." You note that a search that "misses likely records is unlawful as a violation of D.C. Code § 2-532 (a-2)." You further argue that the "withholding provision of the statute does not include" the tallies you requested. You contend that D.C. Official Code § 7-661.07 protects the patient information and records that physicians submit to DOH, whereas you have asked for "internal agency counts of administrative events," which are not "collected by the Department" as that phrase is meant in the Act. D.C. Official Code § 7-661.16.

This Office contacted DOH on March 26, 2018, and notified the agency of your appeal. On April 5, 2018, DOH responded to the appeal.[1] DOH's response indicates that the reason its response letter to you stated that it "does not have any information that would be responsive to your

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

request," was because "[t]he OGC has been including that statement in most responses where no information is being provided, regardless of the reason. Here, the reason that there is no information is that there is a statutory exemption to the District's FOIA for any information collected by DC Health pursuant to the Death with Dignity Act." DOH's response further states, without quoting the underlying statute, that "the statistical information that [you] seek[] is specifically covered by the FOIA exemption for information that is specifically exempted from disclosure by statute, as DC Health is without discretion on whether to release, in whole or part, the requested information." DOH's response does not clearly indicate whether the requested records exist, but this Office infers that the information exists and is being withheld.

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.

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).

The issues to address in this appeal are (i) DOH's candor regarding the existence of records and (ii) the applicability of Exemption 6, pursuant to D.C. Official Code § 7-661.16.

DOH's Position Regarding Responsive Records

DOH's response to your request does not conform to the requirements of DC FOIA and the District of Columbia Municipal Regulations ("DCMR"). As previously discussed, DC FOIA mandates that any person has the right to inspect a record, except if the record is exempt under D.C. Official Code § 2-534. If an agency cannot locate a requested record, the agency must notify the requester. 1 DCMR § 407.3. If an agency has located a record but is withholding it, the agency must advise the requester of, *inter alia*, the specific reasons for the denial under DC FOIA. D.C. Official Code § 2-533; 1 DCMR § 407.3.

In response to your request, DOH advised you that it "does not have any information that would be responsive to your request." Seemingly contradicting itself, DOH then asserted that any information the agency has collected pursuant to the Act is exempt from disclosure. DOH explained its position in its response to your appeal, stating that "our response did include a statement that the agency does not have any information that would be responsive to your request . . . The [agency's Office of the General Counsel] has been including that statement in most responses where no information is being provided, regardless of the reason. Here, the

reason that there is no information is that there is [an applicable statutory exemption]." This practice is contrary to DC FOIA and its implementing regulations and should cease. If an agency locates information that is responsive to a request, it must notify the requester. That the responsive information may be exempt from disclosure has no bearing on whether it exists. If an agency identifies responsive information and determines that the information should be withheld under DC FOIA, the agency must identify the specific exemption or exemptions authorizing the withholding of the record with a brief explanation how each exemption applies to the record withheld. D.C. Official Code § 2-533; 1 DCMR 407.2(b).

Exemption 6

Exemption 6 allows for the withholding of "information specifically exempted from disclosure by statute" when the statute leaves no discretion on the issue. Here, the Act contains such statutory exemption: "The information collected by the Department pursuant to this chapter shall not be a public record and may not be made available for inspection by the public under subchapter II of Chapter 5 of Title 2, or any other law." D.C. Official Code § 7-661.16. You argue, relying partially on the legislative history of the act, that the information intended to be protected under the Act consists of the records physicians provide to DOH. Conversely, the information you requested is the type of information that DOH is mandated to report under D.C. Official Code § 7-661.07. Therefore, you maintain that DOH's tabulations are not "information collected by the Department" under the Act; rather, the tabulations are "simple internal agency counts of administrative events."

On appeal, DOH did not address your argument with respect to the meaning of information "collected by" DOH. Instead, DOH reiterated that the statistical information you seek is specifically exempt from disclosure, and the agency has no discretion on whether to release it in whole or in part.

We disagree with DOH's determination that the information you seek, if it exists, is exempt from disclosure under Exemption 6. DOH states that "[t]here is no requirement that [it] conduct a running analysis of information or even collect it from attending physicians prior to the anniversary date." DOH is correct that an agency is not required under DC FOIA to create a document or answer questions. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). DOH is also correct that the Act does not explicitly require the agency to "conduct a running analysis of information." Nevertheless, DOH has acknowledged that it is in the process of compiling the 2018 report that it is required to produce and make publicly available. Accordingly, if DOH has begun compiling the statistical information you are seeking, it must provide you with such responsive information, subject to any applicable exemptions.[2]

[2] We note that under no circumstances should DOH release the underlying physician reports that contain patient information, and that our decision is limited to aggregated tabulations, as contemplated by your request and D.C. Official Code § 7-661.07.

Conclusion

As a result, we hereby remand your appeal. Within 5 business days of the date of this decision, DOH must issue you a new decision letter clarifying whether responsive records exist, and, if such records exist, provide you with non-exempt portions in accordance with the guidance in this decision.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-96

April 10, 2018

VIA ELECTRONIC MAIL

Mr. Shuntay Brown

RE: FOIA Appeal 2018-96

Dear Mr. Brown:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") improperly denied three of your requests for certain records.

On March 14, 2018, you emailed three requests to DCHA asking for: (i) "the letter of determination under DCMR 14-5317.6(c)(3) with supporting facts regarding the right to a fair hearing regarding removing Willie Jess Lipscomb from the voucher;" (ii) "the verification under DCMR 14-5317.4 and 14-5317.5 as supporting facts regarding the right to a fair hearing regarding removing Willie Jess Lipscomb from the voucher;" and (iii) "the letter of notification mailed to DCHA Office of General Counsel and the family under DCMR 14-8903.3(a)(1) and 14-8903.3(a)(3) as supporting facts regarding the right to a fair hearing receipt signed by Ms. Jones dated 09/12/2017."

On March 27, 2018, you submitted your appeal based on DCHA's denial of your three requests.[1] This Office informed you that it was too early to submit an appeal based on DCHA's failure to respond in a timely manner. *See* D.C. Official Code § 2-532(c)(1) (agencies have 15 business days to respond to DC FOIA requests). You asserted that DCHA informed you that it would not respond to your requests.[2]

On the same day you submitted your appeal, this Office contacted DCHA to notify the agency of your appeal and request its response. DCHA responded on April 3, 2018.[3] In its response, DCHA rejects your assertion that it withheld responsive records. DCHA also provided this Office with copies of emails and notices that it previously provided to you. DCHA resent the same documents to you on March 15, 2018. These records appear to be responsive to your request for records related to 14 DCMR §§ 8903.3(a)(1) and (a)(3) notices.

[1] You previously attempted to appeal the denials based on DCHA's failure to provide timely responses; however, this Office could not open the attachments you included.
[2] You did not provide any records to support your assertion that DCHA had denied your requests.
[3] A copy of DCHA's response is attached.

It is unclear if these records are also responsive to your other two FOIA requests for records related to (i) 14 DCMR § 5317.6(c)(3) and (ii) 14 DCMR §§ 5317.4 and 5317.5. Under 14 DCMR § 5317.6(c)(3), in certain instances when DCHA receives conflicting claims of domestic violence the agency makes a written determination of the true victim. The records related to 14 DCMR §§ 5317.4 and 5317.5 involve the verification that a family must submit to DCHA to prove that a person is no longer residing in a household. DCHA's response to this Office has not clearly explained whether or not it has responded or possesses records responsive to these two requests.

As a result, we render your appeal moot in part and remand it in part. Within 10 business days from the date of this decision, DCHA shall identify the relevant locations of records for each of your remaining requests and describe the results of its search of these locations. If DCHA's forthcoming searches result in retrieving additional responsive records, DCHA shall disclose to you non-exempt portions in accordance with DC FOIA.

This constitutes the final decision of this Office; however, you are free to challenge DCHA's forthcoming substantive response by separate 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 FOIA.

Sincerely,

Mayor's Office of Legal Counsel

cc: Mario Cuahutle, Associate General Counsel, DCHA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-97

April 13, 2018

VIA E-MAIL

Mr. Douglas Bregman

RE: FOIA Appeal 2018-97

Dear Mr. Bregman:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested pertaining to altercations that occurred near the Turkish ambassador's residence and the Turkish embassy.

Background

On January 24, 2018, you submitted a FOIA request to MPD asking for seven categories of records related to "altercations, attacks, and assaults" near the Turkish ambassador's residence and the Turkish embassy on May 16, 2017. Your request included authorizations from four clients allowing MPD to release to your firm records related to your clients.

On February 8, 2018, MPD granted your request in part, by providing access to the public incident report. MPD denied your request in part, stating that responsive body-worn camera footage and the entire investigative record were being withheld under D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3(A)(i)"), on the basis that disclosure of these records would interfere with pending criminal enforcement proceedings by allowing witnesses or suspects to conform testimony to the investigative materials. MPD also informed you that it did not possess records of 911 calls, which are maintained by the Office of Unified Communications.

This Office received your appeal on March 30, 2018, and contacted MPD for its response. On appeal you assert that MPD's blanket exemption under Exemption 3(A)(i) is improper, and that MPD should disclose segregable non-exempt portions of the responsive records. You also assert that certain categories of your request[1] involve non-investigative public records (e.g., the second category seeks "public statements made by MPD" regarding the May 16 incidents). Finally, you claim that there are no longer active enforcement proceedings with regard to thirteen individuals, as two defendants pled guilty and charges were dismissed against eleven suspects. As a result, you argue that MPD should disclose responsive records pertaining to those thirteen individuals

[1] You cite categories 2, 5, 6, and 7.

because Exemption 3(A)(i) applies only to the remaining defendants who are still involved in enforcement proceedings.

MPD sent this Office a response to your appeal on April 9, 2018,[2] reaffirming its position that MPD's investigative records are exempt in their entirety under Exemption 3(A)(i), because MPD "considers the records relating to the arrests of the involved persons as a unified compilation…." MPD further argues that some of the documents pertain to all of the defendants and cannot be segregated for individuals who are no longer involved in enforcement proceedings. However, MPD indicates that it will review the responsive documents and disclose to you public statements as well as other documents that are not protected by an exemption under FOIA.

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).

Exemption 3(A)(i) exempts from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. D.C. Official Code § 2-534(a)(3)(A)(i). "To invoke this exemption, an agency must show that the records were compiled for a law enforcement purpose and that their disclosure '(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Manning v. DOJ*, 234 F. Supp. 3d 26 (D.D.C. 2017) (citing *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

The purpose of Exemption 3(A)(i) is to prevent "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 224, 232 (1978). "So long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, the investigatory record exemption applies." *E.g. Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted).

[2] A copy of the MPD's response is attached.

Conversely, "where an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency's decision." *Id*. An agency must sustain its burden "by identifying a pending or potential law enforcement proceeding or providing sufficient facts from which the likelihood of such a proceeding may reasonably be inferred." *Durrani v. DOJ*, 607 F.Supp.2d 77, 90 (D.D.C. 2009).

Here, you do not appear to challenge that Exemption 3(A)(i) protects from disclosure records pertaining to defendants who are still involved in enforcement proceedings. We accept MPD's representation that releasing these investigative records could interfere with ongoing enforcement proceedings, because the information could allow witnesses and suspects to tailor their testimony. However, you do challenge MPD's withholding of non-investigative public records and records pertaining to individuals whose enforcement proceedings have concluded.

MPD has asserted that it will review the responsive records it maintains and disclose any that are not exempt under DC FOIA. Regarding the investigative records, this Office accepts MPD's representation that some of the documents you seek pertain to all of the individuals arrested and are not segregable. Nevertheless, MPD's statement that it "considers the records relating to the arrests of the involved persons as a unified compilation" appears on its face to be an improper blanket application of Exemption 3(A)(i). To the extent that an investigative record relates solely to an individual who is no longer involved in an enforcement proceeding, withholding such a record under Exemption 3(A)(i) is improper. We note that redaction pursuant to D.C. Official Code § 2-534(a)(3)(C), which protects an individual's privacy in records compiled for law enforcement purposes, would likely apply to these records even after the conclusion of enforcement proceedings.

Conclusion

Based on the forgoing, we affirm MPD's decision in part and remand it in part. Within 10 business days from the date of this decision, MPD shall review and disclose to you non-exempt portions of responsive records it maintains, including those that pertain solely to individuals whose enforcement proceedings have concluded.

This shall constitute 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-98

April 17, 2018

VIA ELECTRONIC MAIL

Mr. Jesse Franzblau

RE: FOIA Appeal 2018-98

Dear Mr. Franzblau:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly denied your August 25, 2017 request for records related to MPD's activities on Inauguration Day, January 20, 2017. MPD granted your request in part and denied your request in part on February 13, 2018.

This Office received your appeal on April 2, 2018, and asked MPD to provide us with a response. MPD responded on April 11, 2018.[1] MPD advised us that it will review the previous response it sent you and will conduct another search for responsive documents. MPD anticipates providing you with a supplemental response this week.

We hereby remand this matter to MPD to, within 5 days of this decision: (1) review its previous response to your request and justify any continued withholdings in accordance with DC FOIA and its implementing regulations; (2) conduct a second search and disclose non-exempt portions of newly identified records or justify the withholding of such records.

This constitutes the final decision of this Office; however, you are free to challenge MPD's forthcoming substantive response by separate 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 FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

[1] MPD's response is attached.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-99

April 10, 2018

VIA ELECTRONIC MAIL

Martin Austermuhle

RE: FOIA Appeal 2018-99

Dear Mr. Austermuhle:

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"), on the grounds that the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") improperly withheld a non-disclosure agreement ("NDA") that you requested.

The NDA at issue here was also a subject of your previous FOIA Appeal, 2018-88. In that appeal, you challenged DMPED's failure to respond to your January 25, 2018 request for the NDA and certain email messages. DMPED subsequently disclosed 16 pages of partially redacted emails but continued to withhold the NDA pursuant to D.C. Official Code § 2-534(a)(1) ("Exemption 1"), which protects from disclosure "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained."

On April 2, 2018, you appealed DMPED's application of Exemption 1 with respect to the withheld NDA. You argue that "a non-disclosure agreement is a standard legal document that likely wouldn't include 'trade secrets and commercial or financial information.'" You further contend that to the extent the NDA does contain protected information, those sections should be redacted, but the document should not be withheld in its entirety.

Upon receipt of your appeal, this Office notified DMPED and requested its justification for the withholding as well as a copy of the NDA for our *in camera* review, in accordance with 1 DCMR § 412.5. On April 6, 2018, DMEPD requested an extension to provided its response pursuant to 1 DCMR § 412.6. On the same day, this Office denied DMPED's extension request and informed DMPED that its response was expected within the timeframe prescribed by 1 DCMR § 412.5, and that in the absence of a timely response by DMPED, we would decide the appeal on the basis of the available record. DMPED has failed to comply with 1 DCMR § 412.5, providing this Office neither the NDA nor further justification of the basis on which it is being withheld from you.
To qualify for protection under Exemption 1, information must: (1) be a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3)

disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained. *See* D.C. Official Code § 2-534(a)(1). Here, DMPED has not provided this Office with any support for its assertion that the NDA contains "trade secret or commercial or financial information" from outside the government, the disclosure of which would result in substantial competitive harm to the party from whom the information was obtained. Moreover, DMPED's refusal to produce the NDA for *in camera* review by this Office deprives us of the ability to evaluate your argument that an NDA is a legal document that typically does not contain trade secrets or commercial or financial information. As a result, DMPED has failed to demonstrate that the NDA you requested warrants protection under Exemption 1.

Based on the record before us, we are compelled to conclude that DC FOIA requires production of the NDA. We hereby remand this matter to DMPED. Within 5 business days of the date of this decision, DMPED shall provide you with a copy of the NDA. If DMPED determines that certain portions are exempt under DC FOIA, it shall comply with D.C. Official Code § 2-533 and 1 DCMR § 407.2 by referring to the specific exemption(s) authorizing the withholding and providing an explanation as to how each exemption applies.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Molly Hofsommer, Esq., FOIA Officer, DMPED (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-100

April 19, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Douglas

RE: FOIA Appeal 2018-100

Dear Mr. Douglas:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to respond to your March 9, 2018 request for records pertaining to itineraries for trainings.

This Office contacted MPD on April 4, 2018, and notified the agency of your appeal. MPD responded on April 13, 2018, and advised us that it had responded to your request on the same date.[1]

Since your appeal was based on MPD's failure to respond to your request, and MPD has now responded, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to assert any challenge, by separate appeal to this Office, to the substantive response that MPD sent you.

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: Ronald Harris, Deputy General Counsel, MPD (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-101

April 24, 2018

VIA ELECTRONIC MAIL

Mr. Guillermo Rueda

RE: FOIA Appeal 2018-101

Dear Mr. Rueda:

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"), on April 9, 2018. In your appeal, you state that the Department of Consumer and Regulatory Affairs ("DCRA") has ignored a request you submitted to that agency on March 16, 2018.

Pursuant to D.C. Official Code § 2-532(c)(1), a public body must respond to a DC FOIA request within 15 business days of receiving the request. In certain circumstances, a public body may extend its response time by an additional 10 business days. D.C. Official Code § 2-532(d). DCRA's FOIA Officer advised you on March 16, 2018, that the agency would be extending the deadline for responding to your request in accordance with D.C. Official Code 2-532(d)(1), due to the need to submit part of your request to a separate District entity to conduct a search for the emails you are seeking.

The 25-business day time limit had not expired when you filed the instant appeal, therefore rendering it premature. Moreover, DCRA has advised this Office that it responded to your request today. In light of the foregoing, this Office dismisses your appeal on the grounds that it was prematurely filed and is now moot. This dismissal shall be without prejudice to you to file a separate appeal if you wish to challenge the substantive response DCRA sent you.

This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action in the Superior Court of the District of Columbia in accordance with DC FOIA.

Sincerely,

Mayor's Office of Legal Counsel

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-102

April 27, 2018

VIA ELECTRONIC MAIL

Ms. Kate Rabinowitz

RE: FOIA Appeal 2018-102

Dear Ms. Rabinowitz:

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 Office of the Deputy Mayor for Planning and Economic Development ("DMPED") improperly withheld records you requested under the DC FOIA.

Background

On March 16, 2018, you submitted a request to DMPED for records related to the Qualified High Tech Companies ("QHTC") incentive program. Your request asked for two categories of information: 1) a list of companies that participated in the QHTC program from 2011-2017 and 2) all of DMPED's internal reports and memoranda that reference the QHTC program. On April 9, 2018, DMPED denied your request, asserting that 1) it did not maintain a list of companies that participated in the QHTC, and 2) its internal reports and memoranda regarding the QHTC were protected from disclosure pursuant to the deliberative process privilege, which protects certain records from disclosure that are predecisional and deliberative, pursuant to D.C. Official Code § 2-534(a)(4) ("Exemption 4").

On appeal, you challenge DMPED's application of Exemption 4. You assert that DMPED did not provide sufficient information to justify withholding records pursuant to Exemption 4. Further, you argue that records made after the QHTC program became active in 2011 would not be predecisional. Finally, you claim that DMPED must disclose all non-exempt portions of records that can be reasonably segregated with redaction.

This Office contacted DMPED on April 12, 2018, and notified the agency of your appeal. On April 19, 2018, DMPED provided this Office with a response to your appeal, including a *Vaughn* index and a copy of the withheld documents for our *in camera* review.[1] In its response, DMPED identifies 17 records as responsive to the second part of your request. DMPED reasserts its position that all of the records are protected by the deliberative process privilege under Exemption 4; however, DMPED states that two of the records have already been made public

[1] A copy of DMPED's response and *Vaughn* index are attached.

and will be released. Of the remaining 15 records, five involve proposed budget support act ("BSA") summaries[2] and ten consist of "talking points." DMPED asserts that the BSA summaries are deliberative because they are used to decide whether or not to include a specific proposal in legislation. DMPED claims that the talking points are protected from disclosure because the records represent internal and predecisional draft responses to be considered for possible use by agency staff.

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.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

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 predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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.*

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the

[2] Two of the five BSA records that DMPED provided appear to be duplicates.

> document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

Both the BSA summaries and the talking points satisfy the first requirement for protection under Exemption 4, in that both are "inter-agency or intra-agency" documents. The next step of analysis is to determine whether the documents are predecisional and deliberative. The BSA summaries appear to contain DMPED's responses to a standard form for a proposed budget action. DMPED asserts that these responses are used to determine whether or not to include a specific proposal in the BSA. As a result, we find that that the majority of DMPED's responses in the BSA summaries are protected from disclosure under Exemption 4. However, D.C. Official Code § 2-534(b) states that agencies shall provide non-exempt reasonably segregable portions of public records. Here, the standard questions in the BSA summary form are neither predecisional nor deliberative. Further, DMPED's responses to questions 1 and 8 on the form, which ask for the proposed title of the Act[3] and citations to existing law respectively, are predominantly factual, and disclosure would have no clear adverse impact on DMPED's deliberations. As a result these portions of the BSA summaries should be disclosed with redactions to DMPED's other responses.

With regard to the withheld talking points, courts have held that this type of record is protected by the deliberative process privilege. *See, e.g., Access Reports v. DOJ*, 926 F.2d 1192, 1196-97 (holding that memorandum written for purpose of preparing senior agency officials for testimony was protected under deliberative process privilege); *Judicial Watch, Inc. v. DHS*, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012) (holding that documents prepared regarding how to present a policy in the press qualified as predecisional and deliberative); *ACLU v. DHS*, 738 F. Supp. 2d 93, 112 (D.D.C. 2010) (concluding that talking points are predecisional because "the document itself suggests that a public statement was anticipated at the time of its creation, and given that no official statement has yet been made, the talking points remain ripe recommendations that are ready for adoption or rejection"). After reviewing the talking points provided by DMPED *in camera*, we find that these records are protected from disclosure under Exemption 4. We note that while DMPED's talking points do contain portions of factual information, the particular facts DMPED chose to include in its talking points reveal its decision making process and which facts it considers most important.

Conclusion

Based on the foregoing, we affirm DMPED's decision in part and remand it in part. Within five business days from the date of this decision, DMPED shall review the BSA summaries it withheld and disclose to you nonexempt portions in accordance with the guidance in this decision.

[3] We note that it would be possible for a draft proposed title to be protected under the deliberative process privilege; however, here the proposed titles appear to be sufficiently generic that they demonstrate why they are responsive without revealing significant details regarding DMPED's decision making process.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Molly Hofsommer, Esq., FOIA Officer, DMPED (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-103

April 30, 2018

VIA ELECTRONIC MAIL

Mr. Radcliffe Lewis

RE: FOIA Appeal 2018-103

Dear Mr. Lewis:

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"), on the grounds that the Department of Human Resources ("DCHR") improperly withheld records responsive to your request under the DC FOIA.

Background

On April 9, 2018, you submitted a request to DCHR for records that state the current citizenship of the Director of the Office of Human Rights ("OHR"). DCHR denied your request on April 13, 2018, on the basis that such disclosure would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) ("Exemption 2").

You appealed DCHR's denial, arguing that it is in the public interest to know the OHR Director's citizenship status. In support of your argument you list a variety of grievances, including D.C. police taking action "to eject me from [a Starbucks] allegedly because I exercised my free speech of asking an employee there if she speaks English after she fumbled my order so much that she filled my coffee cup THREE-FIFTHS full," alleged misconduct of police officers in Prince George's County, Maryland, and the federal government's efforts "to protect the United States from invasion by citizens of other countries who are willfully and deliberately violating the border and trespassing into the country."

This Office received your appeal on April 17, 2018, and contacted DCHR for its response. DCHR responded to this Office on the same day, reaffirming its position that the OHR Director's citizenship status is protected from disclosure pursuant to Exemption 2.[1] DCHR asserts further that one of its responsibilities is to ensure "that each employee of the District under the Mayor's authority can legally work for the District government" and that no exceptions were made for OHR's Director.

[1] A copy of DCHR'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.

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).

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). Courts have held that an individual's nationality or citizenship status involve a sufficient privacy interest to warrant protection. *See e.g., Hemenway v. Hughes*, 601 F. Supp. 1002, 1005-07 (D.D.C. 1985) (protecting citizenship information from disclosure because nationals "from some countries face persistent discrimination"); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 83 F. Supp. 2d 105, 112 (D.D.C. 1999) (protecting passport information from disclosure). *But see Husek v. IRS*, 1991 U.S. Dist. LEXIS 20971, at *1 (N.D.N.Y. Aug. 16, 1991) (holding citizenship, date of birth, educational background, and veteran's preference of federal employees not exempt). In light of the relevant case law, we agree with DCHR's assertion that the Director's citizenship is subject to protection under Exemption 2.

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.

Your appeal includes several allegations and grievances, but none is clearly related to the performance of OHR or DCHR. You also argue that a public interest exists due to the importance of the Director's position at OHR.

Under FOIA, senior officials typically receive less protection for privacy interests. *See Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 *(*stating that lower level officials generally have a stronger interest in personal privacy than senior officials). However, you present no allegation of misconduct establishing that release of the Director's citizenship information would shed light on performance of the statutory duties of OHR or DCHR. *See Berger*, 487 F. Supp. 2d at 505. Due to the absence of a relevant countervailing public interest, we find that the Director's citizenship records are protected from disclosure pursuant to Exemption 2.

Conclusion

Based on the foregoing, we affirm DCHR's decision. 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: John Cheek, Attorney Advisor, DCHR (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-104

May 1, 2018

VIA ELECTRONIC MAIL

Mr. Seth Slomovitz

RE: FOIA Appeal 2018-104

Dear Mr. Slomovitz:

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 Office of Tax and Revenue ("OTR"), a division of the Office of the Chief Financial Officer ("OFCO"), improperly withheld records you requested under the DC FOIA.

Background

On February 12, 2018, you submitted a request to OTR for records related to a vacant lot that is currently part of the tax sale process. OTR responded to your request on April 17, 2018, asserting that responsive documents were being withheld on the bases of the attorney-client and deliberative process privileges pursuant to D.C. Official Code § 2-534(a)(4) ("Exemption 4").

On April 17, 2018, you appealed OTR's response. In your appeal you make references to the substance of ongoing litigation regarding the property at issue. You assert that certain communications between the District and neighbors of the property cannot be protected by the attorney-client privilege as "[t]there is clearly no such privilege relating to communications between these two separate litigants." You note that "it has been admitted that these communications exist."[1] You assert, without citation, that because documents have been referenced in and "used as a defense in the Litigation [sic], any privilege that may have existed has been waived by said disclosures." Your appeal does not challenge the deliberative nature of

[1] The so-called admission refers to the following statement in the District's Opposition to Plaintiff's Motion to Compel the District to Rescind Cancellation of Tax Certificate: "In September 2017, attorneys representing property owners adjacent to the Property . . . specifically brought the Property to the District's attention." This statement does not indicate how property owners made such communications to the District (e.g., by email, telephone call, or in-person meeting) or what is meant by "the District" in this context (e.g., a Councilmember, the Mayor, or a specific agency). As such, it is not clear to this Office that neighbors of the property at issue communicated with OTR via email or other means.

the responsive documents, but instead rests on the argument that there has been a waiver of privilege.

OTR provided this Office with its response to your appeal on April 27, 2018.[2] OTR's response reiterates its belief that responsive records have been properly withheld under Exemption 4 through the deliberative process and attorney-client privileges. On appeal, OTR also argues that the records have been properly withheld under Exemption 4 through the work product privilege. As to the communications between the District and OTR, OTR asserts that its "search has disclosed no records within its custody and control reflecting communications between OTR and neighboring property owners." OTR further asserts that despite apparently not possessing any such records, it "believes that such records would be protected from disclosure in whole or part on privacy grounds." OTR's response indicates its belief that your status as an attorney representing a litigant adverse to the District has a bearing on your right to access public records.

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, DC FOIA creates the right "to inspect … and … copy any public record of a public body . . ." *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

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), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Com'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Litigation Status

OTR's response indicates that your status as an attorney representing a litigant adverse to the District should have a bearing on your rights under DC FOIA. This statement is incorrect. A requester's identity and involvement in litigation relating to the request are well established as irrelevant in the FOIA context. *E.g.*, *North v. Walsh*, 881 F.2d 1088, 1099 (D.C. Cir. 1989) ("FOIA rights are unaffected by the requester's involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery . . . ."); s*ee, Jackson v. First Fed. Sav.*, 709 F. Supp. 887, 889 (E.D. Ark. 1989) (declaring that "there is no rule that the parties to a lawsuit may only gather evidence through the formal discovery devices" and "it is ordinarily unnecessary for the party seeking the material to take steps to compel what will be given freely"); *see also In re F&H Barge Corp.*, 46 F. Supp. 2d 453, 454-55 (E.D. Va. 1998) (noting that "courts have allowed private litigants to obtain documents in discovery via the FOIA"); FOIA Update, Vol. III, No. 1, at 10 (acknowledging that "[u]nder present law there is

[2] Copies of OTR's response and *Vaughn* index are attached.

no statutory prohibition to the use of FOIA as a discovery tool"). The right to access government records is available to all persons and is not contingent on whether an individual has sued the government. D.C. Official Code § 2-531 ("all persons are entitled to full and complete information regarding the affairs of government").

In order to withhold a public record, a government agency must rely on a statutory exemption. D.C. Official Code § 2-533 ("Denial by a public body of a request for any public record shall contain at least the following: (1) The specific reasons for the denial, including citations to the particular exemption(s) under § 2-534 relied on as authority for the denial . . ."). With respect to the documents it has withheld, OTR has asserted a statutory exemption here, on which our analysis turns.

Exemption 4 – Deliberative Process, Attorney-Client, and Attorney Work Product Privileges

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,[3] attorney-client,[4] and attorney work product[5] privileges.

The deliberative process privilege protects agency documents that are both predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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.*

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

Additionally, courts have held that talking points are generally protected by the deliberative process privilege. *See, e.g., Access Reports v. DOJ*, 926 F.2d 1192, 1196-97 (holding that memorandum written for purpose of preparing senior agency officials for testimony was protected under deliberative process privilege); *Judicial Watch, Inc. v. DHS*, 880 F. Supp. 2d

[3] *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).
[4] *See Mead Data Cent. Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).
[5] *See Adionser v. DOJ*, 811 F. Supp. 2d 284, 297 (D.D.C. 2011).

105, 111-12 (D.D.C. 2012) (holding that documents prepared regarding how to present a policy in the press qualified as predecisional and deliberative); *ACLU v. DHS*, 738 F. Supp. 2d 93, 112 (D.D.C. 2010) (concluding that talking points are predecisional because "the document itself suggests that a public statement was anticipated at the time of its creation, and given that no official statement has yet been made, the talking points remain ripe recommendations that are ready for adoption or rejection").

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent. Inc.*, 566 F.2d at 252. The attorney-client privilege protects facts divulged by a client to an attorney and also encompasses any opinions given by an attorney to a client based upon those facts. *See e.g., Mead Data*, 566 F.2d at 252-53; *Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010) (stating that attorney-client privilege protects facts given to attorney by client). However, when it is clear that an attorney conveys facts to a client acquired from other persons or sources, those facts are not privileged unless they reflect client confidences. *See, e.g., Brinton v. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980).

As OTR states in response to your appeal, the work product privilege protects documents prepared by an attorney in contemplation of litigation. *See e.g., Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); *Adionser*, 811 F. Supp. 2d at 297. When a document may have been created for more than one purpose, the work product privilege has been found to apply if the agency can show that the document was created at least in part because of the prospect of litigation. *See e.g., Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 80 (D.D.C. 2003) However, documents prepared in an agency's ordinary course of business, not under circumstances sufficiently related to litigation, may not be accorded protection. *See e.g., Zander v. DOJ*, 885 F. Supp. 1, 11 (D.D.C. 2012).

The withheld records OTR provided for our *in camera* review satisfy the first requirement for protection under Exemption 4, in that they are "inter-agency or intra-agency" communications among Council staff, OTR and OCFO staff, and attorneys in the Office of the Attorney General for the District of Columbia. The next step of the analysis is to determine whether the documents meet the additional criteria for the privileges OTR asserts. We agree with OTR's representation that several of the withheld documents involve predecisional and deliberative communications discussing cancellation of a tax sale. As a result, we find that that those communications may be withheld from disclosure under Exemption 4. Similarly, some of the withheld records involve agency employees providing information and seeking legal advice from attorneys, statements from attorneys reflecting confidential facts received from clients, and records prepared as a result of litigation. Those portions of the responsive records are also properly withheld under Exemption 4.

D.C. Official Code § 2-534(b) states that agencies shall provide non-exempt reasonably segregable portions of public records. Here, OTR withheld all responsive emails in their entirety, including portions that are not protected under the deliberative process, attorney-client, or attorney work product privileges. Some emails, such as a series dated September 20, 2017, purely involve the scheduling of a telephone call. This information is not protected under Exemption 4. Similarly, some of the withheld communications involving attorneys are not

protected by attorney-client and attorney work product privileges in their entirety. An email sent on July 10, 2017, from the Attorney General, for example, contains some of his mental impressions; however, other portions contain only factual information that does not reflect client confidences. As a result, it is improper for OTR to withhold such emails in their entirety; segregable portions should be disclosed with redactions made to protected information.

"Non-responsive" Records

Finally, we note that there is a handwritten comment on the 19th page of the withheld materials stating that information was "redacted – nonresponsive." The practice of withholding non-responsive portions of responsive documents is not permissible under DC FOIA. *See e.g.*, *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016). To the extent that OCFO has redacted or withheld documents that are not protected by an exemption, OCFO must release such records.

Conclusion

Based on the foregoing, we affirm OTR's decision in part and remand it in part. Within ten business days from the date of this decision, OTR shall review the documents it withheld and disclose to you nonexempt portions in accordance with the guidance in this decision.

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: Bazil Facchina, Assistant General Counsel, OTR (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-105

May 8, 2018

VIA ELECTRONIC MAIL

Ms. Clare Garvie

RE: FOIA Appeal 2018-105

Dear Ms. Garvie:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to adequately respond to your request for records related to MPD's use of facial recognition technology ("FRT").

You previously submitted an appeal related to this request in FOIA Appeal 2018-78. In our decision in that appeal, this Office remanded MPD's denial and ordered MPD to disclose non-exempt responsive records. Following FOIA Appeal 2018-78, MPD disclosed 147 pages of responsive records related to its use of FRT. Now you appeal the adequacy of MPD's search and response because you assert that MPD's disclosure indicates that there are potentially 1,400 or more records responsive to your request.

This Office received your appeal on April 24, 2018, and asked MPD for its response. MPD responded on May 1, 2018, acknowledging that additional responsive records exist, as identified by your appeal, and stating that it intends to disclosure non-exempt portions of the additional records.[1]

Based on the foregoing, we remand this matter to MPD. Within 10 business days from the date of this decision, MPD shall begin disclosing to you non-exempt portions of responsive records in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-106

May 10, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Douglas

RE: FOIA Appeal 2018-106

Dear Mr. Douglas:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to adequately search for and improperly withheld information in response to your request for records related to certain training that occurred in September 2017.

Background

On March 9, 2018, you submitted a request to MPD for "all itineraries or copies of agendas, programs, plans, or event descriptions … for an Anti-Defamation League sponsored training in Israel on or around September 9, 2017 to September 16, 2017." On April 4, 2018, you appealed the MPD's failure to respond to your request. This Office docketed the matter as FOIA Appeal 2018-100. MPD provided its response to your request on April 13, 2018, while FOIA Appeal 2018-100 was pending.

You now appeal MPD's April 13, 2018 response, arguing that it is incomplete because it consists only of hotel and travel itineraries and does not include "any information about the speakers, presentations, videos, organizational meetings, speeches … [etc]." You also assert that MPD's response is incomplete because it did not include any emails, which you referenced in a previous request filed on August 18, 2017.[1] Finally, you argue that it was improper for MPD to redact the names of Anti-Defamation League employees who organized the trip because there is a public interest in "which individuals are aiding in training public employees."

This Office received your current appeal on April 26, 2018 and notified MPD for its response. MPD responded on May 8, 2018,[2] asserting that it had conducted a search "of the physical and electronic files of the Executive Office of the Chief of Police," which maintains records concerning the travel and training of senior officials and determined that all responsive

[1] Your appeal states that the prior request was filed on August 18, 2018, which we assume was a typographical error intended to be 2017.
[2] A copy of MPD's response is attached.

documents had already been disclosed. MPD also reaffirmed its redaction of names of Anti-Defamation League employees to protect their personal privacy pursuant to D.C. Official Code § 2-534(a)(2), because disclosure of the names would not inform the public regarding MPD's functions.

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 Search

One of the primary issues in this appeal is your belief that additional responsive records should exist and that MPD did not conduct an adequate search. DC FOIA requires that, under the circumstances, a search is 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: (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 statements cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

You contend that MPD should possess additional records regarding the trainings and seminars that an MPD commander attended in Israel rather than only the hotel and travel accommodations that MPD disclosed. You further argue that MPD's response is incomplete because it does not include emails.[3] Based on the record on appeal, MPD appears to have identified only its Executive Office of the Chief of Police as the location of its search. While MPD asserts that it conducted more than one search, the description of MPD's searches appears to be too narrow. It is unclear what search MPD initially conducted for the records it disclosed. The physical and electronic files, including emails, of the commander identified as having attended the training would likely contain responsive records. As a result, MPD has not demonstrated that it has conducted an adequate search pursuant to your request.

Exemption 2

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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore subject to protection of Exemption 2. *See*, e.g., *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 149 (D.D.C. 2008).

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. You contend that there is a public interest in knowing the identity of individuals who facilitates public employees in receiving training. MPD counter argues that such rationale is not sufficient to overcome the individual's privacy interest in the context of DC FOIA. The "public

[3] We note that the request at issue does not ask for emails. The fact that a related prior request asked for emails is not relevant to the request at issue. An agency must respond to the request as drafted. *See, e.g., Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984). However, emails are still likely to contain responsive records.

interest" in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

> 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.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

Generally, private individuals have *de minimis* privacy interest associated with their names. *See Schoenman v. FBI,* 573 F. Supp. 2d at 149. It is not clear how disclosing the identities of individuals outside the government who helped MPD with travel arrangements for trainings would reveal any information about MPD's conduct as an agency. When there is a privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *See, e.g., Beck,* 997 F.2d at 1494. As a result, we find that MPD properly redacted this information under Exemption 2. We note that the public interest analysis might be different with respect to the identity of an individual who provides training for an MPD employee; however, here you have not established a public interest in the identities of individuals who merely assisted MPD in facilitating travel.

Conclusion

Based on the foregoing, we affirm MPD's decision in part and remand it in part. Within 10 business days from the date of this decision, MPD shall conduct a search of the physical and electronic files of the commander who attended the training, if MPD has not already, and describe the results of its search of to you. If MPD's forthcoming search results in retrieving additional responsive records, MPD shall disclose to you non-exempt portions in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-107

May 15, 2018

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2018-107

Dear Mr. Mulhauser:

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 Metropolitan Police Department ("MPD") did not perform an adequate search in response to your request for records related to its body-worn camera ("BWC") program.

On December 30, 2017, you submitted a request to MPD asking for six categories of records related to FOIA requests involving BWC footage for the prior fiscal year. On February 28, 2018, MPD provided its response to your request. Now, you appeal the adequacy of MPD's search, because you assert that MPD's response failed to address several categories of your request.

This Office contacted MPD on May 2, 2018, and notified the agency of our appeal. On May 14, 2018, MPD sent this Office its response to your appeal.[1] MPD asserts that its FOIA staff has contacted you to determine the missing categories of information and all responsive documents will be disclosed in the near future.

Since your appeal was based on MPD's incomplete response to your request, and MPD asserts that records responsive to the remaining categories of your request are forthcoming, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge MPD's forthcoming substantive response, by separate appeal to 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.

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

Sincerely,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-108

May 15, 2018

VIA ELECTRONIC MAIL

Mr. Carlo Bruni

RE: FOIA Appeal 2018-108

Dear Mr. Bruni:

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"), on the grounds that the Department of Health ("DOH") improperly denied your April 18, 2018 request for records related to animal control correspondence.

On April 30, 2018, DOH denied your request, because it did not believe you were a "person" as defined by DC FOIA since DOH believed the address you provided to submit your request was fabricated. Now, you appeal DOH's denial asserting that you are a person, and DOH's inability to verify your address is not a reason to deny disclosure of records under DC FOIA.

This Office contacted DOH on May 2, 2018, and notified the agency of your appeal. DOH responded on May 11, 2018, reconsidering its denial and asserting that it would provide you with a response to your request in accordance with DC FOIA. We note that DC FOIA does not ordinarily require identity verification. *See* D.C. Official Code § 2-532; 1 DCMR § 402.

Since DOH's has reconsidered its initial denial and claimed that it will provide you with a response, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to challenge DOH's forthcoming substantive response, by separate appeal to 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: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-109

May 21, 2018

VIA ELECTRONIC MAIL

Ms. Ayanna Mackins-Free

RE: FOIA Appeal 2018-109

Dear Ms. Mackins-Free:

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 District of Columbia Department of Transportation's ("DDOT") response to your request for records under the DC FOIA.

Background

On May 3, 2018, you submitted a request to DDOT for footage of a traffic accident from a DDOT traffic camera at the corner of Georgia Ave NW and New Hampshire Ave NW from May 2, 2018. On the same day, DDOT responded that it did "not maintain any recordings from the requested location" and closed your request. DDOT also suggested that you may seek records from the Homeland Security and Emergency Management Agency and the Metropolitan Police Department.[1]

On May7, 2018, you submitted an appeal to this Office challenging the closure of your request. On the same day, this Office notified DDOT of your appeal and requested its response. DDOT provided this Office with a response to your appeal on May 10, 2018.[2] In its response, DDOT asserts that the traffic camera at issue does not record video, but instead is used for live streaming to evaluate traffic. DDOT states that it came to this determination after querying its Traffic, Engineering, and Signals Division. As a result, DDOT reasserts its position that it does not maintain any records responsive to your request.

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

[1] We note that DDOT's response did not advise you as to how it determined that there were no recordings or of your rights to appeal its decision.
[2] A copy of DDOT's response is attached.

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).

The primary issue in this appeal is your belief that responsive records should exist; therefore, we consider whether or not DDOT conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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, DDOT asserts that its Traffic, Engineering, and Signals Division would know if the traffic camera in question recorded the May 2, 2018 footage you seek. The Traffic, Engineering, and Signals Division confirmed that no records were maintained from the traffic camera at issue. Your appeal has not stated facts which would cause us to believe that the footage from the

camera is actually recorded.[3] 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). We accept DDOT's representation that responsive records do not exist because the traffic camera at issue only streams a live feed and does not record footage.

Conclusion

Based on the foregoing, we affirm the DDOT's decision and hereby dismiss your appeal. 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: Karen Calmeise, FOIA Officer, DDOT (via email)

[3] We note that from the email correspondence DDOT attached in its response, it does not appear that DDOT fully explained its search to you or gave you a reason for why it did not have the footage you sought. In response to your appeal, however, DDOT has adequately described its search and explained why recorded footage does not exist.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-110

May 22, 2018

VIA ELECTRONIC MAIL

Mr. Joe Johnson

RE: FOIA Appeal 2018-110

Dear Mr. Johnson:

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"), on the grounds that the Office of Unified Communications ("OUC") denied your April 5, 2018 request for records pertaining to a 911 call.

This Office contacted OUC on May 8, 2018, and notified the agency of your appeal. On May 17, 2018, OUC responded, and advised us that it had provided responsive records to you pursuant to a subpoena for the same records that you sent OUC on May 9, 2018.[1]

Since your appeal was based on OUC's withholding of responsive records, and OUC has now proved you those records, we consider your appeal to be moot. Your appeal is hereby dismissed.

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: Dionne L. Hayes, General Counsel, OUC (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-111

May 22, 2018

VIA ELECTRONIC MAIL

Mr. Mohammad Hassan

RE: FOIA Appeal 2018-111

Dear Mr. Hassan:

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 Department of Consumer and Regulatory Affairs' ("DCRA") response to your request for records under the DC FOIA.

Background

On February 22, 2018, you submitted a request to DCRA for several categories of records related to permit documents, certificates of occupancy, notices of infraction, stop work orders, and settlement agreements. On March 15, 2018, DCRA provided you with approximately 41 documents responsive to your request. DCRA redacted some information from its production pursuant to D.C. Official Code § 2-534(a)(2) to protect personal privacy.

Now you appeal DCRA's response, challenging the adequacy of its search because you believe DCRA's response did not address some of the categories of your request. Your appeal generally claims that DCRA's response did not include certain documents related to permitting and infractions. Your appeal specifically identifies that DCRA's response did not include records you requested related to CO1700390, CO1702630, and B1600869.

This Office received your appeal on May 8, 2018, notified DCRA, and requested its response. DCRA provided this Office with a response to your appeal on May 15, 2018.[1] In its response, DCRA asserts that it conducted an adequate search and provided you with all responsive records. DCRA states that records responsive to your request would be maintained within its Third Party Program, Permit Operations Division, and Inspections Division. DCRA's response includes correspondence with those departments regarding the searches conducted to respond to your request. Regarding your belief that notices and stop work orders were missing from DCRA's response, DCRA includes a screenshot of its Property Information Verification System ("PIVS") demonstrating that there are no responsive records for the property at issue. Finally, DCRA

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

explains that certificates of occupancy, such as your requests for CO1700390 and CO1702630, are available to the public for a fee through a process outside of FOIA.

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).

The primary issue in this appeal is your belief that responsive records should exist; therefore, we consider whether or not DCRA conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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, DCRA identified its Third Party Program, Permit Operations Division, Inspections Division, and PIVS as the locations where responsive records would be maintained if they existed. In response to your appeal, DCRA provided copies of its queries to those departments and systems. Your appeal appears to consist largely of unsupported speculation that additional records should exist; however, you do specifically identify records for B1600869 as missing from DCRA's disclosure. Neither DCRA's disclosure to you nor its response to your appeal clearly addresses the absence of records for B1600869.[2] Based on the record before us on appeal, DCRA's description of its search is too general to determine whether it conducted an adequate search for records related to B1600869.

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). We accept DCRA's representation that it does not maintain notices and stop work orders for the property at issue based on the results of its PIVS search. Finally, we accept DCRA's position that certificates of occupancy, including CO1700390 and CO1702630, are publically available for a fee through a process outside of FOIA.

Conclusion

Based on the foregoing, we affirm DCRA's decision in part and remand it in part. Within 5 business days from the date of this decision, DCRA shall describe the results of its search for records related to B1600869 to you. If additional records related to B1600869 exist that DCRA did not previously disclose, it shall disclose to you non-exempt portions of those responsive records in accordance with DC FOIA.

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

[2] We note that DCRA's disclosure does reference "b1600869" in the folder of documents labeled P1600859; however, B1600869 does not have its own folder, whereas all of the other identified records do. It is unclear from DCRA's response if B1600869 does not have a folder due to clerical error or because no responsive records exist.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-112

May 29, 2018

VIA ELECTRONIC MAIL

Mr. Michael Krynski

RE: FOIA Appeal 2018-112

Dear Mr. Krynski:

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 Department of Consumer and Regulatory Affairs' ("DCRA") response to your request for records under the DC FOIA.

Background

On March 30, 2018, you submitted a request to DCRA for "all permits and communication emails submitted for the March For Our Lives protest held on March 24, 2018" ranging from July 1, 2017 to March 24, 2018. On May 8, 2018, DCRA provided you with a copy of the permit and responsive emails.[1]

Now you appeal DCRA's response, challenging the adequacy of DCRA's search because you believe additional records should have been provided to you. Specifically, you assert that DCRA should have provided you with permit applications and email correspondence with the planners of the protest. Additionally, you state that the earliest email you received was dated February 20, and you believe prior emails should exist.

On May 14, 2018, this Office received your appeal, notified DCRA, and requested its response. DCRA provided this Office with a response to your appeal on May 21, 2018.[2] In its response, DCRA asserts that it conducted an adequate search pursuant to your request. DCRA states that contrary to your assertions on appeal, your initial request did not ask for permit applications or identify the planners of the protest. DCRA states that it conducted an internal search within its Permit Operations Division and instructed the Office of the Chief Technology Officer (OCTO) to conduct a search for emails containing the phrase "march for our lives" between January 1,

[1] The record in FOIAXpress indicates that DCRA withheld some information pursuant to D.C. FOIA exemptions protecting personal privacy, enforcement proceedings, and the deliberative process privilege; however, you do not challenge the application of those exemptions in your appeal.
[2] A copy of DCRA's response is attached.

2017 and March 24, 2018. DCRA indicates that its internal search did not result in any responsive documents;[3] however, the OCTO search did produce the permit and responsive emails that were provided to you.

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).

The issue in this appeal is your belief that additional responsive records should exist; therefore, we consider whether or not DCRA conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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).

[3] The search form DCRA attached in response to your appeal appears to incorrectly indicate in item 7b that there were responsive records. We accept the representations of the FOIA Officer and Permit Operations Division staff that DCRA's internal search produced no responsive records.

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, DCRA identified its Permit Operations Division and its email server maintained by OCTO as the locations where responsive records would be maintained if they existed. In response to your appeal, DCRA provided copies of its queries used by its permit division and OCTO. DCRA asserts that it has provided you with a copy of the permit and responsive emails that resulted from its search. You believe that DCRA's search was inadequate because you did not receive permit applications or certain email correspondence. However, an agency must respond to the request as drafted. *See, e.g.*, *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984). DCRA accurately states that your initial request did not ask for permit applications or provide information that would allow DCRA to conduct a more thorough email search. We find that the timeframe[4] and search phrase DCRA used were reasonable based on your initial request, and DCRA's search was adequate.

Conclusion

Based on the foregoing, we affirm DCRA's decision. 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: Erin J. Roberts, FOIA Officer, DCRA (via email)

[4] We note that the protest at issue was planned in response to a school shooting in Florida that occurred on February 14, 2018. As a result, it is unclear why you requested records starting from July 1, 2017. Nevertheless, DCRA's email search timeframe extended to January 1, 2017.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-113

June 7, 2018

VIA ELECTRONIC MAIL

Mr. Donald R. Durkee

RE: FOIA Appeal 2018-113

Dear Mr. Durkee:

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 Insurance, Securities and Banking ("DISB") improperly redacted records you requested under the DC FOIA.

Background

On May 14, 2018, you submitted a request to DISB for records that DISB exchanged with the Travelers Insurance Company ("Travelers") and the Office of the Attorney General in a particular case. On May 22, 2017, DISB granted your request in part, disclosing 102[1] pages of responsive documents. DISB denied your request in part and withheld six pages of responsive records pursuant to D.C. Official Code §§ 2-534 (a)(1) ("Exemption 1") and (a)(2) ("Exemption 2").

On appeal, you challenge DISB's application of Exemptions 1 and 2. You assert that DISB did not explain how the exemptions applied to the withheld information. You point out that DISB redacted dates, the address of a public sidewalk, the names and titles of government employees, and corporate employees engaging in the ordinary course of business. You argue that these types of information are neither protected by Exemption 1 because there is no risk of competitive harm nor Exemption 2 because disclosure would not result in a clearly unwarranted invasion of personal privacy. Additionally, you assert that you would waive your privacy rights for information in the records that applies to you. Further, you argue that there is a public interest in disclosure because the records could reveal if companies operating in the District are making false statements. Finally, you assert that DISB should identify which exemptions apply to the redactions it made and provide justifications for each application.

[1] Both you and DISB provided this office with copies of 102 pages as the records in dispute. You state that you received 104 pages of records in your appeal. The affidavit of Charlotte Parker asserts that there were 116 pages of responsive records. The guidance in this decision is applicable regardless of the number of pages.

On May 23, 2018, this Office received your appeal and contacted DISB for its response. On June 5, 2017,[2] DISB provided this Office with a response to your appeal, including two affidavits[3] from DISB employees and a *Vaughn* index.[4] In its response, DISB asserts that its response to your request was not a denial because it provided you with 102 pages of responsive records. DISB's *Vaughn* index identifies the pages where it made redactions, and every entry cites "2-534 (a)(1)(2)" as the bases.[5] The two affidavits DISB provided describe DISB's search efforts and retrieval of responsive records.[6] DISB did not provide a justification for its application of the exemptions in its response or affidavits.

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.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

DISB claims that its response to your FOIA request did not constitute a denial. This is incorrect. DISB thoroughly redacted the responsive records it provided to you pursuant to Exemptions 1 and 2. Under DC FOIA, withholding portions of responsive documents through redactions constitutes a partial denial. *See, e.g.*, D.C. Official Code § 2-534 (b). This Office will address DISB's application of Exemptions 1 and 2.

[2] DISB requested and was granted an extension to respond to the appeal.
[3] The affidavit of Charlotte Parker indicates that DISB would provide this Office with an unredacted copy of the responsive records for review; however, this Office has not received an unredacted copy of the responsive records.
[4] Copies of DISB's response, *Vaughn* index, and affidavits are attached.
[5] A *Vaughn* index is not required during the administrative process. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995). This Office requests a *Vaughn* index on appeal because it can be a helpful tool in identifying the application of exemptions. Here, the index does not provide any clarity.
[6] Your appeal did not challenge the adequacy of DISB's search. As a result, this issue will not be addressed.

Exemption 1

Exemption 1 protects from disclosure "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would results in substantial harm to the competitive position of the person from whom the information was obtained." To withhold information under Exemption 1, the information must be: (1) a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1). The D.C. Circuit has defined a trade secret, for the purposes of the federal Freedom of Information Act, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms "commercial" and "financial" used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Generally, Exemption 1 is not applicable to documents prepared by an agency, because the information is not obtained from outside the government. *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980). Documents prepared by an agency can be protected under Exemption 1 to the extent that they contain summaries or reformulations of information supplied by a source outside the government. *See, e.g., OSHA Data Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 (3d Cir. 2000) (finding that individual component data supplied by private-sector employers was protected commercial information); *Gulf & W. Indus. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979); *Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007).

Exemption 1 has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); s*ee also, Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so. [citations omitted]").

Because DISB did not provide this Office with an unredacted copy of the responsive records for our review, we are mostly unable to determine which redacted information allegedly pertains to trade secrets or commercial or financial information. Several of the responsive records involve communications between DISB and Travelers. Generally, information provided from DISB to another party would not qualify for protection under Exemption 1 because the source of the information is not obtained from outside the government. *See Bd. of Trade*, 627 F.2d at 404. DISB has not offered any explanation of how the redacted information involves actual competition. *CNA Financial Corp*, 830 F.2d at 1152. Further, DISB has not made any assertion

that competitive injury or economic harm would be likely if the redacted information were disclosed. *Essex Electro Eng'rs*, 686 F. Supp. 2d at 94.

DISB has not justified its application of Exemption 1 to a majority of the information it redacted; rather, only certain pages of invoices and statements clearly contain commercial or financial information.[7] We also note that these invoices do not appear to involve fixed line item pricing, but instead are for services that involve too many variables for disclosure to result in a competitive disadvantage. *See, e.g., McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1192 (D.C. Cir. 2004) (holding that pricing information that does not allow competitors an unfair advantage is not protected under FOIA). Absent any assertion of actual competition or the potential for economic harm, this information cannot be protected under Exemption 1.

Exemption 2

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, personal phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). However, government employees generally have no expectation of privacy regarding their names and titles in the ordinary course of business. *See, e.g. Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). D.C. Official Code § 2-536(a)(1) provides that the names, salaries, title, and dates of employement of all District employees is considered "[I]nformation which must be made public." This information is publicly available by the District's Department of Human Resources. Additionally, the Supreme Court has held that corporations do not possess personal privacy interests under FOIA. *See FCC v. AT&T, Inc.*, 562 U.S. 397, 403 (2011).

As a result, DISB's redaction of the names and titles of government employees, as well as their work phone numbers, fax numbers, and email addresses was improper because government employees do not have a sufficient privacy interest in such information. Non-government employees, however, do have at least a *de minimis* privacy interest in their names and personal information. We acknowledge that you have waived your privacy interest with respect to

[7] For example DISB-0088, 90, 93, 94

information pertaining to yourself in the responsive records. As a result, it is not necessary for DISB to redact information for personal privacy pertaining 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.

Here, you argue there is a public interest in disclosure of the redacted information to determine if companies have made false statements. A relevant public interest in the context of FOIA, however, would shed light on DISB's performance of the statutory duties, not the activities of a company. *See Berger v IRS*, 487 F. Supp. 2d 482, 505 (D.N.J. 2007). Further, it is unclear how disclosing the names of individual employees would be relevant to determining whether or not false statements were made. Due to the absence of a relevant countervailing public interest, we find that the DISB's redaction of names of non-government employees is justifiable under Exemption 2.

Conclusion

Based on the foregoing, we affirm DISB's decision in part and remand it in part.[8] Within 5 business days from the date of this decision, DISB shall review the documents it withheld and disclose to you nonexempt portions in accordance with the guidance in this decision.

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.

[8] To clarify, the only portion of DISB's decision that is affirmed is its redaction of the names of non-government individuals. Based on DISB's response, none of the other redactions DISB made pursuant to Exemptions 1 or 2 is justified.

Sincerely,

Mayor's Office of Legal Counsel

cc: M. Claudine Alula, FOIA Coordinator, DISB (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-114

May 31, 2018

VIA ELECTRONIC MAIL

Mr. Guillermo Rueda

RE: FOIA Appeal 2018-114

Dear Mr. Rueda:

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 of the Department of Consumer and Regulatory Affairs ("DCRA") to your request for records under the DC FOIA.

Background

On April 25, 2018, you submitted a request to DCRA for "the project Dox submission for the PH enlargement listed in the revision for B1807970 (1101 Fern Street NW). Please include any new code modifications requested and those that are approved not covered in my previous request."[1] This request was docketed in FOIAXpress as 2018-FOIA-04363. On May 15, 2018, DCRA provided you with a response indicating that it conducted a search and no responsive records were located. DCRA invited you to ask the division responsible for the type of records you requested, the DCRA Permit Operations Division, if you had any questions related to the search it conducted.

On May 15, 2018, you filed this appeal "this time for 2018-FOIA-04363 regarding filed permit application #B1808338."[2] Your submission did not indicate a basis for appeal. This Office contacted you to seek the basis of your appeal, to which you responded by indicating that "[t]he problem is that this is not the first declaration of 'no relevant documents' from a FOIA request." You did not indicate why you believe additional records exist that would be responsive to your April 25, 2018 request. Further, you note that you believe "that the applicant filed a new permit application on 5/2 without any documentation." You did not explain why B1808338 would be encompassed by your earlier request for records relating to a different permit, B1807970.

[1] A copy of this request is attached.
[2] Your appeal references a different building permit number than identified in your original request.

This Office notified DCRA of your appeal and requested its response. DCRA provided this Office with a response to your appeal on May 23, 2018.[3] In its response, DCRA asserts that it conducted an adequate search pursuant to your request. DCRA states that on May 2, 2018, it conducted an internal search within its Permit Operations Division of its ProjectDox database for the keyword "B1807970." DCRA attached a declaration by the employee that searched the database, indicating that its internal search did not result in any responsive documents.

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).

The primary issue in this appeal is your belief that additional responsive records should exist; therefore, we consider whether or not DCRA conducted an adequate search. On appeal you indicate that "[t]he problem is that this is not the first declaration of 'no relevant documents' from a FOIA request." You do not explain how the non-existence of documents in the past is indicative of responsive documents existing in this instance. DC FOIA requires only that, under the circumstances, a search is 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) . . .

[3] A copy of DCRA's response is attached.

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, DCRA identified its Permit Operations Division as the location where responsive records would be maintained if they existed. In response to your appeal, DCRA provided copies of the queries its permit division used to conduct a search. Given that the text of your request was for "project Dox submission for the PH enlargement listed in the revision for B1807970," we accept the search term "B1807970" of the ProjectDox database as adequate. Further, we accept DCRA's representations that it searched ProjectDox, the record repository likely to contain responsive documents, and that no responsive records were found. *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006) (finding that plaintiff failed to rebut agency's "initial showing of a good faith search").

An agency must respond to the request as drafted. *See, e.g.*, *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984). On appeal, you reference a different building permit number (B1808338) than the one identified in your original request (B1807970). It is possible that the responsive records you believe should exist were not retrieved because you did not ask for them in your request. *Truesdale v. DOJ*, 803 F.Supp. 2d 44, 49 (D.D.C. 2011) (affirming an agency's decision to search the record system specifically mentioned by the requestor).

Additionally, your appeal references documents dated May 4, 2018, which you believe should have been included in response to your April 25, 2018 request. As a necessary temporal limitation, courts have recognized that search obligations must have a cut-off date. *See e.g. Bonner v. U.S. Dept. of State,* 928 F.2d 1148, 1152 (D.C. Cir. 1991) (Requiring agencies to modify FOIA responses based on documents created after the response could create an endless cycle of reprocessing); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring a cut-off date based on the date of the search which is more inclusive than a cut-off based on the date of the request); *Espino v. DOJ*, 869 F. Supp. 2d 25, 28 (D.D.C. 2012). Here, DCRA's response to the appeal indicates that DCRA conducted its search on May 2, 2018, prior to the date you propose records would have been created. We accept DCRA's representation that at the time it conducted its search no responsive records were located.

Conclusion

Based on the foregoing, we affirm DCRA's decision and dismiss your appeal. 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: Erin J. Roberts, FOIA Officer, DCRA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-115

May 30, 2018

VIA ELECTRONIC MAIL

Mr. Martin Austermuhle

RE: FOIA Appeal 2018-115

Dear Mr. Austermuhle:

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"), on the grounds that the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") failed to respond to your April 30, 2018 request for communications or documents sent by DMPED to Amazon in reference to the District's bid for the company's second headquarters.

This Office contacted DMPED on May 21, 2018, and notified the agency of your appeal. On May 29, 2018, DMPED included this Office on a response it sent to you. In its response, DMPED stated that it is extending the time period in which it will respond to your request pursuant to D.C. Official Code § 2-532(d)(1), due to the voluminous amount of responsive records retrieved and the need to consult additional interested parties.[1]

Since your appeal was based on DMPED's failure to respond to your request, and the agency has indicated that it intends to respond within the extended timeframe permitted by DC FOIA, we consider your appeal to be moot and hereby dismiss it. Your appeal is dismissed without prejudice, however, and you are free to challenge DMPED's substantive response by separate appeal to 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.

[1] We note that DC FOIA and its implementing regulations require an agency to notify the requestor within the 15 business days that the agency will be extending its response time and indicate an expected date for determination, which DMPED failed to do here. *See* D.C. Official Code § 2-532(d); 1 DCMR § 405.

Respectfully,

Mayor's Office of Legal Counsel

cc: Molly Hofsommer, Esq., FOIA Officer, DMPED (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-116

June 12, 2018

VIA ELECTRONIC MAIL

Ms. Pinky Patel

RE: FOIA Appeal 2018-116

Dear Ms. Patel:

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 of the Department of Consumer and Regulatory Affairs ("DCRA") to your request for records under the DC FOIA.

Background

On May 7, 2018, you submitted a request to DCRA for a record relating to "3408 Warder St NW," specifically "all permits, stamped site plans, building code violations, zoning violations, inspector certification or sign off sheet for the underpinning of shared party wall."

On May 24, 2018, DCRA provided you with a response indicating that it conducted a search and found 16 documents responsive to your request – 11 drawings and 5 permits. In subsequent communications, DCRA invited you to ask the division responsible for the type of records you requested if you had any questions.

On May 29, 2018, you filed this appeal. In your appeal, you appear to challenge the adequacy of the search DCRA conducted. You support the basis for your belief that additional records exist by attaching an index of drawings that reference 25 drawings, 11 of which you received in DCRA's response and 14 of which you believe were improperly withheld. Further, you note that you did not receive any information concerning violations associated with a stop work order that you believe was issued.

This Office notified DCRA of your appeal and requested its response. DCRA provided this Office with a response to your appeal on June 5, 2018.[1] In its response, DCRA asserts that it conducted an adequate search pursuant to your request. DCRA states that on May 15, 2018, it conducted an internal search within several of its divisions and databases for the phrase "3408 Warder St." DCRA attached declarations from the employees who searched the relevant

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

databases indicating that the searches retrieved some responsive documents. According to DCRA, it provided you with all of the documents that were located.

In subsequent communications with this office, DCRA indicated that the additional drawings referenced in the index provided to you and cited in your appeal were not uploaded to the database until May 31, 2018, after DCRA conducted its initial search. DCRA also indicated that the stop work order you requested was also not entered into the system until after the search was conducted. DCRA advised us that you submitted a new FOIA request on June 4, 2018, and that these records will be produced in DCRA's final response to that request.

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).

The primary issue in this appeal is your belief that additional responsive records exist because said documents were referenced in an index that DCRA gave you. Therefore, we consider whether or not DCRA conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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, DCRA identified several divisions and databases as the locations where responsive records would be maintained if they existed. In response to your appeal, DCRA provided copies of the queries its divisions used to conduct searches. Given your request for various records relating to "3408 Warder St. NW," we accept the search phrase "3408 Warder St" of DCRA's databases as adequate. Further, we accept DCRA's representations that it searched the record repositories likely to contain responsive documents and that all responsive records were provided to you. *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006) (finding that plaintiff failed to rebut agency's "initial showing of a good faith search").

As a necessary temporal limitation, courts have recognized that search obligations must have a cut-off date. *See e.g. Bonner v. U.S. Dept. of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (Requiring agencies to modify FOIA responses based on documents created after the response could create an endless cycle of reprocessing); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (favoring a cut-off date based on the date of the search which is more inclusive than a cut-off based on the date of the request); *Espino v. DOJ*, 869 F. Supp. 2d 25, 28 (D.D.C. 2012). Here, DCRA has notified this Office that it conducted its searches around May 15, 2018, prior to the date the drawings and stop work order referenced in your appeal were entered into DCRA's system. We accept DCRA's representation that at the time it conducted its search these records were not located. Moreover, DCRA has informed us that it will be providing you with these documents in response to a subsequent request that you submitted to DCRA.

Conclusion

Based on the foregoing, we affirm DCRA's decision and dismiss your appeal. 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: Erin J. Roberts, FOIA Officer, DCRA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-117

June 12, 2018

VIA ELECTRONIC MAIL

Ms. Timicia Fitch

RE: FOIA Appeal 2018-117

Dear Ms. Fitch:

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"), on the grounds that the University of the District of Columbia ("UDC") failed to respond to your request for transcripts and attendance records for three former UDC students.

This Office contacted UDC on May 29, 2018, and notified the agency of your appeal. On June 4, 2018, UDC responded. In its response, UDC stated that it had not responded to your request due to an oversight. UDC further indicated that on June 4, 2018, UDC advised you that the records you requested are exempt from disclosure pursuant to D.C. Official Code § 2-532(a)(6), because they require authorization for release under the Family Educational Rights and Privacy Act.

Since your appeal was based on UDC's failure to respond to your request, and the agency has since responded, we consider your appeal to be moot. Your appeal is dismissed without prejudice, however, and you are free to challenge UDC's substantive response by separate appeal to 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: Jeffery Zinn, Attorney, UDC (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-118

June 19, 2018

VIA ELECTRONIC MAIL

Mr. Jesse Franzblau

RE: FOIA Appeal 2018-118

Dear Mr. Franzblau:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly responded to your August 25, 2017 request for records related to MPD's activities on Inauguration Day, January 20, 2017. MPD granted your request in part and denied your request in part on February 13, 2018.

Background

On April 2, 2018, this Office docketed your previous appeal (Appeal 2018-98) pertaining to this FOIA request that asked for seven numbered categories of records pertaining to MPD's activities on Inauguration Day. We asked MPD to provide us with a response to that appeal, and MPD responded on April 11, 2018. MPD advised us that it would review the initial response it sent you and would conduct another search for documents. Our decision in that appeal directed MPD to review its previous response to you, justify any continued withholdings, and conduct an additional search.

On April 27, 2018, MPD sent you a supplemental response in which it indicated that a second search would be conducted for parts of your request. With respect to item number 5 of your request,[1] MPD reiterated its position that it properly redacted portions of two documents previously released to you under D.C. Official Code § 2-534(a)(2) ("Exemption 2").

On June 1, 2018, you submitted the instant appeal challenging the adequacy of the search MPD conducted in response to your August 25, 2017 request. Specifically, you challenge the following aspects of MPD's supplemental response: (1) MPD failed to respond to your request and this Office's decision that it conduct another search for records that correspond to item number 5 of your request, which would include email correspondence; (2) with regard to the two heavily redacted documents that MPD disclosed, it failed to conduct a line-by-line review and

[1] This item of your request was for "All records regarding the sharing with entities outside the Metropolitan Police Department of information relating to the January 20th incidents."

justification for the redactions; and (3) MPD improperly invoked the privacy exemption to redact certain information in the two disclosed documents.

This Office notified MPD of your second appeal and asked for its response, which MPD provided on June 15, 2018.[2] In its response, MPD asserts that it conducted an adequate search for documents responsive to your request. An initial search was conducted when MPD received your request, and a second search was conducted after MPD received your appeal.[3] The searches consisted of requests sent to MPD's Special Operations Division ("SOD"),[4] Criminal Investigation Division ("CID"),[5] and Intelligence Section ("Intell").[6] MPD represents that personnel from each of these three units checked their electronic and paper files for responsive documents, and that the only responsive documents retrieved were the two documents related to the outside agency manual and orientation presentation that MPD released to you with redactions.

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 Search

The first issue you raise in the instant appeal is whether MPD conducted an adequate search for records responsive to item number 5 of your request, in light of your belief that additional responsive records should exist. Item number 5 asks for "[a]ll records regarding the sharing with

[2] MPD's response included a *Vaughn* index and redacted and unredacted copies of the two documents it disclosed to you. A copy of MPD's response and *Vaughn* index are attached for your review.
[3] It is unclear whether MPD is referring to your initial appeal or the instant appeal.
[4] SOD is the MPD unit responsible for the overall planning of large scale events and demonstrations including the Presidential Inauguration.
[5] CID is the unit responsible for investigating criminal offenses committed by MPD officers.
[6] Intell is the unit responsible for gathering information related to criminal activity.

entities outside the Metropolitan Police Department of information relating to the January 20th incidents."

In specific, you indicate that MPD provided you with only two documents, which were heavily redacted, whereas your request is broad enough that you believe it "would undoubtedly include a number of records (email correspondence, incident reports, memos, reports, briefing papers received by MPD from outside law enforcement agencies, etc.)."

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).

MPD has represented to this Office that three MPD divisions would maintain records responsive to your request, if they existed: SOD, CID, and Intell. MPD has further represented that these divisions conducted two searches of electronic and paper records. MPD retrieved two documents that are responsive to item number 5 of your request, which is at issue in this appeal. These documents have been disclosed to you in redacted form. We accept MPD's representations that it identified the likely record repositories here (SOD, CID, and Intell) and that it conducted two

searches of these repositories.[7] Except as indicated below, in the context of applicable case law, MPD has demonstrated that it conducted an adequate search. *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006) (finding that plaintiff failed to rebut agency's "initial showing of a good faith search").

We find MPD's search to be inadequate to the extent that: (1) it did not conduct a search of its communications office, including emails between the office and media; (2) its Intell division did not conducted an email search; and (3) it did not give due consideration to After Action Reports,[8] which would be responsive to parts 1 and 2 of your request.[9] It would appear that these would be a part of a reasonable search for records responsive to your request.

Redactions Made to the Documents MPD Released

The second aspect of your appeal relates to your contention that the two documents MPD released to you were improperly redacted. You further assert that MPD did not conduct a line-by-line review of each redacted portion, failed to justify the redactions, and improperly invoked Exemption 2 in withholding the redacted portions.

The *Vaughn* index that MPD provided this Office lists the two documents MPD provided you, the page numbers on which MPD made redactions to the documents, and the justification for said redactions. All redactions were made pursuant to either Exemption 2 or D.C. Official Code § 2-534(a)(4) ("Exemption 4"). The redactions made under each asserted exemption will be addressed in turn.

Exemption 2

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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

MPD made redactions to two documents pursuant to Exemption 2 – the names and telephone numbers of law enforcement officers in *The Metropolitan Police Department 58th Inauguration of the President of the United States Outside Agency Operations Manual, January 18-21st, 2017*

[7] MPD has represented to this Office that SOD and CID conducted email searches. MPD has not indicated whether the Intell section conducted an email search.
[8] Part of the Manual, reviewed by this Office, includes a blank sample After Action Report. Section F of the After Action Report is labeled "Incidents" and prompts respondents to "Please describe any incidents that occurred during this detail . . ."
[9] Part 1 of your request sought "[a]ll records regarding the incidents…" Part 2 of your request was for "[a]ll records regarding the conduct of the police and the handling of the incidents of January 20, 2017."

(the "Manual") and *2017 Presidential Inauguration Outside Agency Orientation Presentation* (the "Presentation").

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). In general, there is a sufficient privacy interest in personally identifiable information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994); *see also* FOIA Appeal 2017-133, FOIA Appeal 2017-149.

Courts have frequently held that there is a heightened privacy interest in the names and phone numbers of law enforcement officers. *O'Keefe v. DOD*, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006) ("Government employees, and specifically law enforcement personnel, have a significant privacy interest in their identities, as the release of their identities may subject them to embarrassment and harassment.").[10] Due to the risk of harassment described in the above-cited cases, we find that there is at least a *de minimus* privacy interest in the names and telephone numbers of law enforcement officers.

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

[10] *See also Long v. OPM*, 692 F.3d 185, 194 (2d Cir. 2012) (holding that OPM properly withheld both names and duty-station information for over 800,000 federal employees in five sensitive agencies and twenty-four sensitive occupations, including, *inter alia*, a correctional officer, U.S. Marshal, nuclear materials courier, internal revenue agent, game law enforcement, immigration inspection, customs and border interdiction, and border protection); *Moore v. Obama*, No. 09-5072, 2009 WL 2762827, at *1 (D.C. Cir. Aug. 24, 2009) (unpublished disposition) (per curiam) ("Appellant fails to demonstrate that the Federal Bureau of Investigation improperly withheld the names and a phone number of its employees pursuant to FOIA Exemptions 6 and 7(C)."); *Lahr v. NTSB*, 569 F.3d 964, 977 (9th Cir. 2009) (reversing district court and holding that FBI agents have cognizable privacy interest in withholding their names because release of FBI agents' identity would most likely subject agents "to unwanted contact by the media and others, including [plaintiff], who are skeptical of the government's conclusion" in investigation of crash of TWA Flight 800), *cert. denied*, 130 S. Ct. 3493 (2010); *Banks v. DOJ*, 813 F. Supp. 2d 132, 142 (D.D.C. 2011) (determining that agency properly redacted law enforcement personnel's names and telephone numbers "from a list of newspapers").

> 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.

It is unclear how disclosing the names of the officers redacted in the two documents would assist in the public understanding of MPD's overall performance of its statutory duties. On the other hand, the risk of these officers being harassed by telephone weighs against disclosure, as such harassment could interfere with MPD's operations. Having reviewed unredacted copies of the documents *in camera*, this Office finds that the redactions MPD made to the names and telephone numbers of law enforcement officers were appropriate.

Exemption 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[.]"[11] 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); *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized). As a result, Exemption 4 encompasses the law enforcement investigatory privilege. *See Dellwood Farms Inc. v. Cargill Inc*., 128 F.3d 1122, 1124-25 (7th Cir. 1997) (recognizing common law "law enforcement investigatory privilege"); *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) ("The public interest in safeguarding the integrity of on-going civil and criminal investigations is the same in both situations. The privilege may be asserted to protect testimony about or other disclosure of the contents of law enforcement investigatory files.").

Here, MPD has made redactions to the Manual and the Presentation pursuant to the law enforcement investigatory privilege. However, it appears that the two redacted records are not protected by the law enforcement investigatory privilege because the two records are not related to an investigation. *Anderson v. Marion Cty. Sheriff's Dep't*, 220 F.R.D. 555, 564 n.7 (S.D. Ind.

[11] It appears that these records were shared with federal agencies, including the United States Secret Service, in the course of preparing for the inauguration. As a result, this introduces a question of whether these records may be considered "inter-agency or intra-agency" records for the purpose of Exemption 4, since the United States Secret Service is not a District agency. There is some precedent to support the notion that records shared with a federal agency by a state may be considered inter-agency records, pursuant to the consultant corollary theory. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 2 (2001) (recognizing consultant corollary); *Citizens for Responsibility & Ethics in Wash*., 514 F. Supp. 2d at 44-45 (protecting documents obtained from emergency management officials in Mississippi and Louisiana); *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002) (finding documents provided by state agency to federal agency could meet inter-agency document threshold). However, we need not resolve this question.

2004) ("the law enforcement investigatory privilege contains additional considerations such as whether the investigation has been completed and whether disciplinary proceedings have arisen or may arise from the investigation."). This is the same reason why the records are not protected by D.C. Official Code § 2-534(a)(3)(E), which protects, among other things, "investigatory records compiled for law enforcement purposes . . . [which] disclose investigative techniques and procedures not generally known outside the government." Having reviewed the records, it is clear to this Office that the redactions were made to prevent the public disclosure of law enforcement techniques. Unlike the federal Freedom of Information Act, however, which contains a law enforcement exemption that protects "records or information compiled for law enforcement purposes," the DC FOIA's law enforcement exemption covers only "investigatory records." *FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 814-15 (D.C. 2014) (recognizing "that FOIA statutory exemptions must be read 'narrowly'" and holding that "the phrase 'investigatory records compiled for law enforcement purposes' in exemption 3 [of the DC FOIA] refers only to records prepared or assembled in the course of 'investigations . . .'").

Since the Manual and the Presentation were not created as a part of an investigation, it is difficult to see how they could be protected by either Exemption 3 or the judicially created "law enforcement investigatory privilege." Therefore, while release of the information may be to the detriment of law enforcement operations, there does not appear to be a basis for MPD to continue withholding portions of the Manual and Presentation under Exemption 4.

Conclusion

Based on the foregoing, we affirm MPD's decision in part and remand it in part. Within ten business days from the date of this decision, MPD shall: (1) conduct a search of its communications office, including emails between the office and media and disclose responsive, unprivileged messages; (2) conduct an email search of relevant Intell personnel; (3) review and disclose After Action Reports, which would be responsive to parts 1 and 2 of your request; and (4) remove from the Manual and Presentation redactions previously made pursuant to Exemption 4. 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: Ronald Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-119

June 19, 2018

VIA ELECTRONIC MAIL

Stephen C. Leckar

RE: FOIA Appeal 2018-119

Dear Mr. Leckar:

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 responses you received from the Office of Administrative Hearings ("OAH") to a request you submitted to OAH under the DC FOIA.

Background

On March 12, 2018 you submitted a request to OAH for transmissions[1] between the following individuals from April 1, 2016 to the date of the search that reference Jesse P. Goode: (1) Vanessa Natale and Yvonne Williams, Joseph Onek, and /or Robert Hawkins; (2) Louis Neal and Yvonne Williams, Joseph Onek, and or/ Robert Hawkins; and (3) Eugene Adams and Yvonne Williams, Joseph Onek, and or Robert Hawkins.

OAH sent an initial response to your request on April 18, 2018, in which it disclosed 109 pages of responsive documents and indicated that it was in the process of preparing a privilege log of withheld documents. On May 2, 2018, OAH sent you a second response indicating that it had completed reviewing the emails you requested, which were retrieved in a search conducted by the Office of the Chief Technology Officer ("OCTO"). Accompanying the May 2, 2018 response was a privilege log that OAH assembled, documenting all of the emails it withheld. OAH also advised you that its search and review of personal, privately-owned devices was ongoing.

You submitted the appeal to OAH's responses to your request on May 14, 2018, and submitted a supplement to your appeal on May 18, 2018.[2] Your appeal is based on the following contentions: (1) OAH failed to conduct a comprehensive search for responsive documents; (2) OAH's privilege log contains insufficient descriptions of the withheld documents; (3) OAH improperly asserted the deliberative process privilege because the individuals involved in the communications should not have been participating in deliberations; and (4) OAH and the

[1] You characterized transmissions as including emails and text messages, including those that were deleted, and those that were sent to or from personal devices or government equipment.
[2] This Office did not receive you appeal until June 4, 2018.

Commission on Selection and Tenure ("COST") were operating in violation of the Open Meetings Act ("OMA").

Upon receiving your appeal, this Office notified OAH and requested that it respond. OAH responded on June 14, 2018.[3] In its response, OAH described the searches it conducted and provided us with copies of the documents it disclosed as well as copies of the 22 withheld emails for our *in camera* review. OAH also advised us that it has not identified any responsive documents on personal, privately-owned devices, but continues to hold open this request because a similar demand has been made of OAH for these records by way of a subpoena in a separate matter. With respect to your deliberative process privilege arguments, OAH disputes your claim that certain COST members may not have been properly seated and reiterates its position that it properly invoked the privilege.

On June 18, 2018, you submitted a reply to OAH's response to your appeal. In the reply, you challenge OAH's failure to provide an affidavit or declaration, reiterate your argument that certain COST members' terms had expired, and reassert your position that only COST members may participate in deliberative actions affecting the COST decisions.

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 search

Your first challenge of OAH's decision is premised on your belief that more responsive records should exist than were disclosed to you; therefore, we consider whether OAH conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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,

[3] OAH provided you with a copy of its response.

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).

On appeal, OAH identified the email accounts where responsive records would be maintained (i.e., the incoming, outgoing, and carbon copied messages from Natale, Neal, and Adams) if they existed and provided the requests it submitted to OCTO for the accounts to be searched with relevant phrases. See Exhibit 2 of OAH's response. Your appeal appears to consist largely of unsupported speculation that additional records should exist. For example, you allege that because Mr. Neal indicated in an email that he would deliver copies of certain document to each member of the COST, it is reasonable to infer that one or more COST members who were copied on the email would have replied to it. 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). We accept OAH's representation that all email messages retrieved by OCTO in connection with this matter have either been disclosed to you or listed on OAH's privilege log.

Your request also sought responsive communications sent to or from personal devices such as privately-owned cellular telephones or computers. OAH indicated in its response to this Office that to date it has not identified any such documents but that it is continuing to process this request as part of a separate matter in which the records were sought by subpoena. Whereas OAH provided us with sufficient detail to conclude that its search of government email accounts was adequate, it did not provide us with any details about the searches it conducted for personal accounts and devices. As such, we remand this aspect of your appeal to OAH for further clarification.

Privilege log

You assert on appeal that OAH's privilege log did not contain sufficient information to justify withholding records. In denying a FOIA request, an agency is required to include certain information, such as an explanation of the reasons for the denial, the name of each person responsible for the denial, and the right to appeal. D.C. Official Code § 2–533. There is, however, no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation; courts have found that a *Vaughn* index or privilege log is not necessary during the administrative phase of a FOIA request. S*ee, e.g., Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (finding that agencies need not provide a *Vaughn* index until ordered by court after plaintiff has exhausted administrative process); *see also*, *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because agency responses to FOIA requests are not required to contain a *Vaughn* index); *Schaake v. IRS*, No. 91-958, 1991 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1991). Since a privilege log or *Vaughn* index is not required during the administrative process,[4] your argument that OAH's privilege log is inadequate is without merit. Further, OAH's responses to your request provided sufficient information required by D.C. Official Code § 2–533.

Deliberative process privilege

You raise several arguments in your initial appeal and supplements that OAH's application of the deliberative process privilege was improper. D.C. Official Code § 2-533(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 predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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.*

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the

[4] While this Office requests a *Vaughn* index, affidavit(s), or declaration(s) from agencies at the administrative appeal level, this documentation is not required during the initial FOIA process.

> document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

You argue that Exemption 4 cannot protect communications involving OAH employees who are not members of the COST because those employees cannot participate in the COST's deliberative process. This is contrary to the text of Exemption 4, which allows for protection of "inter-agency or intra-agency" documents because communications exchanged between OAH employees and COST members would qualify as "inter-agency or intra-agency" documents. Further, OAH's response to your appeal cites to a regulation that allows OAH employees to assist in the COST's official duties. *See* 6-B DCMR § 3721.

You also argue that certain COST members' terms had expired at the time of their communications. Generally, when agency employees correspond with outside third parties those records do not qualify as "inter-agency or intra-agency" documents. OAH asserts, and our review of the withheld emails reflects, that the individuals at issue were acting as COST members during the communications. This Office does not have jurisdiction to determine whether purported COST members were properly seated during the time the communications at issue were sent. As a result, we consider the emails at issue to meet the threshold requirement for protection as "inter-agency or intra-agency" documents.

The next step of analysis is to determine whether the documents are predecisional and deliberative. After reviewing the withheld emails, several involve opinions and debate over the COST's jurisdiction, composition, and operational process. We find that that these communications are protected from disclosure under Exemption 4. However, D.C. Official Code § 2-534(b) states that agencies shall provide non-exempt reasonably segregable portions of public records. Certain portions of the withheld email chains discuss only scheduling or transmittal information. This information is purely factual, and disclosure would have no clear adverse impact on OAH's or COST's deliberations. As a result, these portions of the emails should be disclosed.

Conclusion

Based on the foregoing, we affirm OAH's decision in part and remand it in part. Within 10 business days from the date of this decision, OAH shall: (1) describe the search it conducted for responsive records maintained on personal, privately-owned devices; (2) disclose to you any non-exempt portions of responsive records retrieved from personal devices; and (3) disclose segregable portions of the emails previously withheld under Exemption 4 in accordance with the guidance in this decision.

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: Shawn M. Nolen, Attorney-Advisor, OAH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-120

June 19, 2018

VIA ELECTRONIC MAIL

Mr. Stephen Leckar

RE: FOIA Appeal 2018-120

Dear Mr. Leckar:

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"). Here, you challenge the response you received from the Executive Office of the Mayor ("EOM") to a request you submitted to EOM under DC FOIA.

Background

On April 10, 2018, you submitted a request to EOM for records sent or received by the Mayor's General Counsel that concern your client and the Commission on Selection and Tenure ("COST").

On May 17, 2018, EOM responded to your request, releasing 66 pages of responsive documents, some of which were redacted pursuant to D.C. Official Code §§ 2-534(a)(2) ("Exemption 2") and (a)(4) ("Exemption 4"). The redacted portions of the provided documents were labeled with the applicable exemption.

Subsequently, you appealed and challenged EOM's withholding under Exemption 4 on the basis that the redacted documents involve communications between "disparate agencies." Citing to cases involving the federal FOIA in ongoing litigation in federal court, you also argue that the EOM's response was insufficient because it did not include a *Vaughn* index. Lastly, you argue that EOM's search was insufficient because you believe it used "improper cut-off dates" and additional records exist.

On June 5, 2018, this Office received your appeal and requested that EOM respond. EOM responded on June 12, 2018.[1] EOM's response indicated that the case law you cited to concerning a *Vaughn* index does not apply to the administrative stage of a FOIA process and applies to litigation proceedings before a court. EOM further indicated that it complied with the relevant provisions of DC FOIA and its implementing regulations concerning informing

[1] A copy of EOM's response is attached. EOM supplemented its response on June 18, 2018 and indicated that it would conduct a second search using an additional term.

requesters of the reason for withholding portions of a record. According to EOM, the search it conducted was for the time period described in your request. EOM included in its response a copy of the email search request it sent to the Office of the Chief Technical Officer. Lastly, EOM provided this office with an unredacted copy of the documents for our *in camera* review.

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).

EOM's Denial Letter - Vaughn Index

In contending that EOM's response was insufficient, you rely primarily on federal case law concerning ongoing litigation. EOM argues that its May 17, 2018 letter to you was sufficient under the requirements of D.C. Official Code § 2-533, which mandates that letters of denial include: (1) citations to the particular exemptions relied upon; (2) the name of the public official making the decision; (3) and notification of appellate rights. We agree that EOM's response met the requirements of D.C. Official Code § 2-533.

EOM is correct that under DC FOIA, agencies are not required to create a *Vaughn* index at the initial administrative denial stage. *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) ("Agencies need not provide a Vaughn Index until ordered by a court after the plaintiff has exhausted the administrative process."), *aff'd on other grounds*, 76 F.3d 1232 (D.C. Cir. 1996)." The *Vaughn* index is a mechanism to organize FOIA litigation for judges. *Vaughn v. Rosen*, 484 F.2d 820, 827 (1973) ("the District Judge may examine and rule on each element of the itemized list.").[2] As a result, we reject your conclusion that "EOM has failed to meet its burden to demonstrate that the documents requested are exempt from disclosure under the FOIA."

[2] *See also Schotz v. Samuels*, 72 F. Supp. 3d 81, 91 (D.D.C. 2014) ("the plaintiff seems to contend that the defendant was required to provide a *Vaughn* index during the administrative process. . . This is incorrect. A *Vaughn* index, created by judicial fiat (not the FOIA), is a suggested mechanism to assure 'adequate adversary testing' of the government's claimed exemptions and to assist the court in assessing the government's position during litigation.); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 187 n.5 (D.C. Cir. 2013).

Adequacy of the Search

Another issue raised by your appeal is whether EOM conducted an adequate search for the records at issue. DC FOIA requires only that, under the circumstances, a search is 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 an 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.* 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).

Your request was for "[a]ll transmission" of a named employee. We find that EOM reasonably identified the record repository likely to contain responsive records - the email account of the person identified in your request. You further argue that your request encompasses the personal devices of the named employee. We accept EOM's representation that the employee conducted a search for responsive documents on her personal devices and did not identify anything responsive.

You also challenge the cut-off dates of the search EOM conducted, stating the search was inadequate. Your request seeks records from January 1, 2015 to the date of the search. EOM's

---

("An agency is not required to produce a *Vaughn* index — which district courts typically rely on in adjudicating summary judgment motions in FOIA cases.) (citing to Department of Justice, Guide to the Freedom of Information Act 789 (2009 ed.) (It "is well settled that a requester is not entitled to receive [a *Vaughn* index] during the administrative process.")).

response to this appeal included the email search request it submitted on April 10, 2018. This request states the "Time Period" of the search was from "01/01/2015 to 04/10/2018." We find that the search's time period was adequate.

We note that the search terms EOM used did not include "COST" and instead searched for the full name "Commission on Selection and Tenure." Your request was for "transmissions . . . that reference or mentions . . . the COST." EOM has represented to this Office that it has initiated a new request for emails that includes "COST" and will provide you with any new, responsive, non-exempt records yielded by that supplemental search. We accept this representation.

Redactions under Exemption 2 & 4

Summarily, we agree with EOM's assertions of D.C. Official Code § 2-534(a)(2) to redact the names and personally identifiable information of persons identified in the documents. Similarly, with four exceptions noted below, we agree with EOM's assertions of deliberative process privilege, and attorney-client privilege, through D.C. Official Code § 2-534(a)(4). Having reviewed the documents, the redacted emails appear to be the sort of back-and-forth discussions between government employees contemplated by the privilege or amount to the solicitation of legal advice. We reject your argument that the fact that the communications are between "disparate agencies" is dispositive, as the exemption covers both "inter[3]-agency or intra-agency documents." As a result, we affirm the redactions EOM made pursuant to these exemptions.

We disagree with EOM's redactions on:

- The body of the email on pages 4-5 of the production, because we do not believe that the email is deliberative in nature or constitutes the solicitation of legal advice.
- The first three sentences and post script of the body of the email on page 29 of the production, because the information is factual and non-deliberative.
- The redactions made on page 40 of the production, because the redacted portions are not deliberative in nature and do not involve the solicitation or giving of legal advice.
- The opening paragraph concerning scheduling on the email that appears on pages 45, 48, 51, 53, 56-57, 59, and 61 of the production, because the scheduling is not deliberative in nature or part of an attorney-client relationship. We note that the bullet points in this email may remain redacted, as the content reflects the thought process of the sender in reaching a decision.

Conclusion

Based on the foregoing, we affirm EOM's decision in part and remand in part. Within 5 business days from the date of this decision, EOM shall: (1) release the portions of previously redacted

[3] The prefix "inter" can generally be read to mean "between." *See* https://en.wiktionary.org/wiki/inter- . Such that "inter-agency," in the context of D.C. Official Code 2-534(a)(4) can be read to mean "between agencies."

pages noted above; and (2) complete its supplemental search and provide to you responsive, non-exempt portions of records found on a rolling basis.

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: Erika Satterlee, Associate Director, EOM (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-121

July 16, 2018

VIA ELECTRONIC MAIL

Mr. Stephen Leckar

RE: FOIA Appeal 2018-121

Dear Mr. Leckar:

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 lack of response from the Commission on Selection and Tenure ("COST") to a request you submitted to COST under the DC FOIA.

On April 10, 2018, you submitted a request to COST for "all transmissions, including emails and text messages, including deleted ones, sent to or from Yvonne Williams that reference[s] or mention[s] Jesse P. Goode from April 1, 2016, to the date of the search."[1] Your request included transmissions sent to or from Chair Williams' personal devices, such as privately-owned cellular telephones, tablets, laptops, or computers. You mailed a physical copy of your request to Chair Williams' Superior Court chambers.

Having received no response to your request from COST, you submitted an appeal to this Office on the grounds that COST constructively denied your request and stymied your right under D.C. Official Code § 2-531 "to access full and complete information regarding the affairs of the government and the official acts of those who represent them as public officials and employees."

This Office notified COST,[2] and, pursuant to 1 DCMR § 412.5, asked it to provide us with the following: (1) justification for its decision not to grant a review of the records at issue; (2) a Vaughn index of documents withheld and an affidavit or declaration from an employee as to the decision to withhold documents; and (3) a copy of the records in dispute.

[1] We note that despite your request being made to Ms. Williams in her capacity as the chairperson of COST, your request is addressed to "The Honorable Yvonne Williams / D.C. Superior Court," which may have contributed to the delay in COST's response, as the request was initially interpreted as being made to the Superior Court. D.C. Superior Court is not subject to DC FOIA, pursuant to D.C. Official Code § 2-502(5).

[2] There was a delay in notifying COST of your appeal because this Office initially interpreted your appeal as directed at the Office of Administrative Hearings.

On July 13, 2018, COST sent this Office a response to your appeal, a Vaughn Index, declaration, and copies of numerous unredacted records that COST withheld from you.[3] COST's response asserts, without citing to any DC FOIA exemption, that some documents responsive to your request are "personnel records and are not public documents under FOIA" by virtue of being related to a "re-appointment." COST identified three sets of email communications in its Vaughn index that have been withheld from you under the deliberative process and attorney-client privileges. COST did not indicate whether it engaged in an analysis of reasonable segregability as required by D.C. Official Code § 2-534(b); rather, it seems to have withheld all responsive documents from you in their entirety.

The crux of your appeal is that COST constructively denied your FOIA request by failing to respond to it. In responding to your appeal, COST has explained its position with regard to your underlying request; however, you have not had an opportunity to review the response or challenge it. Accordingly, we are attaching to this decision COST's response to your appeal, Vaughn Index, and declaration. Your appeal on the grounds of constructive denial is now moot, but you are free to challenge the substance of COST's July 13, 2018 response by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Nadine Wilburn, OAH Member of the Commission on Selection and Tenure (via email)

[3] We note that COST did not provide us with unredacted or redacted copies of the email messages listed on its Vaughn Index, and the unredacted documents that COST provided us are not listed on the Vaughn Index. We suspect that these unredacted documents may be the personnel records COST references in its response, which it claims are exempt from disclosure.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-122

June 8, 2018

VIA ELECTRONIC MAIL

Mr. Chris Moeser

RE: FOIA Appeal 2018-122

Dear Mr. Moeser:

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"), on the grounds that the Office of the Deputy Mayor for Education ("DME") failed to respond to your client's February 20, 2018 request for communications exchanged between the former Deputy Mayor for Education and the former Chancellor of the District of Columbia Public Schools.

You submitted the appeal June 5, 2018. DME responded on the same day, apologizing for the delay and stating that there were no responsive records.

Since your appeal was based on DME's failure to respond to your request, and the agency has now provided a response, we consider your appeal to be moot and hereby dismiss it. Your appeal is dismissed without prejudice, however, and you are free to challenge DME's response by separate appeal to 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: Keisha Mims, FOIA Officer, DME (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-123

June 13, 2018

VIA ELECTRONIC MAIL

Wayne D'Angelo

RE: FOIA Appeal 2018-123

Dear Mr. D'Angelo:

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"), on the grounds that the Office of Contracting and Procurement ("OCP") failed to respond to your request for certain contract and bid information.

This Office contacted OCP on June 5, 2018, and notified the agency of your appeal. On June 6, 2018, we received a separate appeal from you indicating that OCP responded to your request, and you wish to challenge the substance of the response.[1]

You submitted FOIA Appeal 2018-123 on the grounds that OCP failed to respond to your request, and the agency has since responded. We therefore consider this appeal to be moot, and it is dismissed. OCP provided us with a response to your second appeal on June 12, 2018, and a decision on that appeal is forthcoming.

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: D. Ryan Koslosky, Assistant General Counsel, OCP (via email)

[1] The second appeal has been docketed as Appeal 2018-125.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-124

June 19, 2018

VIA ELECTRONIC MAIL

Mr. Fenit Nirappil

RE: FOIA Appeal 2018-124

Dear Mr. Nirappil:

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 Metropolitan Police Department ("MPD") improperly withheld body-worn camera ("BWC") footage you requested under the DC FOIA.

Background

On April 24, 2018, you submitted a request to MPD for BWC footage of a traffic stop that resulted in the arrest of Trayon White, Sr., a member of the Council of the District of Columbia ("Council"). MPD denied your request on May 24, 2018, on the grounds that the footage is exempt from disclosure under D.C. Official Code § 2-534(a)(2) ("Exemption 2"), and releasing it would constitute a clearly unwarranted invasion of personal privacy.

On June 5, 2018, you appealed MPD's denial, contending that the public interest in Councilmember White's arrest outweighs his limited privacy rights as a public official. This Office notified MPD of your appeal and asked it to respond. On June 18, 2018, MPD sent us a response asserting that it properly withheld the requested BWC footage under Exemption 2 and D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)").[1] MPD also contends that disclosure of the footage would not shed light on MPD's or the Council's performance of their statutory duties; therefore there is no cognizable public interest in the record under DC FOIA.

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 . . ." *Id.* at § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request.

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

The crux of this matter is whether the BWC footage you requested is exempt from disclosure under DC FOIA because it contains material which, if released, would constitute an invasion of privacy and whether the public interest in the footage outweighs the privacy interest.

Exemptions 2 and 3(C) of the DC FOIA relate to personal privacy. Exemption 2 applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Exemption 3(C) provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy." While Exemption 2 requires that the invasion of privacy be "clearly unwarranted," the word "clearly" is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption 2. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

Records pertaining to an investigation conducted by MPD are subject to Exemption 3(C) if the investigation focuses on acts that could, if proven, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). Since the record at issue involves BWC footage of an arrest, the broader standard of Exemption 3(C) applies to your request.

Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of one's individual privacy interests against the public interest in disclosing the record. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 756. On the issue of privacy interests, the D.C. Circuit has held:

> [I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)[2]. "The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators."

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (quoting *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)).

Here, we find that Councilmember White has a sufficient privacy interest associated with the BWC recording at issue. White ultimately was not prosecuted in connection with his arrest; however, an agency is justified in withholding information that alleges wrongdoing even if the accused individual was not prosecuted for the wrongdoing. The agency's purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *Bast*, 665 F.2d at 1254. As the D.C. Circuit held in *Stern*, individuals have a

[2] Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

strong interest in not being associated with alleged criminal activity, and protection of this privacy interest is a primary purpose of the investigatory records exemption. *Stern*, 737 F.2d at 91-92.

With regard to the second part of the privacy analysis under Exemption 3(C), we examine whether Councilmember White's privacy interest in the BWC footage is outweighed by the public interest, therefore warranting disclosure. On appeal, you maintain that "There is . . . a public interest in understanding Council member White's interactions with police given his role in law-making and budget appropriations that affects MPD and policy safety policy in D.C."

The Supreme Court has stated that the privacy analysis must be conducted with respect to the central purpose of FOIA, which is

> 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Reporters Comm. for Freedom of Press, 489 U.S. at 772-773.

Courts have consistently held that the purpose of FOIA is to inform citizens of "what their government is up to." *Id*. "This inquiry . . . should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld." *Schrecker v. United States Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (internal citations omitted). Information is deemed valuable under FOIA when it would permit public scrutiny of an agency's behavior or performance. *Id.* at 666.

In this instance, there has been no claim that the BWC footage of Councilmember White would provide insight into MPD's or the Council's performance. Your public interest argument does not comport with the standard under applicable case law, in that disclosure of the recording would not contribute significantly to public understanding of the operations or activities of the government, which is "the only relevant public interest" to be weighed. *Reporters Comm*., 489 U.S. at 775.

Under FOIA, high ranking government officials typically receive less protection for privacy interests. *See, e.g., Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008) (stating that lower level officials generally have a stronger interest in personal privacy than senior officials). However, public officials "do not waive all privacy interests… simply by taking an oath of public office." *Id*. Here, Councilmember White has a

strong interest in not being associated with alleged criminal activity, and the countervailing public interest is not clearly related to the purpose of DC FOIA; therefore, the record may be withheld from disclosure. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). As a result, MPD's denial of your request for the recording of Councilmember White's arrest was proper.

Conclusion

Based on the foregoing, we affirm MPD's decision. 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: Ronald Harris, Deputy General Counsel, MPD (via email)
Teresa Quon Hyden, Assistant General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-125

June 14, 2018

VIA ELECTRONIC MAIL

Mr. Wayne D'Angelo

RE: FOIA Appeal 2018-125

Dear Mr. D'Angelo:

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 of the Office of Contracting and Procurement ("OCP") to your request for records under the DC FOIA.

Background

On April 23, 2018, you submitted a request to OCP for certain contract records pertaining to ARJ Group, Inc. and its owners. On June 6, 2018, OCP responded to your request by stating that it had no responsive documents, and that the documents you seek are maintained by the District's Department of General Services ("DGS").[1]

On June 6, 2018, you appealed OCP's response to your FOIA request, stating that you know that OCP's response is inaccurate because it "has available online at least 3 activity reports in the relevant time period that identify both the entity for which [you] requested information . . . It is therefore highly implausible, if not impossible, for [OCP] to suggest that they have no records responsive to [your] request."

This Office notified OCP of your appeal and requested that it respond. OCP provided this Office with a response to your appeal on June 12, 2018.[2] In its response, OCP asserts that it conducted a search of its electronic procurement database for records responsive to your request, but none were identified. OCP also searched the licensing database maintained by the Department of Consumer and Regulatory Affairs and the public domain for information pertaining to ARJ Group, Inc. OCP determined from these searches that ARJ Group, Inc. has been awarded construction contracts by DGS. For this reason, OCP advised you in its June 6, 2018 letter that

[1] OCP states in its June 6, 2018 letter that the custodian of the records you are seeking is the Office of the Chief Technology Officer ("OCTO"), but OCP then provides contact information for the FOIA Officer at DGS. According to OCP, its reference to OCTO was a typographical error.

[2] A copy of OCP's response is attached.

DGS is the custodian of the records you are seeking. After being notified of your appeal, OCP conducted a second search of its electronic procurement and awarded contract databases and did not find any responsive documents.

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).

The primary issue in this appeal is your belief that OCP should possess responsive records because you found activity reports on the agency's website listing ARJ Group, Inc. The DC FOIA requires only that, under the circumstances, a search is 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: (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 response to your request, OCP determined that if it possessed responsive records, the records would be in the ARIBA/PASS system, which is maintained by the Chief Procurement Officer and the Director of OCP. According to OCP, it searched this database and found 5 pages of documents, none of which fell within the date range of your request. OCP then searched other agencies' databases, which revealed that DGS is the custodian of the records you are seeking.

Having reviewed OCP's response to your appeal, we find that the search it conducted was adequate. Moreover, OCP's detailed account as to why DGS maintains the information you seek explains why OCP does not possess the records associated with the ARJ Group, Inc. entries that you found on OCP's website.

Conclusion

Based on the foregoing, we affirm OCP's response to your request, insofar as the search it conducted was adequate. 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: D. Ryan Koslosky, Assistant General Counsel, OCP (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-126

June 21, 2018

VIA ELECTRONIC MAIL

Mr. Karl P. Jones

RE: FOIA Appeal 2018-126

Dear Mr. Jones:

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 District of Columba Housing Authority ("DCHA") improperly withheld records you requested.

Background

On May 11, 2018, you requested from DCHA all records related to an incident that occurred on March 26, 2018, in which you allege you were threatened. You assert that the incident resulted in an investigation, and you requested any documents related to the investigation. On June 4, 2018, DCHA responded by denying your request pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"), which protects personal privacy, and D.C. Official Code § 2-534(a)(4) ("Exemption 4"), which DCHA asserted to invoke the deliberative process privilege, attorney-client privilege, and work product doctrine.

In your appeal you challenge DCHA's withholding. You assert that you have a right to the investigatory records because the investigation was based on your claim. You also assert that there is public interest in disclosure because you believe you were wrongfully terminated and you allege that DCHA has engaged in a pattern of wrongful terminations.

This Office received your appeal on June 7, 2018, and asked DCHA for its response. DCHA provided its response to your appeal on June 18, 2018.[1] In its response, DCHA reaffirms its decision to withhold the responsive records in their entirety pursuant to the deliberative process and attorney-client privileges under Exemption 4.[2] DCHA claims that its application of the deliberative process privilege is proper because the responsive records reflect deliberative discussions regarding your continued employment. DCHA asserts that the attorney-client privilege was properly asserted because certain communications involve the agency seeking and

[1] A copy of DCHA's response is attached.
[2] DCHA does not assert the work product doctrine in response to your appeal, which protects documents prepared in anticipation of litigation.

receiving legal advice or services from its attorney. DCHA also asserts that disclosure of witness statements would amount to an unwarranted invasion of personal privacy pursuant to Exemption 2. DCHA argues that your public interest claim is actually only a personal interest related to the termination of your position.

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 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).

The issue in this appeal is whether DCHA may withhold responsive documents in their entirety pursuant to Exemptions 4 and 2. DCHA did not provide this Office with a copy of the responsive records for our *in camera* review; therefore, we cannot fully verify DCHA's assertions made in response to your appeal. As a result, this Office will provide a general analysis of the exemptions asserted based on DCHA's representations.

Exemption 4

This Office accepts DCHA's assertions regarding the attorney-client privilege. *See* DCHA's Response at 2. Communications between DCHA and its attorney that specifically seek or provide legal advice or services may be withheld from disclosure pursuant to Exemption 4.

The next consideration is whether DCHA may withhold all responsive records in their entirety under the deliberative process privilege of Exemption 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).

To be properly withheld under Exemption 4, a record must be contained in an inter- or intra-agency document. Therefore, Exemption 4 is typically limited to documents transmitted within or among government agencies. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (U.S. 2001). To qualify for protection under the deliberative process privilege, information must be predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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*.

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

It appears likely that the records at issue meet the threshold requirement of being inter- or intra-agency documents, as the incident at issue involves exclusively District personnel. DCHA asserts that the responsive records reflect deliberations regarding your employment.[3] Based on the nature of the responsive records, it is likely that portions of the responsive records contain these deliberations. It is also likely that portions of the records express factual statements, transmittal information, or messages other than opinions, proposals, or suggestions.

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). "To demonstrate that it has disclosed all reasonably segregable material, 'the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F .Supp. 2d 106, 120 (D.D.C. 2010)). In *Judicial Watch*, the court held that "[a]lthough purely factual information is generally not protected under the deliberative process privilege, such information can be withheld when 'the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'" *Id*. at 28. (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In these instances, factual information is protected when disclosing the information would reveal an agency's decision-making process in a way that would have a chilling effect on discussion within the agency and inhibit the agency's ability to perform its functions. *Id*.

Based on DCHA's response, it is not clear that the agency considered whether information in the responsive records is reasonably segregable. For example, a communication may contain

[3] We note that your request sought records based a hostile work environment claim that you initiated. Presumably, not all of the responsive records would involve deliberations regarding your continued employment.

introductory factual sentences followed by opinions. Only the sentences involving opinions are protected under the deliberative process privilege; the remainder of the record is not protected under Exemption 4 and should be disclosed under DC FOIA unless another valid exemption applies. Accordingly, DCHA must review the documents withheld in their entirety under the deliberative process privilege of Exemption 4 to determine if any portions may be disclosed.

Exemption 2

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, personal phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994).

Government employees generally have no expectation of privacy regarding their names and titles in the ordinary course of business. *See, e.g. Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). D.C. Official Code § 2-536(a)(1) provides that the names, salaries, title, and dates of employment of all District employees are considered "[I]nformation which must be made public." This information is publicly available by the District's Department of Human Resources. Nevertheless, the identities of witnesses providing information to investigators are generally protected due to the potential of harassment or retaliation. *See, e.g., McCann v. HHS*, No. 10-1758, 2011 WL 6251090, at *3 (D.D.C. Dec. 15, 2011)

Here, individuals identified in or by witness statements involving misconduct have a sufficient privacy interest in personally identifiable information. Since the investigation at issue involves you, however, you may waive your privacy interest with respect to information pertaining to yourself in the responsive records. As a result, DCHA may not need to redact information for your personal privacy.[4]

[4] To clarify, this means information that pertains solely to your personally identifiable information or personal privacy. DCHA would still be able to withhold and redact information regarding others' personally identifiable information and personal privacy, even if the information was held in records that were related 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.

Here, you argue there is a public interest in disclosure to determine if DCHA routinely engages in practice of wrongful terminations. Aside from your personal assertion, you do not provide evidence the DCHA routinely engages in wrongful termination of employees. Bare allegations of misconduct do not satisfy the public interest requirement under FOIA. *NARA v. Favish*, 541 U.S. 157, 175 (2004). Further, it is unclear how disclosing the identities of individual employees would be relevant to DCHA's conduct as an agency. Due to the absence of a relevant countervailing public interest, we find that DCHA may withhold identifiable information about employees in witness statements under Exemption 2.[5]

Conclusion

Based on the foregoing, we affirm DCHA's decision in part and remand it in part. Within five business days from the date of this decision, DCHA shall review the responsive records to determine if reasonable segregable portions may be disclosed in accordance with the guidance of this decision.

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: Kierstan Moore, Legal Office Assistant, DCHA (via email)

[5] We note that the principle of reasonable segregability under D.C. Official Code § 2-534(b) is also applicable here. Generally, Exemption 2 allows only for the redaction of personally identifiable information in records, unless information and details in the witness statements would clearly reveal the identities of individuals involved.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-128

June 25, 2018

VIA ELECTRONIC MAIL

Mr. Stephen Sawchuck

RE: FOIA Appeal 2018-128

Dear Mr. Sawchuck:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") improperly withheld information responsive to your April 29, 2018 request for records related to DCHA's "Moving to Work" plan.

On May 18, 2018, DCHA responded to your request by providing you with links to public websites. You replied to DCHA on the same day, stating that the data on the websites was incomplete, and you requested that DCHA supply you with the missing data. You assert that DCHA did not respond further; therefore, you filed the instant FOIA appeal on June 11, 2018. This Office notified DCHA of your appeal and requested its response. On June 18, 2018, DCHA request an extension to respond to your FOIA appeal.

On June 25, 2018, DCHA informed this Office that it has been in contact with you regarding the missing information and advised you that it will provide you with additional records. Since your appeal was based on DCHA's failure to provide missing information, and DCHA has asserted that additional records are forthcoming, we consider this appeal to be moot, and it is dismissed. If you disagree with DCHA's representation, or if you would like to challenge DCHA's substantive response, you may submit a separate appeal to 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: Mario Cuahutle, Associate General Counsel, DCHA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-129

June 20, 2018

VIA ELECTRONIC MAIL

Martin Austermuhle

RE: FOIA Appeal 2018-129

Dear Mr. Austermuhle:

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"), on the grounds that the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") failed to respond to your request for certain email messages.

On May 4, 2018, you submitted a request to DMPED for "[A]ny and all emails to and from Brian Kenner, Andrew Trueblood, Chanda Washington, Susan Longstreet, and Molly Hofsommer that contain the following terms: 'Amazon,' 'HQ2,' 'FOIA,' 'Freedom of Information,' 'incentives,' 'reporters,' 'Martin,' and 'Austermuhle.'" The date range specified for this request was December 4, 2017 to May 4, 2018.

On May 24, 2018, DMPED advised you that it submitted a search request and received approximately 9,000 responsive emails on May 21, 2018. DMPED indicated that due to the voluminous amount of records retrieved, it was extending the time period for responding to your request.

Having received no documents from DMPED, you submitted an appeal to this Office on June 11, 2018, on the grounds that DMPED constructively denied your request and stymied your right under D.C. Official Code § 2-531 "to access full and complete information regarding the affairs of the government and the official acts of those who represent them as public officials and employees."

Upon receipt of your appeal, this Office notified DMPED and, pursuant to 1 DCMR § 412.5, asked it to provide us with the following: (1) justification for its decision not to grant a review of the records at issue; (2) a *Vaughn* index of documents withheld and an affidavit or declaration from an employee as to the decision to withhold documents; and (3) a copy of the records in dispute.

DMEPD sent this Office a response to your appeal on June 18, 2018, on which you were copied. The response states that "DMPED continues to review the responsive documents, applying redactions as appropriate, and will provide the responsive documents to Mr. Austermuhle as they are available." DMPED's response implies that it has already identified documents that are

responsive to your request and has redacted them. Yet, DMPED has failed to produce a single document to you or advise you of the specific reasons for the denial, including citations to any applicable DC FOIA exemption, as required by D.C. Official Code § 2-533.

As of the date of this decision, 32 business days have elapsed since you requested the emails at issue. This Office has no authority to extend the maximum deadline for responding to a DC FOIA response, which is 25 business days. *See* D.C. Official Code § 2-532. Moreover, it appears that DMPED has made no additional attempt to request an extension from you in connection with the request.[1]

Based on the record before us, we conclude that DMPED has constructively denied your request. DC FOIA requires DMPED to do more than merely assure you that it is working to respond as promptly as possible to your various pending requests. Therefore, we remand this matter to DMPED and direct it to begin, within two business days from the date of this decision, a rolling production to you of responsive emails, or, as applicable, a basis for emails that are redacted or withheld in their entirety.

This constitutes the final decision of this Office; provided, that you are free to challenge any substantive response you receive from DMPED by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Molly Hofsommer, FOIA Officer, DMPED (via email)

[1] DMPED notes that you "currently [have] several pending and large-scale FOIA requests with [DMPED]" and that DMPED is "working to respond as promptly as possible" to all of your requests. DMPED's position for the delay here – that it is working on multiple, large-scale requests you have submitted – is untenable. To our knowledge, DMPED has not produced any emails responsive to your other pending requests. The common practice followed in cases where the volume of documents retrieved makes timely completion of the response to a DC FOIA request impracticable is to produce documents and explanations of the basis for redactions or withholding documents in their entirety on a rolling basis.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-130

June 25, 2018

VIA ELECTRONIC MAIL

Mr. Shuntay Brown

RE: FOIA Appeal 2018-130

Dear Mr. Brown:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") improperly denied your June 11, 2018 request for transcripts of two hearings held on May 31, 2018 and June 11, 2018.

You requested the transcripts under DC FOIA and 14 DCMR § 6307.1(g).[1] On the same date of your request, DCHA responded that it did not possess a transcript and that it is not required under FOIA to create new records. Also on June 11, you appealed DCHA's response claiming the DCHA failed to provide you with a transcript. This Office notified DCHA of your appeal and requested its response.

On June 18, 2018, DCHA provided its response to your appeal.[2] DCHA's response reiterates its position that no responsive records exist and it has no duty to create documents under FOIA. *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). However, DCHA states that its Office of Fair Hearings is processing your transcript request through a separate process.

We agree with DCHA's assertion that FOIA does not require agencies to create new records but only to disclose public records that already exist. *See* D.C. Official Code § 2-502(18). We also accept DCHA's representation that transcripts for the hearings at issue do not currently exist. As a result, we affirm DCHA's response and your appeal is hereby dismissed. However, the meaning of DCHA's statement that its "Office of Fair Hearings is processing [your] request under its record request process" is unclear to this Office. DCHA is strongly encouraged to explain to you your ability to obtain hearing transcripts pursuant to 14 DCMR § 6307.1(g).

If you are dissatisfied with this decision, you may commence a civil action against the District

[1] 14 DCMR § 6307.1(g) states that a complainant has "[t]he right to arrange, in advance, and at his or her expense, to receive a transcript of the hearing." We note that the transcript request at issue was not "in advance" of the hearing, but instead came after.
[2] A copy of DCHA's response is attached.

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: Mario Cuahutle, Associate General Counsel, DCHA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-131

June 29, 2018

VIA ELECTRONIC MAIL

Mr. Martin Austermuhle

RE: FOIA Appeal 2018-131

Dear Mr. Austermuhle:

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"), on the grounds that the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") failed to respond to your request for certain records.

On April 30, 2018, you submitted a request to DMPED for communications or documents sent by DMPED to Amazon in reference to the District's bid for Amazon's second headquarters. Having received no response from DMPED, you appealed to this Office on May 21, 2018, arguing that DMPED's failure to respond to your request constituted a constructive denial of your request for records. We docketed the appeal as 2018-115 and, in accordance with 1 DCMR § 412.5, asked the agency to respond to this Office with an explanation of its failure to respond to your request for records. On May 29, 2018, DMPED advised you that it was extending the time period for responding to your request, in accordance with D.C. Official Code § 2-532(d)(1). We therefore issued a decision on May 30, 2018, determining that Appeal 2018-115 was moot based on the presence of approximately four business days remaining for DMPED to make such timely response. Our determination in Appeal 2018-115 informed you of your right to challenge any substantive response you receive from DMPED by separate appeal to this Office.

On June 14, 2018, you submitted the instant appeal on the grounds that DMPED has constructively denied your request since you have still not received responsive documents in connection with your April 30, 2018 request. We notified DMPED of your second appeal, and DMPED sent us a response on June 21, 2018, on which you were copied, explaining its failure to provide any records in response to your request. DMPED's response indicated that it continues to review the many thousands of responsive pages at issue and will provide them to you as they are available.

As of the date of this decision, 43 business days have elapsed since you requested the documents at issue. This Office has no authority to extend the maximum deadline for responding to a DC FOIA response, which is 25 business days. *See* D.C. Official Code § 2-532. As we noted in FOIA Appeal 2018-129, the common practice followed in cases where the volume of documents retrieved makes timely completion of the response to a DC FOIA request impracticable is to produce, on a rolling basis, responsive documents which do not fall within exemptions from

disclosure under D.C. FOIA and explanations of the basis for redactions or withholding documents in their entirety.

Based on the record before us, we conclude that DMPED has constructively denied your request. Therefore, we remand this matter to DMPED and direct it to begin, within five business days from the date of this decision, a rolling production to you of responsive records, or, as applicable, a basis for records that are redacted or withheld in their entirety.

This constitutes the final decision of this Office; provided, that you are free to challenge any substantive response you receive from DMPED by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Molly Hofsommer, FOIA Officer, DMPED (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-132

June 29, 2018

VIA ELECTRONIC MAIL

Ms. Emily Barth

RE: FOIA Appeal 2018-132

Dear Ms. Barth:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested.

Background

On June 14, 2018, you requested from MPD all "Annual Performance Ratings from FY2014 through FY2018 (present date) for all sworn and civilian MPD employees." Your request also asked for all "Performance Plans and any and all notes, documents, reports, etc. recorded as a result of any and all Interim Performance Management Conferences." You asserted that the incident resulted in an investigation, and you requested any documents related to the investigation. On June 15, 2018, MPD denied your request in full pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"), which protects personal privacy.

You appealed MPD's denial, arguing that the public should have access to the performance information. In your appeal, you assert your understanding that ratings are based on a numerical scale and claim that there is no personal privacy interest in numbers alone.

This Office received your appeal on June 15, 2018, and asked MPD for its response. MPD provided its response to your appeal on June 27, 2018.[1] In its response, MPD reaffirms its decision to withhold the responsive records in their entirety pursuant Exemption 2. MPD assert that disclosure of performance would amount to an unwarranted invasion of personal privacy pursuant to Exemption 2. MPD argues that there is no public interest relevant to FOIA's purpose that would override the personal privacy interests at issue.

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

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 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).

The issue in this appeal is whether MPD may withhold responsive documents in their entirety pursuant to Exemption 2.

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personally identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, personal phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). Courts routinely protect personal information related to employees' performance ratings. *See, e.g., Ripskis v. HUD*, 746 F.2d 1, 3-4 (D.C. Cir. 1984); *FLRA v. U.S. Dep't of Commerce*, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992); *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283-85 (D.D.C. 2011). Therefore, we agree with MPD's assertion that its employees have a sufficient privacy interest in their performance ratings.

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.

Here, we agree with MPD's assertion that you do not identify a relevant public interest for the purposes of FOIA that would outweigh the personal privacy interests at issue. *See id*. Due to the absence of a relevant countervailing public interest, we find that MPD may withhold identifiable information about employees in performance evaluations under Exemption 2.

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). Generally, portions of performance ratings that are not individually identifiable are not protected under Exemption 2. *See, e.g., Ripskis*, 746 F.2d at 3-4 (affirming the redaction of names and identifying data contained on evaluation forms of HUD employees who received outstanding performance ratings, but HUD did disclose redacted versions of performance ratings); *FLRA* 962 F.2d at 1059-61 (affirming the withholding of names and duty stations in performance ratings); *Smith v.*, 798 F. Supp. 2d at 283-85 (affirming agency's redaction of personal and job-performance information for specifically identified employees). If a request sought a specific employee's or small group of employees' performance ratings, it could be impossible to protect personal privacy with redactions. Since your request asks for all performance ratings over several years, however, it is likely that personal privacy interests may be protected through redaction of personally identifiable information and personal details.

Based on MPD's response, it is not clear that the agency considered whether information in the responsive records is reasonably segregable.[2] For example, performance ratings may contain numerical scoring, which after redaction, cannot be linked to a particular individual. Only personally identifiable information and details are protected under Exemption 2; the remainder of the record should be disclosed under DC FOIA unless another valid exemption applies.[3] Accordingly, MPD must review the documents withheld in their entirety to determine if portions may be disclosed.

Conclusion

Based on the foregoing, we affirm MPD's decision in part and remand it in part. Within five business days from the date of this decision, MPD shall review the responsive records to determine if segregable portions may be disclosed in accordance with the guidance of this

[2] MPD did not provide this Office with a sample of a performance rating for our *in camera* review; therefore, we cannot verify your assertion that performance ratings are primarily numerical ratings.

[3] We note that the deliberative process privilege under D.C. Official Code § 2-534(a)(4) may apply to certain records you requested related to "Performance Plans."

decision. If segregability is possible, MPD shall disclose the non-privileged portions of the records to you.

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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-133

July 5, 2018

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2018-133

Dear Mr. Mulhauser:

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 of the District of Columbia Public Charter School Board ("PCSB") to your request for records under the DC FOIA.

Background

On April 24, 2018, you submitted a request to PCSB for records related to "facility surveys under the PACE legislation … in non-DCPS buildings used by public charter schools." On May 30, 2018, PCSB responded to your request and provided you with approximately 14 documents. The disclosed documents were redacted to protect personal privacy interests pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2") and commercial information pursuant to D.C. Official Code § 2-534(a)(1) ("Exemption 1"). PCSB also withheld certain documents in their entirety pursuant to Exemption 1 and D.C. Official Code § 2-534(a)(4) ("Exemption 4"), which PCSB applied to protect records it considered deliberative.

On June 20, 2018, you appealed PCSB's response to your FOIA request, stating that the records PCSB disclosed were not relevant to your request. You believe that additional responsive records should exist; consequently, you challenge both the adequacy of PCSB's search and its application of Exemption 4. You assert that you have received information from D.C. officials that leads you to believe additional records should exist. Further, you argue it would be improper for PCSB to assert Exemption 4 for records it exchanged with outside contractors, but you are unable to determine if that is at issue due to the minimal explanation PCSB provided regarding its application of Exemption 4.

This Office notified PCSB of your appeal and requested its response. On June 26, 2018, PCSB provided this Office with a response to your appeal, including a search certification form, *Vaughn* index, and a copy of the responsive records at issue for our *in camera* review.[1] In its response, PCSB describes its search efforts. PCSB asserts that it consulted with staff members

[1] A copy of PCSB's response, search certification, and *Vaughn* index are attached.

who are knowledgeable about facility survey projects and the PACE legislation to determine where to search and which terms to use to find responsive records. PCSB asserts that it searched its electronic files and email records, and its staff is not aware of any other responsive documents. PCSB contests your assertion on appeal that it should maintain additional responsive records, and suggests that another agency may possess the records you seek.

PCSB's response and *Vaughn* index also provide additional information regarding four documents that were withheld in their entirety. PCSB withheld one document, a property condition report of Benjamin Banneker High School, pursuant to Exemption 1.[2] PCSB asserts that the report was provided by a contractor as a work product sample, and that disclosure would result in competitive harm by revealing the contractor's process for reporting facility surveys. PCSB withheld the remaining three documents under the deliberative process privilege of Exemption 4. Two of the withheld documents consist of a former employee's notes evaluating technical proposals received in response to an RFP by the Department of General Services ("DGS"). PCSB asserts that the notes are inter-agency documents shared with the DGS to facilitate DGS's decision to award a contract. PCSB asserts that the notes reflect the author's thoughts and opinions. The final withheld document is a chart outlining responsibilities for collecting information required by PACE. PCSB asserts its belief that the chart consists of a PCSB employee's recommendations and proposals for collecting data required by the PACE Act. PCSB acknowledges that it cannot confirm this because the employee who created the document no longer works at PCSB.

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).

On appeal, you do not challenge the redactions in PCSB's disclosure because you believe that the records disclosed are not relevant to your request. As a result, this Office will focus on the

[2] We note that Benjamin Banneker is a DCPS school. As a result, the record does not appear to be responsive to your request for records related to "non-DCPS buildings."

adequacy of PCSB's search and PCSB's application of Exemption 4 to withhold documents in their entirety.[3]

Adequacy of Search

The DC FOIA requires only that, under the circumstances, a search is 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: (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 its response to your appeal, PCSB provided a thorough explanation of its search efforts to find records responsive to your request. PCSB asserts that it consulted with knowledgeable staff members to determine the terms and locations to find responsive records. PCSB asserts that it searched the relevant electronic files and email records, and its staff is not aware of any other likely repositories for responsive documents. Having reviewed PCSB's response to your appeal, we find that the search it conducted was adequate in response to your request. If you have information that you believe would help PCSB to locate additional responsive records, you may provide that information to PCSB in a new request so that it can target additional search efforts.

[3] This Office will not address the document withheld in its entirety pursuant to Exemption 1 because the record does not pertain to a "non-DCPS building."

Exemption 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).

To be properly withheld under Exemption 4, a record must be contained in an inter- or intra-agency document. Therefore, Exemption 4 is typically limited to documents transmitted within or among government agencies. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (U.S. 2001). To qualify for protection under the deliberative process privilege, information must be predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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*.

> The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

The records at issue meet the threshold requirement of being inter- or intra-agency documents, as the records were created by PCSB personnel and used internally or shared only with other District agencies. After reviewing the documents *in camera*, this Office accepts PCSB's representation that the two drafts of notes evaluating technical proposals are predecisonal in that they were created before DGS awarded a contract and deliberative in that they reflect the author's opinions and priorities. It is less clear that the chart identifying data required by the PACE Act should be withheld in its entirety.

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). "To demonstrate that it has disclosed all reasonably segregable material, 'the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which

they apply.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F .Supp. 2d 106, 120 (D.D.C. 2010)). In *Judicial Watch*, the court held that "[a]lthough purely factual information is generally not protected under the deliberative process privilege, such information can be withheld when 'the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'" *Id*. at 28. (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In these instances, factual information is protected when disclosing the information would reveal an agency's decision-making process in a way that would have a chilling effect on discussion within the agency and inhibit the agency's ability to perform its functions. *Id*.

PCSB contends that the document describing data required by the PACE Act was drafted before it chose how to collect the data and deliberative because it reflects the author's opinions. It is not clear that PCSB considered whether information in the document is reasonably segregable. After reviewing the document *in camera*, we find that only the fourth column of the chart contains deliberative proposals for data collection. The first three columns of the chart appear to list purely factual information regarding data collection requirements specified by the PACE Act. PCSB does not assert, and it is unclear to this Office, if the chart contains factual requirements identified by the PACE Act or represents a curated list of particular data requirements that would reflect PCSB's deliberative process.[4] Accordingly, PCSB should review the document to determine if any segregable factual information may be disclosed.

Conclusion

Based on the foregoing, we affirm PCSB's response to your request, insofar as the search it conducted was adequate. We affirm in part and remand in part PCSB's application of Exemption 4. Within 5 business days from the date of this decision, PCSB shall review the chart describing data required by the PACE Act that it withheld and disclose to you nonexempt portions in accordance with the guidance in this decision. 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: Sarah H. Cheatham, Deputy General Counsel, PCSB (via email)

[4] We note that it is also unclear to this Office whether the shading of the chart may be protected by the deliberative process privilege.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-135

July 3, 2018

VIA ELECTRONIC MAIL

Mr. Carlo Bruni

RE: FOIA Appeal 2018-135

Dear Mr. Bruni:

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"), on the grounds that the Office of Contracting and Procurement ("OCP") improperly assessed fees related to your FOIA request.

On April 18, 2018, you submitted a request to OCP for records related to a contract with the Humane Rescue Alliance. On June 4, 2018, OCP responded to your request, stating that it identified 92 pages of responsive documents, made redactions on 3 pages to protect personal privacy interests pursuant to D.C. Official Code § 2-534(a)(2), and would disclose the responsive records after you paid a fee of $23 for the costs of reproduction.

This Office received your appeal on June 21, 2018, and contacted OCP for its response. You assert on appeal that OCP's fees are improper because the documents you requested are required to be posted publically on the internet pursuant to 27 DCMR § 1305. You assert that OCP's internet postings related to the contract are inadequate; therefore, you argue that you should not be charged a fee for your request.

On June 28, 2018, OCP provided this Office with its response to your appeal.[1] In its response, OCP argues that fee disputes do not fall within the jurisdiction of administrative appeals; therefore, your appeal should be dismissed. OCP also claims that the amount of its fee is appropriate under 1 DCMR § 408.1.

This Office's jurisdiction is limited to "review[ing] the public record to determine whether [a record] may be withheld from public inspection." D.C. Official Code § 2-537(a). We generally do not interpret our authority to include reviewing disputes over FOIA fee waivers. As a result, we do not make any findings regarding the amount of the fee at issue here. However, OCP is denying public inspection of records until it receives your payment for a $23 fee. D.C. Official Code § 2-532(b-3) provides for two situations in which an agency can require advance payment of fees: (1) when it has been determined that a fee will exceed $250; and (2) when a "requester

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

has previously failed to pay fees in a timely fashion." Here, the amount of the fee is under $250. Additionally, OCP has not asserted and this Office is not independently aware of any instance in which you have previously failed to pay applicable fees. As a result, it is improper for OCP to require advance payment from you according to D.C. Official Code § 2-532(b-3).

Conclusion

Based on the foregoing, we remand this matter to OCP. Within 5 business days from the date of this decision, OCP shall provide you with the records it has prepared in response to your request. It may charge you a fee in connection with the documents, in accordance with DC FOIA and its implementing regulations.

This constitutes the final decision of this Office. You are free to challenge OCP's forthcoming substantive response by separate appeal to 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: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-136

July 6, 2018

VIA ELECTRONIC MAIL

Ms. Jodie Fleischer

RE: FOIA Appeal 2018-136

Dear Ms. Fleischer:

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"), on the grounds that the District Department of Transportation ("DDOT") did not adequately respond to your April 9, 2018 request for recent reports required by the Distracted Driving Safety Act of 2004.

On April 30, 2018, DDOT responded to your request by providing you with a link to reports from the years 2002 to 2015. On June 21, 2018, you appealed DDOT's response on the basis that reports for 2016 and 2017 were not available through the link, even though reports are required to be published annually pursuant to D.C. Official Code § 50-1731.09. This Office notified DDOT of your appeal and requested its response.

On June 26, 2018, DDOT provided its response to your appeal.[1] Based on the record on appeal it is unclear if DDOT informed you of the reason for the missing reports when it responded to your request; however, DDOT provided an explanation on appeal. DDOT's response states that the reports are compiled by Howard University in three-year increments and that there has been a delay in posting the most recent reports due to a transition of the Metropolitan Police Department's database. As a result, DDOT asserts that it has conducted an adequate search, provided you with the most current reports available, and does not maintain reports for 2016 and 2017 yet.

Under FOIA, DDOT is not required to create new records but only to disclose public records that already exist. *See* D.C. Official Code § 2-502(18); *see also*, *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). Although DDOT does not appear to be in compliance with the annual reporting requirements of D.C. Official Code § 50-1731.09, it has met its obligation under FOIA since it produced to you all documents in existence at the time of your request.
We accept DDOT's representations that it has disclosed all responsive reports in its possession. As a result, we affirm DDOT's response, and your appeal is hereby dismissed.

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

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: Karen R. Calmeise, Hearings/FOIA Officer, DDOT (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-137

July 9, 2018

VIA ELECTRONIC MAIL

Ms. Emily Barth

RE: FOIA Appeal 2018-137

Dear Ms. Barth:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to perform an adequate search in response to your June 14, 2018 request for records related to policies and procedures that are unique to the Narcotics and Special Investigations Division ("NSID").

On June 18, 2018, MPD responded to your request, asserting that there were no responsive records because NSID members are subject to the same policies and procedures of all units and Patrol Districts. You appealed MPD's response based on the adequacy of MPD's search because you believe there are policies, procedures, or protocols that are unique to NSID and special units operating under NSID.

This Office received your appeal on June 28, 2018, and asked MPD for its response. MPD responded on June 28, 2018, asserting that it would conduct an additional search that it expected to complete by July 6, 2018.[1]

DC FOIA requires that a search be reasonably calculated to produce 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

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

> 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 statements 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, MPD has not provided this Office with sufficient information to determine if it has conducted an adequate search. MPD has not specified how it determined which locations to search or what search was conducted of those locations. Additionally, it is unclear whether or not MPD has concluded the additional search that it expected to complete by July 6, 2018.

Based on the foregoing, we remand this matter to MPD. Within 10 business days from the date of this decision, MPD shall identify the relevant locations of records responsive to your request and describe the results of its search to you. Further, MPD shall disclose to you non-exempt portions of responsive records in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-138

July 9, 2018

VIA E-MAIL

Mr. Evan McAnney

RE: FOIA Appeal 2018-138

Dear Mr. McAnney:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested pertaining to complaints made against a police officer.

Background

On June 4, 2018, you submitted a FOIA request to MPD for all records of formal and informal complaints made against a specific police officer. MPD denied your request on the date you submitted it, without admitting or denying the existence of the requested records, stating that acknowledgement or disclosure of responsive records would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) ("Exemption 2") and D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)").

This Office received your appeal on June 22, 2018, challenging MPD's denial of your request for all formal and informal complaints made against the officer. [1] You argue that responsive records involve a substantial public interest because "[c]itizens pay for police services. They are entitled to know the details regarding the performance of these servants."

This Office notified MPD of your appeal and requested its response. MPD did not respond to the appeal; however, there is sufficient information in the record for this Office to issue a decision.

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

[1] Your appeal also notes that you have not received a response from MPD to another FOIA request. If MPD fails to provide a timely response, you may submit a separate appeal of the constructive denial of that request under D.C. Official Code § 2-532(e).

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).

Exemptions 2 and 3(C) of the DC FOIA relate to personal privacy. Exemption 2 applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Exemption 3(C) provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy." While Exemption 2 requires that the invasion of privacy be "clearly unwarranted," the word "clearly" is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption 2. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

Exemption 3(C) is applicable to records pertaining to investigations conducted by the MPD if the investigations focus on acts that could, if proven, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (The exemption "applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well."). Since the records you seek relate to investigations that could result in civil or criminal sanctions, Exemption 3(C) applies to your request.

Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of one's individual privacy interests against the public interest in disclosing the disciplinary files. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 756. On the issue of privacy interests, the D.C. Circuit has held:

> [I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)[2]. "The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators."

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (quoting *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)).

[2] Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

Here, we find that there is a sufficient privacy interest associated with a police officer who is being investigated for wrongdoing based on allegations. "[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under [(3)(C)]." *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). An agency is justified in not disclosing documents that allege wrongdoing even if the accused individual was not prosecuted for the wrongdoing, because the agency's purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *Bast,* 665 F.2d at 1254.

As discussed above, in *Stern* the D.C. Circuit held that individuals have a strong interest in not being associated with alleged criminal activity and that protection of this privacy interest is a primary purpose of the investigatory records exemption. *Stern,* 737 F.2d at 91-92. We find that the same interest is present with respect to civil disciplinary sanctions that could be imposed on an MPD officer. The records you seek may consist of mere allegations of wrongdoing, the disclosure of which could have a stigmatizing effect regardless of accuracy.

We say "may consist" because the MPD has maintained that it will neither confirm nor deny whether complaint records exist relating to the officer. This type of response is referred to as a "Glomar" response, and it is warranted when the confirmation or denial of the existence of responsive records would, in and of itself, reveal information exempt from disclosure. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2nd Cir. 2009). Here, the Glomar response is justified because if a written complaint or subsequent investigation against the officer you have named exists, identifying the record's existence would likely result in the privacy harm that the DC FOIA exemptions were intended to protect.

With regard to the second part of the privacy analysis under Exemption 3(C), we examine whether the individual privacy interest is outweighed by the public interest to require disclosure. On appeal, you assert that "[c]itizens pay for police services. They are entitled to know the details regarding the performance of these servants." The public interest in the disclosure of a public employee's disciplinary files was addressed by the court in *Beck v. Department of Justice, et al*., 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held:

> The public's interest in disclosure of personnel files derives from the purpose of the [FOIA]--the preservation of "the citizens' right to be informed about what their government is up to." *Reporters Committee,* 489 U.S. at 773 (internal quotation marks omitted); *see also Ray,* 112 S. Ct. at 549; *Rose,* 425 U.S. at 361. 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. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.

Id. at 1492-93.

In the instant matter, disclosing the records you are seeking would not shed light on MPD's performance of its statutory duties and would constitute an invasion of the individual police officers' privacy interests under Exemptions 3(C) and (2) of the DC FOIA.[3]

Conclusion

Based on the forgoing we affirm the MPD's decision and dismiss your appeal.

This shall constitute 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

[3] We note that any public interest that would be served by disclosing the wrongdoings of police officers might be served by the Office of Police Complaints' ("OPC") annual, redacted, online report of all sustained findings of misconducts, along with extensive data regarding the type of allegations made and the demographics of complainants. *See Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). OPC's annual reports may be found at http://policecomplaints.dc.gov/page/annual-reports-for-OPC.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-139

July 16, 2018

VIA ELECTRONIC MAIL

Dr. Daryao Khatri

RE: FOIA Appeal 2018-139

Dear Dr. Khatri:

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 of the University of the District of Columbia ("UDC") to your request for records under the DC FOIA.

Background

On May 19, 2018, you submitted a request to UDC[1] for three categories of records related to a former UDC professor: (1) all information related to "bumping rights" or the transfer of the professor from one department to another; (2) copies of the professor's resume and transcripts; and (3) a list of the courses the professor taught during 2012-2015 academic years. On June 19, 2018, UDC responded to your request and denied the first two categories of records you requested to protect personal privacy interests pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"). For the third category of records, UDC provided you with a link to a website to search courses taught by the professor.

On June 29, 2018, you appealed UDC's denial of the first two categories of your request. You assert that disclosure is warranted because UDC officials may have lied and misrepresented facts during an arbitration, and the information would help you to decide whether to pursue a lawsuit. You also claim that personal privacy interests could be protected by redacting personal information, such as the professor's name and social security number, rather than withholding the records in their entirety.

This Office notified UDC of your appeal and requested its response. On July 9, 2018, UDC provided this Office with a response to your appeal, and copies of the transcripts responsive to the second category of your request for our *in camera* review.[2] In its response, UDC asserts that there are no responsive records for the first category of your request because the professor had not exercised bumping rights and was not transferred after 2012. UDC argues that if those

[1] UDC asserts that your request was not properly submitted, but it still processed your request.
[2] A copy of UDC's response is attached.

records did exist they would be protected from disclosure pursuant to Exemption 2 and D.C. Official Code § 2-534(a)(4) ("Exemption 4"), which can be applied to protect the deliberative process privilege. UDC also asserts that its search effort did not locate a copy of the professor's resume. UDC argues that if a resume did exist it would be protected from disclosure pursuant to Exemption 2. UDC states that its search effort did locate the professor's undergraduate and doctoral transcripts; however, UDC claims that the transcripts are also protected from disclosure pursuant to Exemption 2. Finally, UDC also asserts that your public interest arguments are self-serving and inaccurate.

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).

Your appeal was submitted based on UDC withholding records pursuant to Exemption 2. In response to your appeal UDC raised additional issues, such as a lack of responsive records and the potential application of Exemption 4. As a result, this Office will address UDC's application of Exemptions 2 and 4 and the adequacy of UDC's search.

Records Related to Department Transfer

UDC asserts that there are no records responsive to your request for information related to exercising "bumping rights" or the transfer of the professor from one department to another because no transfer occurred after 2012. It is unclear from UDC's response if it maintains records related to the professor exercising bumping rights or transferring prior to 2012. The DC FOIA requires that a search is 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: (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).

Based on the record on appeal it is not clear that the first category of your request is limited to records after 2012. While the third category of your request is limited to the academic years from 2012 to 2015, your request does not expressly apply this timeframe to the first category of your request. Nevertheless, UDC's response to your appeal does not sufficiently describe its search efforts to determine if the search it conducted was adequate for the time period after 2012. UDC has not stated how it identified the likely locations for responsive records, what those locations were, or described the search it conducted of those locations. As a result, UDC has not demonstrated that it conducted an adequate search for records responsive to the first category of your request.

UDC asserts that if it did maintain records responsive to the first category of your request, the information would be protected from disclosure pursuant to Exemptions 2 and 4.[3] 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). "To demonstrate that it has disclosed all reasonably segregable material, 'the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant

[3] To be properly withheld under the deliberative process privilege pursuant to Exemption 4, a record must be contained in an inter- or intra-agency document. Therefore, Exemption 4 is typically limited to documents transmitted within or among government agencies. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (U.S. 2001). To qualify for protection under the deliberative process privilege, information must be predecisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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 correlating those claims with the particular part of a withheld document to which they apply.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F .Supp. 2d 106, 120 (D.D.C. 2010)). In *Judicial Watch*, the court held that "[a]lthough purely factual information is generally not protected under the deliberative process privilege, such information can be withheld when 'the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'" *Id*. at 28. (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In these instances, factual information is protected when disclosing the information would reveal an agency's decision-making process in a way that would have a chilling effect on discussion within the agency and inhibit the agency's ability to perform its functions. *Id*.

Here, if responsive records exist, UDC must analyze the records to determine if segregable portions may be disclosed. We note that, contrary to your assertion on appeal, redaction of the professor's name would not protect the individual's privacy interests because your request seeks records related only to the professor you identified.

Resume and Transcript Records

UDC asserts that its search did not reveal a copy of the professor's resume. As discussed above, UDC's response does not provide sufficient information to determine whether or not its search was adequate. UDC claims that if it did maintain a copy of the resume, the document would be withheld in its entirety pursuant to Exemption 2. Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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).

Courts have held that there is an overriding public interest in parts of successful employment applications that show an employee's qualifications for their position. *See, e.g., Barvick v. Cisneros*, 941 F. Supp. 1015, 1020 n.4 (D. Kan. 1996); *Associated Gen. Contractors, Inc. v. EPA*, 488 F. Supp. 861, 863 (D. Nev. 1980). As a result, if UDC maintains a copy of the professor's resume, it should be disclosed. UDC may redact the resume to the extent it contains purely personal detail not related to the professor's qualifications (e.g., home address or personal phone number).

UDC's search did locate the professor's undergraduate and doctoral transcripts, but UDC asserts that the transcripts are protected from disclosure pursuant to Exemption 2. UDC provided copies of the transcripts for our *in camera* review. Courts routinely hold that purely personal details that do not shed light on agency functions are protected from disclosure. *See, e.g., Info. Acquisition Corp. v. DOJ*, 444 F. Supp. 458, 463-64 (D.D.C. 1978) (protecting disclosure of "core" personal information such as marital status and college grades). You allege that there is an interest in disclosure because the information may reveal if UDC officials lied under oath and

misrepresented facts during an arbitration. You also claim that the information could allow you to decide whether or not to pursue a lawsuit.

Allegations of misconduct are easy to allege and hard to disprove; therefore, requesters are typically required to demonstrate a meaningful showing of misconduct to warrant disclosure of information subject to protection under Exemption 2. *See, NARA v. Favish*, 541 U.S. 157, 175 (2004). You do not provide any description or meaningful evidence of the lies or misrepresentations that you allege may have occurred. You have not demonstrated how disclosure of the professor's grades would be related to your allegations. Additionally, interest in a private lawsuit is generally not recognized a public interest in the context of FOIA. *See Carpenter v. DOJ*, 470 F.3d 434, 441 (1st Cir. 2006). As a result, UDC's withholding of the professor's transcripts was appropriate under Exemption 2.

Conclusion

Based on the foregoing, we affirm in part and remand in part UDC's response to your request. Within 10 business days from the date of this decision, UDC shall describe to you the search it conducted, including identifying the locations it searched and why these locations were selected. With respect to the first category of records, if UDC decided on its own to limit the search to 2012 and beyond, it shall conduct another search for responsive records prior to 2012 and disclose to you non-exempt portions of responsive records in accordance with DC FOIA and the guidance of this decision. You are free to challenge any forthcoming substantive response from UDC by separate appeal to 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: Karen M. Hardwick, General Counsel, UDC (via email)
Jeffery N. Zinn, Attorney Contractor, UDC (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-140

July 20, 2018

VIA ELECTRONIC MAIL

Mr. Robert Friedman

RE: FOIA Appeal 2018-140

Dear Mr. Friedman:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly responded to a request for records related to the Black Lives Matter ("BLM") movement.

Background

On June 1, 2017, your organization submitted a FOIA request for fourteen categories of records pertaining to MPD's policing and reaction to the BLM movement and one of its organizing members in the District. On August 7, 2017, one of MPD's FOIA officers proposed narrowing the scope of your search for emails and correspondence related to the fourth and fifth categories of the request. Your organization did not object. On September 1, 2017, MPD provided a partial response to the request, disclosing records related to categories 1-3 of the request and asserting that records related to categories 6-14 were exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(i) without acknowledging whether or not responsive documents existed. MPD also asserted that its search for correspondence responsive to categories 4 and 5 was ongoing with the Office of the Chief Technology Officer ("OCTO"), and that responsive records would be disclosed on a rolling basis as they were received and reviewed. On June 28, 2018, after a lawsuit related to the FOIA request was filed, MPD disclosed 108 pages of emails responsive to categories 4 and 5 of the FOIA request.

On July 6, 2018, your organization filed the instant appeal challenging MPD's disclosure related to categories 4 and 5 of the request for three reasons. First, you assert that there should be more records than the 108 pages that MPD disclosed. This claim is based on statements an MPD FOIA officer made during discovery in the related lawsuit. The statements indicated that OCTO's search returned over 500 emails. As a result, you challenge the adequacy of MPD's search or review, which resulted in the disclosure of only 108 pages. Second, you challenge the redactions MPD applied to one of the 108 pages, arguing that the redactions were excessive and MPD did not properly assert a valid exemption under FOIA. Finally, you assert that one of the emails references an attachment, and the attachment was not included in MPD's disclosure.

We asked MPD to provide us with a response to the appeal, and MPD responded on July 17, 2018.[1] In its response, MPD argues that the 108 pages it disclosed were narrowed according to the August 7 correspondence, and that your appeal improperly conflates the search results of the FOIA request with that of the pending lawsuit. With regard to the page that you believe was excessively redacted, MPD reconsidered its position and asserts that it disclosed an unredacted copy of the page. Regarding to the alleged missing attachment, MPD asserts that the attachment is included as the final page of the document in its disclosure.[2]

On July 18, 2018, this Office contacted MPD requesting clarification regarding the email search OCTO conducted in response to the FOIA request, and how MPD determined whether or not emails were responsive. MPD responded on July 19, 2018, asserting that it conducted two searches for records responsive to parts 4 and 5 of the request. The first search was limited to the terms specified in MPD's August 7 correspondence and resulted in OCTO returning over 500 emails to MPD. MPD's FOIA officer at the time determined that only emails related to surveillance and monitoring of the BLM organizer would be responsive to the FOIA request. Based on those criteria, the FOIA Officer at the time determined that none of the emails were responsive to the request.

After the lawsuit was filed, MPD instructed OCTO to conduct a broader, global email search. That search resulted in OCTO returning over 3,500 emails to MPD. The results of this search were reviewed by a different FOIA officer, and the FOIA officer applied broader criteria to determine if messages were responsive to the request. For the review after the lawsuit, emails were considered responsive if the emails contained the search terms specified in the FOIA request. MPD filtered out emails that exclusively involved other agencies because those emails were not MPD's records. From the remaining emails, MPD removed messages that were purely duplicative or automatically generated by a listserv, such as news clips. MPD asserts that 108 pages of responsive records remained. MPD cross referenced the results of the OCTO searches conducted before and after the lawsuit was filed and found that the results of the former search were wholly encompassed by the later.

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).

[1] A copy of MPD's response is attached.
[2] After reviewing the copy of the disclosure that you included in your appeal as Exhibit 8, this Office was able to open the attachment in the copy that you provided, and we agree with MPD's representation that the final page of the disclosure is a copy of the attachment.

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).

Following your appeal, MPD provided you with an unredacted copy of a contested document and demonstrated that an allegedly missing document was included in its disclosure. As a result, the only issue remaining is the adequacy of MPD's search and review of correspondence responsive to categories 4 and 5 of the request.

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).

Here, you allege that MPD's search for or review of the documents at issue was inadequate because statements made during the discovery process of a related lawsuit indicate that more than 500 emails were retrieved from an OCTO search; however, MPD disclosed only 108 pages of emails without explaining the discrepancy. After reviewing the record on appeal, we find that MPD's search for records was adequate. MPD ultimately instructed OCTO to perform an email search using the terms specified by your organization. We accept MPD's representation that once it received search results from OCTO, it removed only emails that were not MPD's records,

news clips, and documents that were duplicative to facilitate its review. Based on MPD's representation, we find that MPD's review was appropriate to the extent that no substantive information was withheld from disclosure based on MPD eliminating news clips and duplicative records from the documents it considered responsive.

Conclusion

Based on the foregoing, we affirm MPD's decision in so far as the search it conducted for records responsive to categories 4 and 5 of your request was adequate and dismiss your appeal.

This shall constitute 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: Ronald Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-141

July 30, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Cunningham

RE: FOIA Appeal 2018-141

Dear Mr. Cunningham:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly responded to your June 19, 2018 request for records related to a 911 call and a police report filed by a particular officer.

On June 21, 2018, MPD responded to your request, asserting that it conducted a comprehensive search for the police report you requested but its search did not locate any responsive documents. MPD also informed you that it does not keep records of 911 calls, which are maintained by the Office of Unified Communications. On July 17, 2018, you appealed MPD's response based on your belief that a police report should exist. On the same day, this Office notified MPD of your appeal and asked for its response.

On July 24, 2018, MPD provided its response to your appeal.[1] In its response, MPD describes the search it conducted and reasserts that no responsive records were located. Further, MPD points out that the officer you identified in your request informed you via email on June 20, 2018, that a police report was not created for the incident at issue.

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). FOIA does not require an agency to create records in response to a request. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents"). The fact that you believe MPD should have created a police report does not impact MPD's responsibilities under FOIA.

Based on the foregoing, we affirm MPD's decision insofar as the search it conducted for records responsive your request was adequate, and we hereby dismiss your appeal.

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

This shall constitute 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Ronald Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-142

July 30, 2018

VIA ELECTRONIC MAIL

Mr. Gustavo Galarraga

RE: FOIA Appeal 2018-142

Dear Mr. Galarraga:

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"), on the grounds that the University of the District of Columbia ("UDC") failed to respond to your May 10, 2018 request for records related to UDC's procurement of janitorial services.

You submitted your appeal on July 17, 2018. UDC responded on July 23, 2018, apologizing for its delay, but asserting that the delay was caused in part by your refusal to clarify your request. UDC also stated that it provided you with a response to your request on July 23, 2018.

Since your appeal was based on UDC's failure to respond to your request, and the agency has now responded, we consider your appeal to be moot and hereby dismiss it. Your appeal is dismissed without prejudice, however, and you are free to challenge UDC's response by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Karen M. Hardwick, General Counsel, UDC (via email)
Jeffery N. Zinn, Attorney Contractor, UDC (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-143

August 2, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Douglas

RE: FOIA Appeal 2018-143

Dear Mr. Douglas:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to perform an adequate search for responsive records as instructed by this Office's decision in FOIA Appeal 2018-106.

On March 9, 2018, you submitted a request to MPD for records related to a specific official's training in Israel. On May 10, 2018, this office partially remanded MPD's response to your request for failing to demonstrate that it conducted an adequate search. On June 19, 2018, MPD provided you with responsive documents after it conducted an additional search. MPD's June 19 disclosure did not describe MPD's additional search efforts.

On July 19, 2018, this Office received your current appeal, notified MPD, and requested its response. On appeal you assert that, based on MPD's June 19 response, there is no indication that MPD searched the physical files of the official at issue. MPD provided its response to your appeal on July 26, 2018.[1] In its response MPD describes its search as including the physical and electronic files of the Office of the Chief of Police, an email search carried out by the Office of the Chief Technology Officer, and a personal search of the official's office. As a result, MPD argues that it conducted an adequate search in response to your request.

Previously, this Office partially remanded MPD's response in FOIA Appeal 2018-106 because MPD identified the files of the Executive Office of the Chief of Police as the only location that it searched. In FOIA Appeal 2018-106, this Office determined that MPD's search was not adequate because emails and the personal records of the official at issue would also reasonably contain responsive documents. Now, MPD asserts that it has searched the official's emails and personal records. You argue that MPD's search is inadequate because its disclosure does not clearly contain physical records that the official may have personally received.

As we stated in FOIA Appeal 2018-106; however, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18). The test is not

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

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).

We accept MPD's representation that it made a reasonable determination as to the locations of responsive records and searched for records in those locations in accordance with the guidance of FOIA Appeal 2018-106. As a result, MPD has now demonstrated that it has conducted an adequate search pursuant to your request. *See Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68).

Based on the foregoing, we affirm MPD's response to your request, insofar as the search it conducted was adequate. 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: Ronald Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-144

August 9, 2018

VIA ELECTRONIC MAIL

Ms. April Currey

RE: FOIA Appeal 2018-144

Dear Ms. Currey:

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"), on the grounds that the Metropolitan Police Department ("MPD") did not conduct an adequate search for records related to ledgers and log books created during a criminal investigation between 1979 and 1980.

Background

On February 19, 2018, your organization submitted to MPD a multi-part FOIA request for entries in ledgers and log books related to investigations of three victims of sexual assault and simple assault.[1] Your request asked MPD to search the records of its Evidence Control Branch ("ECB") and Mobile Crime Lab ("MCL"), as well as the Washington National Records Center ("WNRC"). On May 4, 2018, MPD denied your request.[2] MPD's denial did not include a detailed description of its search efforts.

On July 26, 2018, your organization filed the instant appeal challenging the adequacy of MPD's search. The request and appeal acknowledge that responsive records are unlikely to exist electronically due to the age of the records. As a result, the appeal argues that MPD must conduct a physical search for records maintained by the ECB, MCL,[3] and WNRC. Additionally, the appeal asserts that if the responsive records were destroyed, MPD should provide records memorializing the destruction.

[1] The request notes that your organization previously submitted a similar request, which was the subject of FOIA Appeal 2016-63.
[2] On July 2, 2018, MPD reissued its denial, correcting a typographical error to clarify that its search resulted in no responsive records.
[3] Your request and appeal acknowledge that MCL records were transferred to the District of Columbia Department of Forensic Sciences (DFS), which we note is a separate agency from MPD.

We notified MPD of the appeal and asked for its response. MPD provided a response and certification of search form on August 3, 2018.[4] MPD's response asserts that its staff conducted physical and electronic searches of its ECB. MPD also requested that DFS conduct a search for responsive documents.[5] MPD's response does not describe a search of the WNRC.

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).

The issue on appeal is whether MPD conducted an adequate search for records responsive to your request. 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).

[4] A copy of MPD's response and certification of search are attached.
[5] We note that based on information contained in the request and MPD's response to FOIA Appeal 2016-63, DFS would maintain records created by the MCL.

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, the primary basis of your appeal is that MPD failed to demonstrate that it conducted a physical search for responsive records. Under FOIA, MPD is not required to demonstrate proof of record destruction, as your appeal implies. *See Weisberg v. U.S. Dep't of Justice*, 705 F.2d at 1351. After reviewing the record on appeal, we find that MPD's search for records maintained by its ECB was adequate.[6]

MPD's response, however, does not address its records maintained by the WNRC. Previously, MPD's response in FOIA Appeal 2016-63 indicated that according to relevant retention policies, the records at issue would have been scheduled for destruction between 1994 and 1995. The fact that the retention period has lapsed is not necessarily a sufficient justification to avoid conducting a search; the records at issue may not have been destroyed in accordance with the retention schedule. *See In Def. of Animals*, 527 F. Supp. 2d at 32. As a result, MPD should check with staff at the WNRC to verify whether or not responsive records remain available.[7]

Conclusion

Based on the foregoing, we affirm MPD's response in part, in that its search of the ECB in response to your request was adequate. MPD's response is remanded in part with respect to its search of the WNRC. Within 10 business days of this decision, MPD shall describe the search it conducted for responsive records maintained by the WNRC and disclose to you any non-exempt portions of responsive records retrieved.

This shall constitute 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: Ronald Harris, Deputy General Counsel, MPD (via email)

[6] We also find that MPD's search for documentation of the destruction of responsive records within its ECB was adequate.
[7] It is this Office's understanding that records MPD transfers to the WNRC remain within the MPD's control.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-145

August 16, 2018

VIA E-MAIL

Ms. Shana Knizhnik

RE: FOIA Appeal 2018-145

Dear Ms. Knizhnik:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested pertaining to two interactions between MPD officers and members of the public.

Background

On July 9, 2018, you submitted a FOIA request on behalf of the American Civil Liberties Union of the District of Columbia for records related to MPD's actions on the 5200 block of Sheriff Road NE on June 13, 2018 and June 25, 2018. Your request sought three categories of records related to the interactions: (1) video recorded by body-worn cameras ("BWC"), (2) video recorded by other means such as dashboard cameras or surveillance cameras, and (3) documents created as a result of the interactions such as after-action reports, PD-251 forms, PD-76 forms, incident reports, and disciplinary records. Your request also asserts that no arrests resulted from the June 13 interaction, that the June 25 interaction resulted in four arrests, and that all of the arrested individuals' charges were dismissed prior to appearing before a judge.

On July 13, 2018, MPD denied your request in its entirety pursuant to D.C. Official Code § 2-534(a)(3)(B) ("Exemption 3(B)"). MPD's denial stated that the responsive records were part of an ongoing administrative investigation and that disclosure could potentially: reveal the direction and pace of the investigation, lead to attempts to destroy or alter evidence, or alter testimony of potential witnesses.

This Office received your appeal on July 26, 2018, and contacted MPD for its response.[1] On appeal, you assert that MPD's application of Exemption 3(B) is improper and that MPD has not met its burden to withhold responsive records pursuant to Exemption 3(B). You argue that MPD has not met the standard for withholding responsive records, based on a previous administrative

[1] Due to administrative error, MPD was not notified of your appeal until August 8, 2018. You were subsequently notified of the error and did not object to a delayed timeline for this determination.

appeal and case law precedent pertaining to the analogous provision of federal FOIA. You assert that MPD has failed to demonstrate that there is any pending or imminent trial or adjudication necessary to invoke Exemption 3(B). Finally, you challenge each of MPD's stated reasons for withholding, arguing that MPD's conclusory assertions are insufficient.

On August 14, 2018, MPD sent you a response to your appeal.[2] In that response, MPD reconsidered its original denial and disclosed a public incident report for each of the interactions at issue. On the same day you contacted this Office to acknowledge that MPD had disclosed incident reports; however, you asserted that MPD's response following your appeal did not address BWC footage, the primary substance of the request, or your arguments pertaining to Exception 3(B).

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.

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).

Following your appeal, MPD reconsidered its initial denial and voluntarily disclosed incident reports that were previously withheld. In response to MPD's revised position, you indicated to this Office that you are primarily concerned with MPD's continued withholding of BWC footage.

The primary issue remaining to address on appeal is MPD's withholding of video recordings pursuant to Exemption 3(B). Exemption 3(B) exempts from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would "deprive a person of a right to a fair trial or an impartial adjudication." D.C. Official Code § 2-534(a)(3)(B). As stated in your appeal, the standard for withholding under this exemption has been interpreted to require "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Washington Post Co. v. DOJ*, 863 F.2d 96, 102 (D.C. Cir. 1988).

[2] MPD sent this Office a copy of its response on the same day.

Here, MPD has relied on conclusory assertions and speculation in denying the request for public records and failed to argue that it satisfies the burden of proof set forth in *Washington Post Co. v. DOJ*. *See id*. at 101.

Conclusion

Based on the forgoing, we find that your appeal is moot in part, insofar as it seeks documents created as a result of the interactions at issue. You are free to challenge the adequacy of MPD's disclosure of these documents by separate appeal to this Office.

We remand this matter to MPD in part, insofar as the appeal seeks BWC and video recorded by other means. Within five business days from the date of this decision, MPD shall review and disclose to you non-exempt portions of such BWC and video recorded by other means or provide a reasonable explanation of the basis for withholding in accordance with Exemption 3(B), as interpreted by *Washington Post Co. v. DOJ*, or other relevant exemptions under DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to this Office.

This shall constitute 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-146

August 10, 2018

VIA ELECTRONIC MAIL

Ms. Michelle Goldchain

RE: FOIA Appeal 2018-146

Dear Ms. Goldchain:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to respond to your February 2, 2018 request for records pertaining to arrests for "marijuana and other illegal drugs."

On July 27, 2018, this Office received your appeal, notified MPD, and asked for its response. MPD responded on August 3, 2018,[1] and advised us that it had made the information you requested available to the public via a website on August 1, 2018.[2]

Since your appeal was based on MPD's failure to respond to your request, and MPD has now made responsive information available, we consider your appeal to be moot. Your appeal is hereby dismissed; however, the dismissal shall be without prejudice. You are free to assert any challenge, by separate appeal to this Office, to MPD's substantive disclosure.

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: Ronald Harris, Deputy General Counsel, MPD (via email)

[1] A copy of MPD's response is attached.
[2] We note that your request asked for arrest data from 2007 to 2017 involving "marijuana and other illegal drugs" whereas the data posted by MPD only pertains to marijuana arrests from 2012 to 2017. Based on the record on appeal, it is unclear if MPD explained this limitation or received your approval to narrow the scope of its response.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-147

August 14, 2018

VIA ELECTRONIC MAIL

Mr. Gerald Da'Vage

RE: FOIA Appeal 2018-147

Dear Mr. Da'Vage:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") improperly denied your July 9, 2018 request for a log of a District government cell phone's incoming calls for a period during December of 2017.

You requested a log of incoming calls for a specific cell phone from December 18, 2017 to December 22, 2017. Your request asserted that there were no privacy concerns because the cell phone was assigned to you as a housing inspector for the time at issue. On June 30, 2018, DCHA denied your request, asserting that there were not responsive records because the agency "does not maintain or possess telephone records."

On July 31, 2018, this Office received your appeal challenging DCHA's denial. On the same day, this Office notified DCHA of your appeal and requested its response. On appeal, you argue that DCHA could simply obtain a list of incoming calls from Verizon and that DCHA is trying to withhold beneficial evidence to an opposing party in a legal dispute.

DCHA provided its response to your appeal on July 7, 2018.[1] DCHA's response reiterates its position that it does not maintain responsive records and it has no duty to create documents under FOIA. DCHA further asserts that it switched its cellular provider from Verizon to T-Mobile; nevertheless, DCHA claims that it does not typically maintain call logs, and call logs would be maintained exclusively by the wireless provider.

In the context of FOIA, courts have held that call logs are not agency records subject to disclosure unless the logs are ordinarily kept or used in the course of its business. *Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 164 (D.D.C. 2004); *see also Nissen v. Pierce County.*, 183 Wn.2d 863, 882 (2015) (finding that call logs maintained by a cellular provider are not an agency's records). FOIA does not require agencies to create new records but only to disclose public records that already exist. *See* D.C. Official Code § 2-502(18). We accept DCHA's

[1] A copy of DCHA's response and affidavit are attached.

representation that it does not maintain call logs in the ordinary course of business.

As a result, we affirm DCHA's response that it does not maintain responsive records, and your appeal is hereby dismissed.

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: Mario Cuahutle, Associate General Counsel, DCHA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-148

August 14, 2018

VIA ELECTRONIC MAIL

Dr. Daryao Khatri

RE: FOIA Appeal 2018-148

Dear Dr. Khatri:

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"), on the grounds that the University of the District of Columbia ("UDC") failed to adhere to the partial remand issued by this Office in FOIA Appeal 2018-139.

Background

On May 19, 2018, you submitted a request to UDC for three categories of records related to a former UDC professor. On July 16, 2018, this Office partially remanded UDC's response for improperly limiting the scope of its search for certain categories of your request. On July 30, 2018, UDC provided you with a response to this Office's remand. In that response, UDC asserted that a broader search located four records that were potentially responsive to one category of your request; however, UDC asserted that those records were exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"). UDC further stated that no other responsive records were found.

On July 31, 2018, this Office received your current appeal, notified UDC, and requested its response. Now you challenge UDC's response for two reasons: (1) you argue that UDC's application of Exemption 2 is improper, and that although certain identifying information may be redacted, the records should not be withheld in their entirety; (2) you challenge the adequacy of UDC's search with respect to its inability to locate a resume for a former professor because UDC ordinarily requires professors to submit resumes.

On August 13, 2018, UDC provided this Office with a response to your appeal and copies of the four records withheld pursuant to Exemption 2 for our *in camera* review.[1] In its response, UDC identifies the four withheld records as Retention Lists and argues that the privacy interests involved in the information on the lists outweigh a non-existent personal interest. Additionally, UDC argues that its search for the responsive resume was adequate. UDC asserts that it determined the relevant locations to search for the resume, conducted a search of those locations,

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

and did not find the resume for the professor at issue. Finally, UDC argues that the fact that it maintains and located resumes for other employees does mean that its search for the requested resume was inadequate.

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).

Your current appeal is based primarily on two issues: UDC's withholding of records pursuant to Exemption 2 and the adequacy of UDC's search for a resume.

Exemption 2

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). However, government employees generally have no expectation of privacy regarding their names and titles in the ordinary course of business. *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). D.C. Official Code § 2-536(a)(1) provides that the names, salaries, title, and dates of employment of all District employees "are specifically made public information, and do not require a written request for information[.]" Further, this information is made publicly available by the District's Department of Human Resources.

Here, UDC has withheld four Retention Lists in their entirety pursuant to Exemption 2. These lists appear to contain UDC employees' names, date of hiring, ranks, and acronyms for professional disciplines, and "Art XXI-D Rights." The columns containing employee's names, date of hiring, and ranks clearly do not involve a sufficient privacy interest to warrant protection under Exemption 2. It is unclear if the remaining columns listing professional disciplines and "Art. XXI-D Rights" involve a sufficient privacy interest to warrant protection under Exemption 2. As a result, UDC's withholding of these records in their entirety was improper.

Adequacy of Search

As we stated in FOIA Appeal 2018-139, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18). 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).

We accept UDC's representation that it made a reasonable determination as to the locations of responsive records and searched for records in those locations in accordance with the guidance of FOIA Appeal 2018-139. As a result, UDC has now demonstrated that it has conducted an adequate search pursuant to your request. *See Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68).

Conclusion

Based on the foregoing, we affirm in part UDC's response insofar as the search it conducted was adequate. We remand UDC's response in part. Within five business days from the date of this decision, UDC shall review the records it withheld pursuant to Exemption 2 and disclose nonexempt portions in accordance with the guidance of this decision. You are free to challenge UDC's forthcoming substantive response by separate appeal to 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: Karen M. Hardwick, General Counsel, UDC (via email)
Jeffery N. Zinn, Attorney Contractor, UDC (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-149

August 17, 2018

VIA ELECTRONIC MAIL

Mr. Derek Crumbley

RE: FOIA Appeal 2018-149

Dear Mr. Crumbley:

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"), on the grounds that the Office of the Metropolitan Police Department ("MPD") did not adequately search for records responsive to your request for surveillance camera footage.

Background

On June 27, 2018, you submitted a request to MPD surveillance camera footage from the entrance of the Camelot Gentleman's Club recorded on June 5 and 6, 2018. On July 12, 2018, MPD closed your request asserting that it did not maintain responsive records.

This Office received your appeal on August 3, 2018, and contacted MPD for its response. Your appeal asserts that MPD did not adequately search for records. In support of your contention that MPD does maintain responsive records, you included an email from an MPD detective dated July 7, 2018, which states that Camelot had provided MPD with its surveillance video.

On August 14, 2018, MPD provided this Office with its response to your appeal.[1] In its response, MPD reasserts its position that it does not maintain records responsive to your request. The response states that MPD's "criminal investigator has confirmed no such tapes have been obtained from the business." MPD further argues that if responsive records did exist, they would be exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3(A)(i)") which protects the investigatory records compiled for law enforcement purposes when disclosure would interfere with enforcement proceedings.

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

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

policy, the 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).

The primary issue in this appeal is your belief that responsive records exist and that MPD did not conduct an adequate search. The DC FOIA requires only that, under the circumstances, a search is 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, 263 (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 statements 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, you have provided an email from an MPD detective indicating that MPD did receive video footage responsive to your request. MPD's response to your appeal is general and conclusory and does not account for the statement of one of its detectives indicating that MPD does maintain a responsive record. Based on the record on appeal, it is not apparent that MPD has: (1) made a

reasonable determination regarding the locations records you requested, which would likely involve contacting the detective in the email included in your appeal; (2) communicated to you this determination; and (3) described the search it conducted for the responsive record. Therefore, MPD has not demonstrated that it has conducted a reasonable search pursuant to your request.

Because MPD has not demonstrated that it conducted a reasonable and adequate search, this decision need not address whether any records which may be uncovered by such a search are exempt from disclosure Exemption 3(A)(i).

Conclusion

Based on the foregoing, we remand this matter to MPD. Within ten business days from the date of this decision, MPD shall identify the relevant locations for responsive records and describe the results of its search. If MPD's forthcoming search results in retrieving responsive records, MPD shall disclose to you non-exempt portions or provide a reasonable explanation of the basis for withholding in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-150

August 17, 2018

VIA ELECTRONIC MAIL

Mr. Nkosi Yafeu

RE: FOIA Appeal 2018-150

Dear Mr. Yafeu:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly denied your FOIA request.

On July 30, 2018, you submitted a request to MPD for eight categories of records related to training and job performance. You assert that MPD closed your request on June 2, 2018 without providing you a reason. On August 3, 2018, this Office received your appeal, in which you contend that MPD improperly processed and closed your request without reason. On the same day, this Office contacted MPD for its response.

On August 10, 2018, MPD provided this Office with its response to your appeal.[1] In its response, MPD asserts that your appeal was closed because its estimated cost to process your request exceeded the amount you had indicated you were willing to pay. Your request form indicated that you were willing to pay up to $20, and MPD estimated that your request would cost $80 to process. As a result, MPD argues that there is no basis to appeal and that your appeal should be dismissed.

This Office's jurisdiction is limited to "review[ing] the public record to determine whether [a record] may be withheld from public inspection." D.C. Official Code § 2-537(a). We generally do not interpret our authority to include reviewing disputes over FOIA fees. As a result, we do not make any findings regarding the amount of the fee at issue here. However, MPD is denying public inspection of records because its fee estimate exceeds the initial amount that you indicated you were willing to pay.

D.C. Official Code § 2-532(b-3) provides for two situations in which an agency can require advance payment of fees: (1) when it has been determined that a fee will exceed $250; and (2) when a "requester has previously failed to pay fees in a timely fashion." Here, the amount of the fee is under $250. Additionally, MPD has not asserted and this Office is not independently aware

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

of any instance in which you have previously failed to pay applicable fees. While MPD should inform you if its fee estimate exceeds the amount you indicated you were willing to pay, unless you told MPD not to process your request after you were informed of the increased cost, it is improper for MPD to close your request because its fee estimate exceeds your preapproved amount.

We note that certain categories of your request resemble interrogatories. FOIA only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). MPD is not obligated to create or compile any information you request, only to disclose existing non-exempt public records.

Conclusion

Based on the foregoing, we remand this matter to MPD. Within ten business days from the date of this decision, MPD shall provide you with a response to your request unless you instruct MPD not to proceed based on the fee estimate in excess of the amount you preapproved. MPD may charge you a fee in connection with the documents, in accordance with DC FOIA and its implementing regulations.

This constitutes the final decision of this Office. You are free to challenge MPD's forthcoming substantive response by separate appeal to 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-151

August 20, 2018

VIA ELECTRONIC MAIL

Mr. Christopher Biello

RE: FOIA Appeal 2018-151

Dear Mr. Biello:

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 Department of Consumer and Regulatory Affairs' ("DCRA") response to your request for records under the DC FOIA.

Background

On July 16, 2018, you submitted a request to DCRA for inspection records, permit drawings, and permit applications pertaining to your property from 2016 to the present. DCRA responded to your request and provided you with copies of several responsive records. DCRA's response, however, did not include two permit drawings you requested or inspection records.

Now you appeal DCRA's response, challenging the adequacy of DCRA's search because you believe those records should have been provided to you. Specifically, you assert that the permit drawings and inspection reports should have been submitted to DCRA by contractors and a third-party inspection company.

On August 6, 2018, this Office received your appeal, notified DCRA, and requested its response. DCRA provided this Office with a response to your appeal on August 14, 2018.[1] In its response, DCRA asserts that it conducted an adequate search pursuant to your request. DCRA states that records responsive to your request would be maintained within its Permit Operations Division, Inspections and Compliance Administration, and Third Party Program. DCRA's response includes certification of search forms from three divisions. DCRA claims that all responsive records recovered by the searches were produced.

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

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

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).

The issue in this appeal is your belief that additional responsive records should exist; therefore, we consider whether or not DCRA conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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, DCRA identified its Permit Operations Division, Inspections and Compliance Administration, and Third Party Program as the locations where responsive records would be maintained if they existed. However, the divisions identified in the certification of search forms

that DCRA included with its response do not match the divisions identified in DCRA's response.[2] We note that the different names on the forms may be programs associated with or within the divisions identified by DCRA. Additionally, the attached forms do not clearly indicate that all of the divisions at issue adequately searched for responsive records. Whereas the form provided by the Customer Services Division does provide a sufficient description of its search, the information provided by the Third Party Program and particularly the Elevator Division is too general to determine if that division conducted an adequate search.

Conclusion

Based on the foregoing, we affirm DCRA's decision in part and remand it in part. Within 5 business days from the date of this decision, DCRA shall review and clarify, where appropriate, its searches for permit drawings and inspection records and describe the results of those searches.[3] If additional records exist that DCRA did not previously disclose, it shall disclose to you non-exempt portions of those responsive records 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: Erin J. Roberts, FOIA Officer, DCRA (via email)

[2] The certification forms attached are from the Customer Services Division, Elevator Division, and Third Party Program.

[3] For example, the description of search terms in the Elevator Division's form only states "Accela." The description should include more detail to demonstrate that the division's efforts were adequate.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-152

August 21, 2018

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2018-152

Dear Mr. Mulhauser:

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"), on the grounds that the Office of the Deputy Mayor For Education ("DME") did not respond to your request for records relating to "facility surveys under the PACE legislation (Council Act 21-582) in non-DCPS buildings used by public charter schools."

Background

On April 17, 2018, you submitted a request to DME for records relating to facility surveys of non-District of Columbia Public Schools ("DCPS") buildings used by public charter schools. On May 21, 2018, having not heard from the agency, you inquired into your request's status. On May 23, 2018, DME sent you an email with a list of possible search terms for its email search, and you responded the same day by requesting that additional relevant terms be added. On August 7, 2018, having received no response, you filed this appeal.

This Office contacted DME about the appeal and requested a response.

On August 10, 2018, DME sent to you 200 pages of documents, some of which were redacted. On August 12, 2018, you sent an email to this Office indicating that you had not received a letter explaining the production, but that based on the provided documents containing only e-mails, you challenged the adequacy of the search conducted by DME. On August 13, 2018, DME sent to you a letter indicating that it had redacted responsive documents pursuant to D.C. Official Code § 2-534(a)(1) and (a)(2). DME's letter indicated that no responsive records had been withheld in their entirety. On August 15, 2018, you reiterated that you were challenging the adequacy of DME's search – stating that DME had not provided any information concerning the scope of its search. You requested that the DME describe its search in an affidavit.

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, the 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 on April 17, 2018. DME failed to provide all responsive requested records within the 15 days prescribed by D.C. Official Code § 2-532(c)(1). As a result of DME missing the deadline set by the statute, this Office finds that DME constructively denied your request. D.C. Official Code § 2-532(e). DME has since provided you with a response letter and redacted responsive documents. The letter indicated that an email search had been conducted using search terms that you agreed to; the letter did not indicate that any responsive records had been withheld in their entirety. On August 12 and 15, 2018, you challenged the adequacy of the search DME conducted by stating that DME's letter did not indicate how the search was conducted and did not indicate that a determination had been made as to which record repositories would reasonably be expected to contain responsive records. As a matter of efficiency we will review this challenge on the record before us.

Adequacy of the Search

You challenge the search DME conducted as inadequate. The DC FOIA requires only that, under the circumstances, a search is 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, 263 (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 statements 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 an email to this Office on August 12, 2018, you state that the 200 pages of documents you received in response to your request consisted almost entirely of emails. Your request, however, was broader than emails and included all memos, notes, plans, budget estimates, spreadsheets, and policies. You challenge the adequacy of DME's search, because the absence of non-email records suggests that non-email record repositories were not searched.

Based on the record on appeal, it is not apparent that DME has: (1) made a reasonable determination regarding the locations of the records you requested; (2) communicated to you this determination; and (3) described the search it conducted for the records. Therefore, DME has not demonstrated that it has conducted a reasonable search pursuant to your request.

We note that DME provided this Office with a copy of an email in which it proposed to you the terms it would be using to conduct its search. DME's response letter reiterates this fact, stating "the search terms were agreed upon by both you and [the FOIA Officer]." We note that the burden of selecting search terms and locations is not born by the requester. DC FOIA does not require a requester to know the names of agency employees or the exact terms of art in order to request records. *See* FOIA Appeal 2017-47. *See 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.") It is DME's responsibility to make a determination as to where the requested documents are 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;[1] s*ee 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.").

[1] 1 DCMR § 402.5 states ("Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. **Every reasonable effort shall be made by the agency to assist in the identification and location of requested records.**") (emphasis added).

Because DME has not yet demonstrated that it conducted a reasonable and adequate search, this decision need not address whether any records which may be uncovered by such a search are exempt from disclosure.

Conclusion

Based on the foregoing, we remand this matter to DME. Within ten business days from the date of this decision, DME shall identify the relevant locations for records responsive to your request and describe the results of its search. If DME's forthcoming search results in retrieving responsive records, DME shall disclose to you non-exempt portions or provide a reasonable explanation of the basis for withholding in accordance with DC FOIA. You are free to challenge DME's forthcoming substantive response by separate appeal to 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: Keisha E. Mims, Interim Chief of Staff, DME (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-153

August 24, 2018

VIA ELECTRONIC MAIL

Mr. Brett Barbin

RE: FOIA Appeal 2018-153

Dear Mr. Barbin:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly denied your FOIA request.

On August 8, 2018, you submitted a request to MPD for surveillance footage recorded by a speed camera on August 3, 2018. You assert that although you had requested a fee waiver, MPD denied your request due to a "fee related" issue. On August 13, 2018, this Office received your appeal, in which you contend that your request for a fee waiver should have been granted because you represent indigent clients. On the same day, this Office contacted MPD for its response.

On August 21, 2018, MPD provided this Office with its response to your appeal.[1] In its response, MPD asserts that it did not close your request; rather, MPD advised you that its fee estimate exceeded the amount that you indicated you were willing to pay. In response to your appeal, two MPD personnel conducted searches for responsive records. One search indicated that the camera at issue does not record surveillance video. The other search determined that if a recording had existed, MPD would no longer maintain the recording because the 10-day retention period has lapsed. As a result, MPD asserts that the appeal should be dismissed because there are no responsive records.

We have two concerns with MPD's handling of your request. The first relates to MPD's communication regarding the fee issue. MPD should have made clear to you that your request was not closed because its fee estimate exceeded the amount you indicated you were willing to pay. While it was proper for MPD to notify you of its fee estimate, it would be improper for MPD to unilaterally close your request because its fee estimate exceeded your preapproved amount. *See* D.C. Official Code § 2-532(b-3) (providing for two situations in which an agency can require advance payment of fees: (1) when it has been determined that a fee will exceed $250; and (2) when a "requester has previously failed to pay fees in a timely fashion").

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

Our second concern relates to the timing of one of MPD's searches. MPD's response to your appeal asserts that it would no longer maintain the recording because the 10-day retention period had passed. However, your request was submitted within the retention timeframe, and the reason the period lapsed was due to MPD's delay in conducting the search. If MPD receives a request related to time sensitive records, it should take efforts to search promptly or ensure that the records are preserved.

Despite our concerns, your appeal was based on a fee waiver dispute,[2] and we accept MPD's representation that no responsive records exist because the camera at issue does not record surveillance footage. As a result, we consider this appeal to be moot, and it is dismissed.

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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

[2] This Office's jurisdiction is limited to "review[ing] the public record to determine whether [a record] may be withheld from public inspection." D.C. Official Code § 2-537(a). We generally do not interpret our authority to include reviewing disputes over FOIA fees, unless a fee itself amounts to a constructive denial.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-154

September 4, 2018

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2018-154

Dear Mr. Mulhauser:

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 District of Columbia Public Charter School Board ("PCSB") to your request for records under the DC FOIA.

Background

On July 24, 2018, you submitted a request to PCSB for records related to communications or meetings between the Urban Institute and PCSB. On August 14, 2018, PCSB responded to your request and provided you with 182 pages of responsive documents. PCSB asserted that certain information was redacted to protect personal privacy interests pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"), and individual student information was redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 CFR Part 99) under D.C. Code § 2-534(a)(6) (Exemption 6).

You appealed PCSB's response to your FOIA request, challenging the adequacy of PCSB's search and its application of certain redactions. You argue that PCSB's disclosure to you consisted only of email messages, and you believe that additional responsive records related to meetings should exist. Additionally, you contend that redactions PCSB made to two columns on three pages of its disclosure were improper because the columns do not involve "information of a personal nature" pursuant to Exemption 2 or "information directly related to a student" pursuant to FERPA.

This Office received your appeal on August 20, 2018, notified PCSB of your appeal, and requested its response. On August 24, 2018, PCSB provided this Office with a response to your appeal, including a search certification form, *Vaughn* index, and an unredacted copy of the responsive records at issue for our *in camera* review.[1] In its initial response to your request, PCSB conducted an email search which produced the 182 pages of records. PCSB also searched its electronic file system using the terms "Urban Institute meeting" and "'Urban Institute' +

[1] A copy of PCSB's response, search certification, and *Vaughn* index are attached.

'meeting notes.'" PCSB asserts that following your appeal it conducted a broader search of its file system for responsive records using the term "Urban Institute." Additionally, PCSB identified three employees who may have had meetings with the Urban Institute and instructed them to search their files.[2]

Regarding its application of redactions, PCSB argues that the columns at issue were redacted to protect information regarding students' use of public transit. PCSB claims that disclosure of the redacted information could risk the students' safety. Additionally, PCSB argues that it has adopted of policy of implementing FERPA not to disclose any personally identifiable information ("PII") when the sample size involves 10 or fewer students.

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).

On appeal, you challenge the adequacy of PCSB's search and PCSB's redaction of columns on three pages of records.

Adequacy of Search

The DC FOIA requires only that, under the circumstances, a search is 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,

[2] At the time PCSB submitted its response to your appeal, two employees had completed their searches and PCSB expected the remaining employee to complete the search upon returning from leave.

> '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).

PCSB's initial search for records responsive to your request constituted of checking for email messages and conducting a narrowly tailored search of its file system. After you appealed, PCSB conducted a second search using a broader search term and identified three employees who would reasonably be expected to maintain responsive records if they existed. The second search, which PCSB described in response to your appeal, appears to reflect a reasonable determination of the relevant locations for records. At the time of its response, PCSB was still processing its expanded search efforts. If other employees or repositories are identified as relevant for records related to the meetings between PCSB and the Urban Institute, those should be explored as well.

Student Information

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

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). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994).

FERPA, which PCSB has invoked through Exemption 6 of DC FOIA, prevents disclosure of students' education records and PII. PCSB's FERPA policy interprets records covered by FERPA as including at a minimum "grades, report cards, transcripts, attendance information, academic appeals, and records of any disciplinary proceedings."

Here, the chart at issue appears to contain four columns of information: (1) the name of the school; (2) the number of students enrolled; (3) the number of "DC One Cards Issued;" and (4) the number of "Pass[es] Successfully Loaded." DCPS redacted all of the information in the last two columns listing the number of cards issued and passes loaded. This information does not involve a substantial privacy interest; individual students are not named or identified in any way by the data. Further, the information does not involve PII or education records under a broad interpretation of FERPA. We disagree with DCPS's position that disclosure of this information would pose a safety risk to students taking public transit to school.[3] Further, DCPS's policy of not disclosing student information when the sample size is 10 or less is not warranted here.[4] As a result, PCSB's redaction of these columns was improper.

Conclusion

Based on the foregoing, we remand PCSB's redaction of the columns at issue. Within 5 business days from the date of this decision, PCSB shall disclose to you an unredacted version of the chart. 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: Sarah H. Cheatham, Deputy General Counsel, PCSB (via email)

[3] DCPS's risk argument is far too attenuated and relies on too many assumptions to warrant withholding records from disclosure.

[4] We note that DCPS's sample size policy does not override the requirements of DC FOIA. While the policy may justify withholding information pursuant to Exemptions 2 and 6, particularly for student data related to grading, discipline, or special needs, there does not appear to be a basis for withholding the information at issue.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-155

September 5, 2018

VIA ELECTRONIC MAIL

Mr. Brody Mullins

RE: FOIA Appeal 2018-155

Dear Mr. Mullins:

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 Office of Tax and Revenue's[1] ("OTR") response to your request under DC FOIA.

Background

On May 9, 2018, you submitted a FOIA request to OTR for "check or payment details and information" related to property taxes for "4 Thompson Circle NW Washington 20008" from 2016 through 2018. On June 1, 2018, OTR informed you by letter that it was withholding responsive records pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2").[2]

Subsequently you appealed OTR's decision, arguing that there is a "broad array of information about information about individuals, their real estate holdings, their mortgages and their property tax payments, including late payments," already available on OTR's website, such that disclosure of the withheld records "could not be considered an invasion of privacy because it is essentially *already* public information." Your appeal acknowledges that releasing information such as the "routing number or account number" would represent an invasion of privacy. Your appeal further states that "if the payment for property tax was paid by a mortgage company or trust, disclosure of such information would [not] represent an invasion of privacy because corporations and trusts do not have the same privacy protections as individuals."

This Office contacted OTR on August 21, 2018, and notified the agency of your appeal. On August 28, 2018, OTR provided us with a response to your appeal.[3] OTR reaffirmed its use of Exemption 2 and argued that the records were properly withheld because they implicated a privacy interest and there was no countervailing public interest warranting their release. OTR did

[1] OTR is a division of the Office of the Chief Financial Officer.
[2] Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
[3] A copy of OTR's response is attached.

not address the applicability of personal privacy interests to corporations or trusts. OTR concluded by stating that "the identifying information is protected from disclosure pursuant to Exemption 2." OTR did not discuss the applicability of segregable release mandated by D.C. Official Code § 2-534(b).

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.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

Personal Privacy

OTR is correct that personally identifiable information is exempt from disclosure under Exemption 2 of DC FOIA. Personal information in the context of your request would include individuals' names, phone numbers, and account numbers. *See Skinner v. U.S. Dept. of Justice*, 806 F.Supp.2d 105, 113 (D.D.C. 2011). Having reviewed the withheld records *in camera*, however, we find that some of the records OTR withheld from you represent payments made by corporate entities. Corporate entities do not possess privacy rights. *FCC v. AT&T Inc.*, 562 U.S. 397, 409-410 (2011). As such, records documenting payments made by a corporate entity are not protected under Exemption 2.[4] Since you are not challenging OTR's redaction of personally identifiable information, and corporations do not possesses privacy interests in the context of FOIA, there is no need to address countervailing public interests in disclosure.

Reasonable Redaction

D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. 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

[4] We note that a corporation's account number and routing information could still be redacted under DC FOIA pursuant to D.C. Official Code § 2-534(a)(1), which protects certain commercial and financial information obtained by the government.

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).

Here, OTR has withheld the responsive records at issue in their entirety. You acknowledge that some information you requested would constitute an invasion of privacy if released. In turn, OTR has maintained its position that "the identifying information is protected from disclosure pursuant to Exemption 2" without meeting the agency's burden of considering whether reasonable redaction is possible. The records that OTR submitted to this Office *in camera* were redacted to remove account and personal information.[5] Thus, it is clear that OTR could apply the same redactions in a disclosure made to you that would protect personal privacy while still providing you with informational value (e.g., verification of the amount of the payment).

Conclusion

Based on the foregoing, we remand OTR's decision. Within 10 days of the date of this decision, OTR shall review the withheld information and release responsive material to you in accordance with the Exemption 2 guidance in this decision and with OTR's obligation under DC FOIA to release segregable information.

This constitutes the final decision of this Office; however, you are free to challenge OTR's subsequent response by separate 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 the DC FOIA.

Sincerely,

Mayor's Office of Legal Counsel

cc: Tracye Y. Peters, FOIA Officer, OTR (via email)

[5] OTR did not provide this Office with unredacted copies of the documents; therefore, we cannot be certain as to what information was redacted.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-156

September 5, 2018

VIA E-MAIL

Mr. Arthur Spitzer

RE: FOIA Appeal 2018-156

Dear Mr. Spitzer:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested pertaining to a shooting and traffic accident involving MPD officers that resulted in fatalities.

Background

On July 6, 2018, your organization, the American Civil Liberties Union of the District of Columbia ("ACLU"), submitted a request for records related to a shooting that occurred on May 9, 2018 and a traffic crash that occurred on May 4, 2018. The request sought video recorded by body-worn cameras and video recorded by other means such as dashboard or surveillance cameras.

On August 9, 2018, MPD responded to the request by disclosing "an Incident Report, a Traffic Crash Report, and two Press Releases." MPD denied the request for video pursuant to D.C. Official Code § 2-534(a)(3)(B) ("Exemption 3(B)"). MPD's denial stated that the responsive records were part of an ongoing administrative investigation and that disclosure could potentially: reveal the direction and pace of the investigation, lead to attempts to destroy or alter evidence, or alter testimony of potential witnesses.[1]

This Office received your appeal on August 21, 2018, and contacted MPD for its response. On appeal, you assert that MPD's application of Exemption 3(B) is improper and that MPD has not met its burden for withholding responsive records pursuant to this exemption. You base your arguments on a previous administrative appeal decision issued by this Office and case law precedent pertaining to the analogous federal FOIA provision. You assert that MPD has failed to demonstrate that there is any pending or imminent trial or adjudication necessary to invoke Exemption 3(B). Finally, you argue that MPD's conclusory assertions are insufficient, as was its response to your organization's request in FOIA Appeal 2018-145 (Aug. 16, 2018).

[1] We note that, as in FOIA Appeal 2018-145, MPD's initial rationale does not meet the standards for withholding pursuant to Exemption 3(B).

On September 5, 2018, MPD sent this Office a response to your appeal and a declaration from an inspector in its Internal Affairs Division.[2] In its response and declaration, MPD reasserted its denial of ACLU's request for video recordings; however, MPD changed the basis for its withholding, citing instead to D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3(A)(i)"). MPD asserts that the United States Attorney's Office for the District of Columbia is reviewing the officers' conduct in the incidents at issue. According to MPD, disclosure of the withheld records and videos would allow persons involved and witnesses to alter their statements and testimony regarding the incidents, which would interfere with potential enforcement proceedings.

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.

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).

Your appeal was submitted based on MPD's partial denial of ACLU's request pursuant to Exemption 3(B). After receiving your appeal, MPD invoked Exemption 3(A)(i) as the grounds for withholding additional documents and videos. Since MPD has revised its position, we shall address whether its withholding of records is justified pursuant to Exemption 3(A)(i).

Exemption 3(A)(i) protects from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. D.C. Official Code § 2-534(a)(3)(A)(i). "To invoke this exemption, an agency must show that the records were compiled for a law enforcement purpose and that their disclosure '(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Manning v. DOJ*, 234 F. Supp. 3d 26, 33 (D.D.C. 2017) (citing *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

The purpose of Exemption 3(A)(i) is to prevent "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 224, 232 (1978). "So long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, the investigatory record

[2] MPD's response and declaration are attached.

exemption applies." *E.g. Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted).

Conversely, "where an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency's decision." *Id*. An agency must sustain its burden "by identifying a pending or potential law enforcement proceeding or providing sufficient facts from which the likelihood of such a proceeding may reasonably be inferred." *Durrani v. DOJ*, 607 F.Supp.2d 77, 90 (D.D.C. 2009).

Here, we accept MPD's representation that the records at issue are investigatory and were compiled for law enforcement purposes. We also accept MPD's assertion that disclosure of the videos could interfere with pending or anticipated enforcement proceedings in connection with a review being conducted by the United States Attorney's Office by allowing persons involved to alter or conform their statements to the recorded evidence. As a result, we find that the records at issue may be withheld pursuant to Exemption 3(A)(i).

Conclusion

Based on the foregoing, we affirm MPD's revised decision and hereby dismiss your appeal.

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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-157

September 6, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Cunningham

RE: FOIA Appeal 2018-157

Dear Mr. Cunningham:

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"), on the grounds that the Office of Unified Communications ("OUC") failed to respond to your July 23, 2018 request[1] for the audio recording and written transcript of a 911 call you made on May 24, 2018.

On August 22, 2018, you submitted your appeal to this Office, alleging that OUC had failed to provide you with responsive records. On the same day, this Office notified OUC of your appeal and asked for its response.

On August 29, 2018, OUC provided its response to your appeal.[2] In its response, OUC asserts that it emailed you a copy of the 911 audio recording on July 31, 2018. As evidence, OUC's response includes an email sent to you with an attachment labeled "911 Call.wma" on July 31, 2018. OUC acknowledges that its response did not inform you that OUC does not create or maintain written transcripts of call audio. As a result, OUC maintains that it has granted your request in full to the extent that responsive records exist.

Since your appeal was based on OUC's failure to provide you with responsive records and OUC has demonstrated that it did provide you with the responsive record that it maintains, we affirm OUC's response to your request.

If you did not receive OUC's July 31 email or you were unable to access the attachment, you should coordinate with OUC to obtain a copy of the audio recording. We note that if you require the recording in a different format, such as a physical copy, there may be reproduction costs for

[1] You previously attempted to request the 911 call records at OUC in person. At that time, OUC informed you that the records you sought may be protected from disclosure pursuant to personal privacy interests, which you could overcome by verifying that you were the individual who made the 911 call at issue. On or about July 23, 2018, you submitted a written FOIA request with proof of your identity to OUC.
[2] A copy of OUC's response is attached.

the disclosure, and OUC may charge you a fee to recoup the cost incurred. *See* D.C. Official Code § 2-532(b) and 1 DCMR § 408.

This shall constitute 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Dionne Hayes, General Counsel, OUC (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-158

September 6, 2018

VIA ELECTRONIC MAIL

Ms. Rose Santos

RE: FOIA Appeal 2018-158

Dear Ms. Santos:

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"), on the grounds that the Office of Contracting and Procurement ("OCP") closed a records request you submitted to OCP through the FOIAXpress system without producing any documents.

This Office received your appeal on August 23, 2018, and asked OCP to provide us with a response. On August 24, 2018, OCP advised us that it informed you via letter sent through FOIAXpress on August 21, 2018, that the District's Child and Family Services Agency ("CFSA") maintains the documents you requested.[1] OCP also provided you with contact information for CFSA's FOIA Officer.

We reviewed OCP's thorough response to your appeal, which includes a copy of the letter it sent you on August 21, 2018. We accept the agency's representations that it responded to your request and that it does not maintain the records you are seeking. Accordingly, we affirm OCP's response to your request.

This shall constitute 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

[1] A copy of OCP's response to your appeal is attached.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-159

September 7, 2018

VIA ELECTRONIC MAIL

Mr. Chris Moeser

RE: FOIA Appeal 2018-159

Dear Mr. Moeser:

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").

Background

On August 3, 2018, your client submitted a request to the Department of Health ("DOH") for records relating to data on births, maternal deaths, and pregnancy-related deaths in the District of Columbia from 2010-2017.

On August 7, 2018, DOH granted your request in part and denied it in part. DOH indicated that the agency "made available to you certain information compiled by the Department for the years 2012-2016." DOH further indicated that "Information for 2017 is still being compiled and analyzed and has not yet been finalized or compiled into an agency record that would be available for dissemination . . ."

Your appeal contends that DOH's denial is improper because they "did not release the specific data in the format requested." Your appeal notes that D.C. Official Code § 2-532(a-1) requires that agencies provide records "in any form or format requested." Your appeal further notes that raw data for 2017 would constitute a public record, subject to FOIA, even if DOH "has not finished analyzing the data or compiling it into an official report." Your appeal concludes by requesting that DOH "release the requested data for 2010-2017 in XLS format."

This Office contacted DOH on August 23, 2018, and notified the agency of your appeal. On September 6, 2018, DOH responded to the appeal.[1] DOH's response indicates that the requested data "is not provided in any one specific format" and that it is not "currently available in an XLS format." DOH argues that it is not required to create a record that does not exist. DOH's response further asserts that the information is properly withheld under (1) D.C. Official Code §2-534(a)(2) ("Exemption 2") because the release would constitute an invasion of personal privacy; (2) D.C. Official Code §2-534(a)(3) because the release may interfere with an

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

investigation and would constitute an invasion of personal privacy from the disclosure of investigatory records; and (3) D.C. Official Code § 2-534(a)(4) ("Exemption 4") because the records for 2017 are protected by the deliberative process privilege.

In a supplemental response submitted on September 7, 2018,[2] DOH clarified that all underlying responsive data is in a database governed by the Vital Records Act and specifically exempt from disclosure pursuant to D.C. Official Code § 2-534(d)(1) ("The provisions of this subchapter [DC FOIA] shall not apply to the Vital Records Act of 1981.).

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.

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).

Here, you've challenged the lack of production of underlying data from the years 2012-2017 for maternal mortality. While not indicated in its denial letter to your client, on appeal DOH has represented to this Office that all of the underlying data is derived from Vital Records – such as birth and death certificates. We accept this representation. Vital Records are explicitly exempt from D.C. FOIA pursuant to D.C. Official Code § 2-534(d)(1) ("The provisions of this subchapter [DC FOIA] shall not apply to the Vital Records Act of 1981.). "Vital Records means certificates or reports of birth, death, marriage, divorce, annulment, **and data related thereto** which is permitted to be gathered under this chapter." D.C. Official Code § 7-201(15) (emphasis added). It appears that the database that stores the underlying data requested by your client qualifies as a Vital Record. As a result, DOH properly withheld the underlying data.

Your appeal argues that DOH is required to provide information to your client in the format requested, citing to D.C. Official Code § 2-532(a-1). This is true, however, DOH has indicated that no aggregate tables or charts have been produced that are responsive to your request that have not been disclosed. DOH is not required to create a record that does not already exist. *Frank v. DOJ*, 941 F. Supp. 4, 5 (D.D.C. 1996) (an agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions").

[2] A copy of DOH's supplemental response is attached.

Conclusion

As a result, we affirm DOH's decision.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Edward Rich, Senior Assistant General Counsel, DOH (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-160

August 31, 2018

VIA ELECTRONIC MAIL

Ms. Marguerite Pridgen

RE: FOIA Appeal 2018-160

Dear Ms. Pridgen:

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"), on the grounds that the Department of Employment Services ("DOES") improperly charged you a fee to process your FOIA request.

On July 30, 2018, you submitted a request to DOES for three categories of information related to the Senior Community Service Employment Program. DOES provided you with 55 pages of documents in response to your request and charged you $13.75 for the costs of document reproduction. On August 28, 2018, this Office received your appeal, in which you contend that DOES could have provided you the information you requested in a one-page email; therefore, you argue it was improper for DOES to charge you for 55 pages of records.

This Office's jurisdiction is limited to "review[ing] the public record to determine whether [a record] may be withheld from public inspection." D.C. Official Code § 2-537(a). We generally do not interpret our authority to include adjudicating disputes over FOIA fees unless an estimated fee is so excessive as to constitute a constructive denial or if a requester is improperly required to pre-pay a fee. Here, you are not claiming that your request was denied, DOES did not require pre-payment, and you acknowledge that DOES's disclosure contained the information responsive to your request. As a result, we decline to make any findings as to the amount of the fee at issue. Under D.C. Official Code § 2-532(b), fee waivers are discretionary, and you are free to contact DOES directly to request that it reconsider its fee assessment.

On a side note, your request and appeal indicate that you believe DOES has a responsibility to answer questions under FOIA. However, DC FOIA requires the disclosure of existing nonexempt documents, not the creation of answers to questions or interrogatories. *See Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). DOES is not obligated to create or compile any information you request, only to disclose existing non-exempt public records.

Based on the foregoing, we consider your appeal to be moot due to lack of jurisdiction, and it is dismissed.

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: Tonya Robinson, General Counsel, DOES (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-162

September 11, 2018

VIA ELECTRONIC MAIL

Mr. Charles Watts

RE: FOIA Appeal 2018-162

Dear Mr. Watts:

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"), on the grounds that the Office of Employee Appeals ("OEA") failed to respond to your August 1, 2018 request for records related to a decision rendered by the District of Columbia Court of Appeals in 2004.

You submitted your appeal on August 30, 2018, and this Office notified OEA and requested that it respond to your appeal. On September 7, 2018, OEA provided you with a response to your request. In its response, OEA asserted that it does not maintain any responsive records.

Since your appeal was based on OEA's failure to respond to your request, and the agency has now responded, we consider your appeal to be moot and hereby dismiss it. You have already appealed OEA's response by separate appeal to this Office, and that appeal is under consideration.

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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Sheila G. Barfield, Executive Director, OEA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-164

September 21, 2018

VIA ELECTRONIC MAIL

Ms. Valerie Jablow

RE: FOIA Appeal 2018-164

Dear Ms. Jablow:

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"), on the grounds that the Office of the Deputy Mayor for Education ("DME") failed to respond to your request for certain records.

On June 24, 2018, you submitted a request to DME for records related to correspondence and contracts with Parents Amplifying Voices in Education. Having received no response from DME, you contacted the Interim Deputy Mayor for Education on August 10, 2018, who advised you that DME's delayed response was due to lacking a FOIA officer and stated that DME would process your request.

On September 6, 2018, you submitted an appeal to this Office on the grounds that as of that date you had not received any records from DME in response to your June 2018 request. We docketed your appeal and, in accordance with 1 DCMR § 412.5, asked the agency to respond to this Office with an explanation of its failure to respond to your request. On September 13, 2018, DME sent us a response, on which you were copied. DME asserted that it would provide you with documents on a rolling basis until the completion of its search and review process. DME further stated that the process is expected to be lengthy given the wide scope of your request, but that DME is "committed to completing the process." Since the date of its response, DME has made two disclosures to you consisting of approximately 130 pages of documents.

This maximum deadline for responding to a DC FOIA response is 25 business days. *See* D.C. Official Code § 2-532. As we have noted in previous FOIA appeals, the common practice followed in cases where the volume of documents retrieved makes timely completion of the response to a DC FOIA request impracticable is to produce, on a rolling basis, responsive documents which do not fall within exemptions from disclosure under D.C. FOIA and explanations of the basis for redactions or withholding documents in their entirety.

It is undisputed that DME did not begin producing documents to you within the timeframe mandated by DC FOIA. Subsequently, however, DME provided you with two batches of documents and has agreed to provide you with the remaining pages on a rolling basis. We

therefore remand this matter to DME and direct it to continue disclosing, on a weekly basis, non-exempt records or a basis for records that are redacted or withheld in their entirety.[1]

This constitutes the final decision of this Office; provided, that you are free to challenge any substantive response(s) you receive from DME by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Keisha Mims, Interim Chief of Staff, DME (via email)

[1] According to DME, an estimated total of 100-200 more pages will be provided to you.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-165

September 18, 2018

VIA ELECTRONIC MAIL

Mr. Eugene Miller

RE: FOIA Appeal 2018-165

Dear Mr. Miller:

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"), on the grounds that the Metropolitan Police Department ("MPD") failed to respond to your request for certain body-worn camera ("BWC") and dashboard camera footage.

On September 7, 2018, this Office received your appeal and asked MPD to provide us with a response. MPD responded on September 11, 2018,[1] stating that it contracts with a third-party vendor to redact BWC footage, and although MPD timely requested redactions services, the vendor has a backlog of requests and has not yet completed yours.[2] MPD further indicated that it has directed the vendor to expedite your request.

Based on the record before us, we conclude that MPD's failure to timely respond to your request constitutes a constructive denial under DC FOIA. Nevertheless, we accept MPD's representation that it is attempting to process your request on an expedited basis. We therefore remand this matter to MPD and direct it to disclose to you any non-exempt, responsive footage, within 10 business days of the date of this decision. You may challenge MPD's subsequent response by separate appeal to this Office.

If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia in the Superior Court of the District of Columbia in accordance with DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

[1] A copy of MPD's response is attached.
[2] We asked MPD about the status of dashboard camera footage, and MPD's FOIA Officer stated that MPD does not use dashboard cameras. MPD should formally advise you of this if it has not already done so.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-166

September 24, 2018

VIA ELECTRONIC MAIL

Mr. Henry Martin

RE: FOIA Appeal 2018-166

Dear Mr. Martin:

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"), on the grounds that the Department of General Services ("DGS") failed to respond to your request for records relating to an Environmental Impact Statement for a project at Hearst Recreation Center.

On September 10, 2018, this Office docketed your appeal and asked DGS to provide us with a response. Your appeal contended that DGS's response was due on September 7, 2018 and that you had not received an explanation for the delay. DGS responded on September 18, 2018,[1] stating that it has since provided you with all responsive records. It appears that DGS failed to comply with 1 DCMR § 405.5, in that it did not, as of the date a response was due, advise you as to the reason for its delay, the date on which a determination might be expected, or that you had the right to treat the delay as a denial.

We conclude based on the record before us that DGS's failure to timely respond to your request constitutes a constructive denial under DC FOIA. D.C. Official Code § 2-534(e). Nevertheless, we accept DGS's representation that it is has conducted a search and provided you with responsive documents. Your appeal was based on DGS's failure to respond to your request, and DGS has now responded. As a result, we consider your appeal to be moot and hereby dismiss it; however, you are free to challenge DGS's substantive response by separate appeal to this Office.

If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia in the Superior Court of the District of Columbia in accordance with DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: C. Vaughn Adams, Senior Assistant General Counsel, DGS (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-167

September 24, 2018

VIA E-MAIL

Ms. Savannah Thurman

RE: FOIA Appeal 2018-167

Dear Ms. Thurman:

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 reassert a request for records made to the Metropolitan Police Department ("MPD") relating to four names.

Background

You submitted a FOIA request to MPD stating "Please provide records of each citizen complaint, 911 call, or police officer/unit dispatch made by/in regards to the subject listed below from 01/01/2007 to present (please search each name separately:[four names a date of birth]." On September 5, 2018, MPD denied your request on the grounds that disclosure of the requested records would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) ("Exemption 2").

On appeal you do not challenge MPD's response. You reassert that you would like the requested records and that you "agree to all redactions necessary to release the requested information." Your appeal did not present any authorization from any of the individuals referenced in your request.

MPD sent this Office a response to your appeal on September 21, 2018.[1] MPD reaffirms its earlier position that under Exemptions 2 the records are exempt because the "release of the requested documents would constitute a clearly unwarranted invasion of privacy of the names persons." MPD argues that you have not raised a public interest applicable to DC FOIA to balance against the privacy interests of the individuals involved in the records sought.

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

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

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.

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).

Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id*.

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. "[A]s a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . ." *Reporters Comm. For Freedom of Press*, 489 U.S. at 780. Here, we find that disclosing records responsive to your request for "citizen complaint[s]" and "dispatch" made in regards to a named individual would constitute an invasion of the individual's personal privacy.

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.
Your brief appeal does not present an argument that there is a countervailing public interest in the release of the records you seek. We find that the release of police records relating to a named individual would not shed light on MPD's performance of its statutory duties. *See Berger*, 487 F. Supp. 2d at 505. Due to the absence of a relevant countervailing public interest, we find that the requested records, if they exist, are protected from disclosure pursuant to Exemption 2.

As a result of the existence of a privacy interest and the apparent lack of a public interest in the records at issue, MPD properly withheld portions of the records that would reveal the identities of private individuals pursuant to Exemption 2 of the DC FOIA.

Segregability

The last issue to be considered is whether MPD could disclose remaining portions of the records in a way that would still protect personal privacy interests. D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under 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).

Courts have required an agency to address whether it could redact records to protect individual privacy interests, while releasing the remaining information. *Canning v. DOJ*, No. 01-2215, slip op. at 19 (D.D.C. Mar. 9, 2004) (finding application of Exemption 7(C) to entire documents rather than to personally identifying information within documents to be overly broad); *Prows v. DOJ*, No. 90-2561, 1996 WL 228463, at *3 (D.D.C. Apr. 25, 1996) (concluding that rather than withholding documents in full, agency simply can delete identifying information about third-party individuals to eliminate stigma of being associated with law enforcement investigation).

Here, you have named the individual whose records you seek. Redaction of the records, if they exist, would therefore not protect the privacy interest contemplated by Exemption 2. The records you seek may consist of mere allegations of wrongdoing, the disclosure of which could have a stigmatizing effect regardless of accuracy.

We say "may consist" because the MPD has neither confirmed nor denied whether complaint records exist relating to the named individual. This type of response is referred to as a "Glomar" response, and it is warranted when the confirmation or denial of the existence of responsive records would, in and of itself, reveal information exempt from disclosure. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2nd Cir. 2009). Here, the Glomar response is justified because if a record relating the person you have named exists, identifying the record's existence would likely result in the privacy harm that Exemption 2 was intended to protect.

Conclusion

Based on the forgoing, we affirm MPD's decision.

This shall constitute 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-168

September 24, 2018

VIA E-MAIL

Ms. Savannah Thurman

RE: FOIA Appeal 2018-168

Dear Ms. Thurman:

This letter responds to eight administrative appeals you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In each appeal, you challenge the denial of the Metropolitan Police Department ("MPD") to produce records related to a specific residential address. Due to the similarity of the eight appeals, this Office has consolidated them and will address them in this determination.

Background

You submitted eight requests to MPD requesting "records of each citizen complaint, 911 call, or police officer/unit dispatch" to a specific address from "01/01/2007 to present." On September 5, 2018, MPD denied each request for citizen complaints, stating that disclosure of the requested records would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) ("Exemption 2"). MPD also informed you that it does not maintain records related to 911 calls and police dispatch, which MPD states are maintained by the Office of Unified Communications ("OUC").

On September 10, 2018, you appealed each of MPD's denials, asserting that MPD may disclose responsive records with "all redactions necessary to release the requested information." On the same day, this Office notified MPD of your appeals and requested its response.

MPD sent this Office a response to your appeal on September 21, 2018.[1] MPD reaffirms its position that responsive records are protected from disclosure under Exemption 2, because the records involve protected privacy interests and you have not demonstrated any countervailing public interest in disclosure.

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

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

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).

We accept MPD's representation that it does not maintain records related to 911 calls and unit dispatches, which are maintained by OUC. The remaining issue is whether MPD may withhold in their entirety documents related to "citizen complaints" linked to specific addresses pursuant to Exemption 2.

Based on MPD's responses to your requests and appeals, it does not appear that MPD has conducted any searches or identified records responsive to your requests. Rather, MPD has determined that if responsive records existed they would categorically be exempt from disclosure pursuant to Exemption 2. While most of the addresses at issue appear to be individual residences, we note that one address does not appear to be valid within the District of Columbia[2] and one appears to be a commercial address,[3] which would involve a different privacy analysis than a residential address.[4] Since the records you seek could involve different analyses under Exemption 2, MPD's blanket denial was improper.

It is unclear to this Office that MPD has adequately determined what a "citizen complaint" is in the context of your requests. Based on your requests, a "citizen complaint" could involve a complaint originating from the address at issue, a complaint regarding the address at issue, or a complaint about police officers' conduct[5] occurring at the address at issue. Pursuant to 1 DCMR § 402.5, if MPD cannot identify the records you are seeking based on the information contained in your requests it should contact you for supplemental information.

If MPD can determine what records you seek, it should conduct a reasonable and adequate search by making a reasonable determination as to the locations of records requested and searching for the records in those locations. *See Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008).

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). Accordingly, after MPD conducts adequate searches, it must review responsive documents withheld in their entirety

[2] "541 Georgia Ave, Washington, DC"
[3] "4401A Connecticut Ave NW"
[4] The Supreme Court has held that corporations do not possess personal privacy interests in the context of FOIA. *See FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011).
[5] If you are seeking complaints related to specific officers, this Office's guidance in your FOIA Appeal 2018-167 would be applicable.

to determine if portions may be disclosed. Since your requests seek records related to specific addresses, it could be impossible to adequately protect personal privacy with redactions.

Conclusion

Based on the foregoing, we affirm MPD's decision in part and remand it in part. MPD shall contact you to identify the "citizen complaint" records you are seeking. If the records are not clearly categorically exempt, within ten business days from the date of your response, MPD shall identify the relevant locations for records responsive to your request and describe the results of its searches to you. If MPD's forthcoming searches result in retrieving responsive records, MPD shall disclose to you non-exempt portions or provide a reasonable explanation of the basis for withholding in accordance with DC FOIA. You are free to challenge MPD's forthcoming substantive response(s) by separate appeal to this Office.

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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-169

September 25, 2018

VIA ELECTRONIC MAIL

Mr. Charles Watts

RE: FOIA Appeal 2018-169

Dear Mr. Watts:

This letter responds to the appeal you have submitted to the Mayor this year under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). Here, you are challenging the response provided by the Office of Employee Appeals ("OEA") to a request you submitted under DC FOIA.

Background

On August 1, 2018, you submitted a request to OEA for records relating to a decision rendered by the District of Columbia Court of Appeals in 2004.
When OEA did not respond, on August 30, 2018, you submitted an appeal which was docketed as FOIA Appeal 2018-162. On September 7, 2018, OEA provided you with a response, indicating that OEA does not possess records responsive to your request. On September 11, 2018, FOIA Appeal 2018-162 was dismissed as moot. That same day you challenged the substance of OEA's September 7, 2018, response, which we docketed as FOIA Appeal 2018-169.

FOIA Appeal 2018-169, like its underlying request, is centrally concerned with the merits of arguments raised in proceedings and events dating between 2002 and 2010. You accuse OEA of providing a "bogus response" to your request because OEA's September 7, 2018 denial letter is similar to its denial of a similar DC FOIA request you made in 2012. [1]

Parts of your request amount to an interrogatory (i.e., requesting Department of Corrections employees "must agree that PROGRAM STATEMENT 4353.1A was the official DC Jail Records Office policy"). Other parts of your request amount to a request for legal research (i.e. "This writer therefore requests. . . all documentation, established policy, and all information used

[1] You appealed the denial of the 2012 request, which was docketed as FOIA Appeal 2012-32. That appeal described your request as "a lengthy, argumentative discourse interspersed with interrogatories, requiring not only answers to questions but responses necessitating legal and factual analysis." FOIA Appeal 2012-32 concluded that you had "not made a proper request under DC FOIA."

by Senior Administrative Law Judge . . . and the OEA, that ***PROVES*** this writer . . . was in fact a ***LEGAL INSTRUMENTS EXAMINER***[.]").Other parts of your request amount to the solicitation of the creation of records (i.e. "please provide this writer and all parties mentioned above with a written letter that expresses you were unable to corroborate [the] Judge . . . thereby exonerating me . . .")

Your request does not reasonably describe a record as required by 1 DCMR § 402, and OEA is not obligated to answer your questions or create records for you. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."); *see also* FOIA Appeal 2014-41; FOIA Appeal 2017-36; FOIA Appeal 2017-95. The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009).

Because we find that your request does not reasonably describe a record, we need not reach the question of whether OEA conducted an adequate search. We do note that OEA has proffered in its response to this Office that it will be mailing you a copy of your "entire file," though it is not clear to us whether that is what you are requesting.

Conclusion

Based on the foregoing, we affirm OEA's decision and hereby dismiss your appeal. 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: Sheila Barfield, Executive Directors, OEA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-170

October 1, 2018

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2018-170

Dear Mr. Mulhauser:

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"). Your appeal is based on the failure of the Office of the Chief Technology Officer ("OCTO") to respond to a June 18, 2018 request you submitted to OCTO for records "showing OCTO['s] response to an opinion from the Office of Open Government," relating to OCTO "requiring specific addresses of all government recipients before OCTO would search for emails requested from an agency under the DC FOIA."

The record before us indicates that OCTO acknowledged your request when it was received. After not hearing anything further, you filed this appeal on September 15, 2018, on the grounds that OCTO's failure to respond is a constructive denial under D.C. Official Code § 2-532(e).

Upon receiving your appeal on May 17, 2017, this Office notified OCTO and requested that it provide us with a response. On September 17, 2018, OCTO informed you that its delay in responding to your request was caused by a change in staff, and OCTO promised you that a "response to your inquiry will be forthcoming shortly." OCTO did not provide a further response or explanation to this Office by the September 24, 2018 deadline or seek an extension to respond pursuant to 1 DCMR § 412. In the interest of a complete record, this Office contacted OCTO again on September 27, 2018, but has still not received a substantive agency response as of the writing of this decision.

OCTO has failed to provide you with records within the 15 business days, as prescribed by D.C. Official Code § 2-532(c)(1). Further, based on the record before this Office, it appears that OCTO did not seek an extension to respond to your request by "written notice . . . setting forth the reasons for extension and expected date for determination," as contemplated by D.C. Official Code § 2-532(d)(1). Nor did OCTO timely inform you of the "reason for the delay," "the date on which a determination may be expected," and that you had "the right to treat the delay as a denial." 1 DCMR § 405.5. Lastly, OCTO did not assert an exemption to justify withholding records at any point. As a result, this Office finds that OCTO constructively denied your request. D.C. Official Code § 2-532(e). Having denied your request, and having failed to offer a

sufficient explanation to this Office for the reasons for such denial, this Office finds OCTO to be improperly withholding the records at issue.

In light of the above, this Office remands this matter to OCTO to, within 5 business days of the date of this decision: (1) identify all record repositories likely to contain responsive records; (2) search those repositories for responsive records; and (3) provide you with any responsive documents in OCTO's possession, subject to redaction or withholding in accordance with D.C. Official Code § 2-534. You may challenge OCTO's subsequent response by separate 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 the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Pamela Brown, General Counsel, OCTO (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-171

October 1, 2018

VIA ELECTRONIC MAIL

Mr. James Trainum

RE: FOIA Appeal 2018-171

Dear Mr. Trainum:

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"), on the grounds that the Department of Consumer and Regulatory Affairs ("DCRA") failed to adequately respond to your request for certain records.

Background

On July 24, 2018, DCRA received your request relating to permits and inspections of construction at 1643 Potomac Ave SE. Specifically you requested "a detailed list of all complaints made," "the results of any inspections of the property," and "any responses made by the property owner." On September 7, 2018, DCRA provided you with a response indicating that it was unable to locate documents responsive to your request.

On September 15, 2018, you appealed DCRA's response, stating your belief that complaints exist because you and your neighbors called the "311 operator and the DCRA Illegal Construction Hotline" and made complaints relating to the construction. Further, your appeal states that you spoke with "a DCRA inspector who was trying to gain access to the building site pursuant to these complaints," and that the inspector told you that you "could receive a copy of his report . . . [by] fil[ing] a FOIA request with DCRA."

This Office notified DCRA of your appeal, and it responded on September 21, 2018.[1] DCRA's response indicates that it does not maintain "a detailed list of all complaints" and that it is not obligated to create a record under DC FOIA. Further, in its response, DCRA described its process of searching for responsive records. DCRA's response indicates that it requested a search of its Office of Regulatory Investigation Section and its Office of Consumer Protection. Both divisions conducted a search of emails, the Regulatory Investigation Section tracking system, and hard copy files. Additionally, the Illegal Construction and Third Party Division conducted a search of its email accounts and a database used by the division called Acela. This search yielded three unresponsive pictures and inspector notes that could not be exported from the database

[1] A copy of DCRA's response is attached for your reference.

without creating a record and which were not provided in DCRA's initial denial letter. Nevertheless, DCRA's response to this appeal included three screenshots containing responsive information relating to the inspection of the property named in your request.

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).

The primary issue in this appeal is your belief that responsive records should exist; therefore, we consider whether DCRA conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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, DCRA identified its Third Party Program, Office of Consumer Protection, and Office of Regulatory Investigation as the locations where responsive records would be maintained if they existed. In response to your appeal, DCRA included adequate descriptions of the searches those divisions conducted and the results of those searches. DCRA indicated that the searches yielded only three records: three sets of inspector notes in the Acela database that could be produced only by taking screenshots, which DC FOIA does not require.[2] In light of the applicable case law discussed above, we accept DCRA's search as adequate.

Your request included a request for a "detailed list of all complaints made regarding the construction at 1643 Potomac Ave SE." 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). We accept DCRA's representation that it does not maintain a "detailed list of complaints." Under DC FOIA, DCRA is not required to create records. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."). We also note that calls made to 311 are maintained by another District agency, the Office of Unified Communications, and that it does not appear likely that DCRA would maintain such records.

Conclusion

Based on the foregoing, we affirm DCRA's response to your request, insofar as the searches it conducted were adequate.

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: Genet Amare, FOIA Officer, DCRA (via email)

[2] Nonetheless, DCRA has attached these records in response to this appeal.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-172

October 1, 2018

VIA E-MAIL

Mr. Raul Anaya

RE: FOIA Appeal 2018-172

Dear Mr. Anaya:

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 Homeland Security and Emergency Management Agency ("HSEMA") improperly withheld records you requested pertaining to a traffic accident that occurred on September 10, 2018.

Background

On September 14, 2018, you submitted a FOIA request, on behalf of your client, to HSEMA[1] asking for ten categories of records related to "an accident which occurred on 9/10/2018 at 24th Street & Benning Road."

On September 17, 2018, HSEMA denied your request, stating that the only responsive record it possessed was DDOT traffic camera footage and it would not release the footage because the underlying incident was being investigated by the Metropolitan Police Department (MPD).

This Office received your appeal on September 17, 2018, and contacted HSEMA for its response on September 18, 2018. On appeal you assert that based on previous experience, you know that HSEMA controls traffic camera footage and you did not expect MPD to release the relevant footage. You also express concern that the footage may be lost due to automatic deletion.

HSEMA sent this Office a response to your appeal on September 18, 2018, reaffirming its position that the only responsive record it possessed was DDOT traffic camera footage and it was reluctant to disclose records that may interfere with a law enforcement investigation. Further, HSEMA recommended that you request the footage directly from MPD.

[1] It appears that you submitted the same or a substantially similar request to the Metropolitan Police Department and Office of Unified Communications.

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).

The primary issue in this appeal is whether HSEMA can withhold from disclosure footage responsive to your request because it may be subject to an investigation being conducted by MPD. There is no blanket exemption under DC FOIA that protects all investigatory records from disclosure. Rather D.C. Official Code § 2-534(a)(3) ("Exemption 3") states that certain investigatory records may be withheld from disclosure when certain enumerated conditioned are met.

For example, Exemption 3(A)(i) exempts from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. "To invoke this exemption, an agency must show that the records were compiled for a law enforcement purpose and that their disclosure '(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Manning v. DOJ*, 234 F. Supp. 3d 26 (D.D.C. 2017) (citing *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

The purpose of Exemption 3(A)(i) is to prevent "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 224, 232 (1978). "So long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, the investigatory record exemption applies." *E.g. Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted).

Conversely, "where an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency's decision." *Id*. An agency must sustain its burden "by identifying a pending or potential law enforcement proceeding or providing sufficient facts from which the likelihood of such a proceeding may reasonably be inferred." *Durrani v. DOJ*, 607 F.Supp.2d 77, 90 (D.D.C. 2009).

Here, HSEMA's assertion that the traffic footage it maintains *may* be subject to MPD investigation does not meet the burden for withholding pursuant to Exemption 3(A)(i). Speculation that a record may be involved in an ongoing investigation is not a sufficient basis for withholding a record from disclosure under DC FOIA. Further, it was improper for HSEMA to require you to transfer your request to MPD for a record that HSEMA acknowledges possessing. D.C. Official Code § 2-532(d)(2)(B) states that an agency may extend the time taken to respond to a FOIA request when it needs to consult with another public body. It is therefore HSEMA's responsibility to consult with MPD to determine if the record at issue is protected from disclosure pursuant to one or more of the conditions specified under Exemption 3; it is not incumbent upon you to seek the record from MPD if HSEMA maintains it.

Conclusion

Based on the forgoing, we remand HSEMA's decision. Within 10 business days from the date of this decision, HSEMA shall review, in consultation with MPD if necessary, and disclose to you the non-exempt portions of the footage it maintains or provide a reasonable explanation of the basis for withholding in accordance with Exemption 3 or other relevant exemptions under DC FOIA.

This shall constitute 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: Whitney Bowen, FOIA Officer, HSEMA
Anthony Crispino, Deputy General Counsel, HSEMA (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-173

October 5, 2018

VIA ELECTRONIC MAIL

Timothy M. Mulligan, Esq.

RE: FOIA Appeal 2018-173

Dear Mr. Mulligan:

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly denied your request for certain photographs pertaining to your client.

This Office received your appeal, notified MPD, and asked for its response. MPD responded on October 2, 2018[1] and advised us that it has reconsidered your request and will be releasing the photographs to you shortly.

Since your appeal was based on MPD's denial of your request and MPD has now agreed to produce the responsive photographs, we hereby dismiss your appeal as moot. You are free to assert any challenge, by separate appeal to this Office, to MPD's forthcoming disclosure.

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: Ronald B. Harris, Deputy General Counsel, MPD (via email)

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-174

October 15, 2018

VIA ELECTRONIC MAIL

Mr. Michael Perloff

RE: FOIA Appeal 2018-174

Dear Mr. Perloff:

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"), on the grounds that the Metropolitan Police Department ("MPD") withheld records responsive to your July 9, 2018 request for video records related to events in June 2018.

You submitted your appeal on September 24, 2018, and this Office notified MPD and requested that it respond to your appeal. On October 15, 2018, MPD indicated to this Office that that it made the documents you requested available to you.

Since your appeal was based on MPD's withholding of records, and the agency has now represented that it will no longer withhold those records, we consider your appeal to be moot and hereby dismiss it. You are free to challenge MPD's release by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Ronald Harris, Deputy General Counsel, MPD (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-175

October 15, 2018

VIA ELECTRONIC MAIL

Mr. John Uhar

RE: FOIA Appeal 2018-175

Dear Mr. Uhar:

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 District Department of Transportation's ("DDOT") response to your request for records under the DC FOIA.

Background

On September 7, 2018, you submitted a request to DDOT for records related to Public Space Permit PA10160729. On September 28, 2018, DDOT responded to your request via email providing you with 46 pages of responsive records. DDOT asserted that some of the records were partially redacted to protect personal privacy pursuant to D.C. Official Code § 2-534(a)(2). On the same day, you submitted your appeal asking why your request for records related to PA1016079 was closed[1] and requested that DDOT inform you if the permitting records for the location were not available.

This Office notified DDOT of your appeal and requested its response. DDOT provided this Office with a response to your appeal on October 15, 2018.[2] In its response, DDOT asserts that its Public Space Regulation Division ("PSRD") conducted an adequate search pursuant to your request and that all responsive records recovered by the search were produced. DDOT notes that your request and appeal reference different permit numbers and asserts that is has provided you with all the responsive records in its possession pertaining to the permit number of your original request. Finally, DDOT notes that your request references "@ 1995," and that DDOT was uncertain whether you were referring to a location or a year. DDOT adds that it does not have the capacity to search for records prior to 2001.

[1] Your appeal does not address DDOT's response to your request. In case you did not receive DDOT's response, a copy of DDOT's September 28 response to your request is attached.
[2] A copy of DDOT's appeal 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).

We interpret your appeal as challenging DDOT's response on the basis that additional responsive records should exist; therefore, we consider whether or not DDOT conducted an adequate search. DC FOIA requires only that, under the circumstances, a search is 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: (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, DDOT identified its PSRD as the location where responsive records would be maintained if they existed. We accept DDOT's assertion that it provided you with all of the records related to permit PA10160729 that were uncovered by the agency's search. Your appeal does not provide any basis to indicate that additional records beyond those DDOT disclosed should exist. As a result, we find that DDOT's search in response to your request was adequate.

Conclusion

Based on the foregoing, we affirm DDOT's response to your request. 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: Karen R. Calmeise, FOIA Officer, DDOT (via email)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2018-176

October 15, 2018

VIA ELECTRONIC MAIL

Ms. Valerie Jablow

RE: FOIA Appeal 2018-176

Dear Ms. Jablow:

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"), on the grounds that the Office of Contracting and Procurement ("OCP") failed to respond to your September 4, 2018 request for records related to a contract award.

You submitted your appeal on September 28, 2018, and this Office notified OCP and requested that it respond to your appeal. On October 5, 2018, OCP provided its response and claimed that it made the documents you requested available to you on the same day.[1] In its response, OCP explained that its production was delayed because it had limited access to its contract record system during the transition to a new fiscal year between September and October.

Since your appeal was based on OCP's failure to respond to your request, and the agency has now responded, we consider your appeal to be moot and hereby dismiss it. You are free to challenge OCP's substantive response by separate appeal to 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: D. Ryan Koslosky, Associate General Counsel, OCP (via email)

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

MARY MCLEOD BETHUNE DAY ACADEMY
PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO ENTER SOLE SOURCE CONTRACT

Mary McLeod Bethune Day Academy Public Charter School intends to enter into a sole source contract with The Achievement Network ("ANet") for student assessment and professional development services to help identify and close gaps in student learning for the upcoming school year. The annual cost of these contracts will be approximately $27,000. The decision to sole source is due to the fact that the vendor is the publisher and holds the copyrights to the materials and training. The contract term shall be automatically renewed for the same period unless either party, 60 days before expiration, gives notice to the other of its desire to end the agreement. For further information regarding this notice contact purchasing@mmbethune.org no later than 5:00 pm, January 4, 2019.

MARY MCLEOD BETHUNE DAY ACADEMY
PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Mary McLeod Bethune Day Academy Public Charter School is seeking bids from prospective vendors to provide;

STUDENT TRAVEL: Mary McLeod Bethune Day Academy seeks a qualified vendor to provide educational trip packages to Costa Rica for approximately 24 students and 6 adult chaperones for 6 days and 5 nights in the second week of June, 2019. Pricing should be inclusive of all air travel, ground transportation, hotel accommodations, educational experiences, and at least two meals per day. Please email rates, itineraries, and proposals to purchasing@mmbethune.org

Proposals are due no later than 5:00 pm, January 4, 2019. Questions can be addressed to: purchasing@mmbethune.org

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF PARKS AND RECREATION

NOTICE OF APPLICATION

Notice is hereby given that, pursuant to the authority set forth in § 9a D.C. Law 3-30; D.C. Official Code § 8-1808.01 (2006 Supp.), and Chapter 7 of Title 19 (Amusements, Parks and Recreation) of the District of Columbia Municipal Regulations, Section 730-735, dated December 7, 2007, that the District Department of Parks and Recreation is reviewing an application for a dog exercise area within the green space across from Plummer Elementary School, located specifically northwest of intersection of Texas Avenue, SE and C Street, SE (Reservation 612).

The proposed application seeks to install and operate an (approximate) 10,000 square-foot off-leash dog park at the above referenced location. The proposed site is located in within green space along Texas Avenue, SE (within Fort Chaplin Park that was transferred to the District Government in 1972). Interested parties wishing to review the application can review the application in-person at the District Department of Parks and Recreation headquarters at 1250 U Street, NW on the 2nd floor. The application is also available at: http://dpr.dc.gov/page/dog-parks

Interested persons may submit written comments within thirty (30) days of publication of this notice. The written comments must include the person's name, telephone number, affiliation, if any, mailing address, and statement outlining the issues in dispute or support surrounding the implementation of a dog park. All relevant comments will be considered in reviewing the dog park application. **Written comments postmarked after January 28, 2019 will not be accepted.**

Address written comments to:

Office of Planning & Capital Projects
District Department of Parks and Recreation
Attn: Dog Park Comments – Ward 7 Dog Park
1250 U Street, NW
Washington, DC 20009

To submit comments via email, please email dpr.dogparks@dc.gov

For more information, please call (202) 673-7647.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

PUBLIC NOTICE

FORMAL CASE NO. 1115, APPLICATION OF WASHINGTON GAS LIGHT COMPANY FOR APPROVAL OF A REVISED ACCELERATED PIPE REPLACEMENT PROGRAM;

and

FORMAL CASE NO. 1154, APPLICATION OF WASHINGTON GAS LIGHT COMPANY FOR APPROVAL OF PROJECTPIPES 2 PLAN

1. The Public Service Commission of the District of Columbia ("Commission") hereby gives notice that on December 7, 2018, Washington Gas Light Company ("WGL" or "the Company") filed a request for approval of a "PROJECTpipes 2 Plan ("PIPES 2 Plan")" with the Commission.[1] The Commission is opening a new docket *Formal Case No. 1154* to address WGL's request.

2. By Order No. 17431, the Commission approved the first five (5) years of WGL's proposed 40-year Revised Accelerated Pipe Replacement Plan.[2] Under the Accelerated Pipe Replacement Plan ("PIPES 1 Plan"), WGL proposed to replace approximately 23,600 bare and/or unprotected steel service segments, 29 miles of bare steel main, 25 miles of targeted unprotected steel main and all 428 miles of low pressure and medium pressure cast iron main in the District of Columbia.[3] The Commission also indicated that the remainder of the 40-year Revised Plan should be submitted for our approval in 5-year segments.[4] WGL seeks approval of its PIPES 2 Plan as well as authorization to recover the costs associated with the PIPES 2 Plan through the approved PROJECTpipes surcharge mechanism.[5] Also, WGL requests approval of the PIPES 2 Plan and surcharge mechanism in advance of the expiration of the current PIPES 1 Plan, by September 30, 2019, "to allow the continuous progression of PROJECTpipes, and to

---

1 *Formal Case No. 1115, Application of Washington Gas Light Company for Approval of Revised Accelerated Pipe Replacement Program ("Formal Case No. 1115"),* Washington Gas Light Company's Application for Approval of PROJECTpipes 2 Plan, filed December 7, 2018, ("PIPES 2 Plan").

2 *Formal Case No. 1093, In the Matter of the Investigation into the Reasonableness of Washington Gas Light Company's Existing Rates and Charges for Gas Service ("Formal Case No. 1093") and Formal Case No. 1115,* Order No. 17431, ¶ 32, rel. March 31, 2014.

3 *Formal Case No. 1093,* WGL's Request for Approval of a Revised Accelerated Pipe Replacement Plan, Attachment A, at 3 to 13, filed August 15, 2013.

4 *Formal Case No. 1093 and Formal Case No. 1115,* Order No. 17431, ¶ 32, rel. March 31, 2014.

5 *Formal Case No. 1115,* PIPES 2 Plan at 1.

ensure the continued availability of contractor resources needed to perform the work under this program."[6]

3. According to WGL, "under the PIPES 1 Plan, as of September 30, 2018, the Company retired or remediated approximately 12.8 miles of main and 2,959 services."[7] WGL states that the PIPES 2 Plan will "further the Company's efforts to address relatively higher-risk pipe associated with an aging infrastructure by replacing pipe materials and components, as well as adding new features to enhance the safety of the system."[8] Specifically, the PIPES 2 Plan covers the period October 1, 2019, through December 31, 2024, and consists of 13 programs, including eight (8) distribution programs and five (5) transmission replacement programs, at an estimated total cost of $305.3 million.[9] WGL indicates that through its PIPES 2 Plan, it intends to replace 22 miles of main and replace or changeover 8,274 services in its distribution system over the five-year period of the plan, at a total estimated cost of $277.1 million. For the transmission programs, WGL states that it has budgeted $28.2 million for the five-year plan for the District of Columbia portion of the total cost for these projects.[10]

4. The Commission notes that pursuant to the Settlement approved by the Commission in the AltaGas-WGL Merger *Formal Case No. 1142*, Commitment No. 54, requires that WGL file the results of a cost/benefit analysis of PROJECTpipes with the Commission as a part of its second five-year PROJECTpipes filing.[11] In its Pipes 2 Plan filing, the Company has indicated that the study is not expected to be concluded until April of 2019; and that WGL will file the results of the study for consideration in this proceeding when it is concluded.[12] We also note that there are other AltaGas-WGL Merger commitments regarding PROJECTpipes, including Commitment Nos. 53, 72, and 74.[13]

5. The Commission invites interested persons to provide comments and reply comments on the matters set forth in WGL's request for approval of the PIPES 2 Plan by January 21, 2019, and February 6, 2019, respectively. Interested persons may propose a

---

6 *Formal Case No. 1115*, PIPES 2 Plan at 1-2.

7 *Formal Case No. 1115*, PIPES 2 Plan at 1.

8 *Formal Case No. 1115*, PIPES 2 Plan at 3.

9 *Formal Case No. 1115*, PIPES 2 Plan at 4.

10 *Formal Case No. 1115*, PIPES 2 Plan at 5.

11 *Formal Case No. 1142, In the Matter of the Merger of AltaGas Ltd. and WGL Holdings, Inc. ("Formal Case No. 1142")*, Order No. 19396, Appendix A at 21, rel. June 29, 2018.

12 *Formal Case No. 1115*, PIPES 2 Plan at 11.

13 *Formal Case No. 1142*, Appendix A at 20-28.

procedural schedule to facilitate adjudication of this matter and specifically identify material issues of fact that they believe are in dispute, should persons request a hearing in this matter. Comments and replies thereto shall be filed with Brinda Westbrook-Sedgwick, Commission Secretary, Public Service Commission of the District of Columbia, 1325 G Street, N.W., Suite 800, Washington, D.C. 20005 or electronically on the Commission's website at https://edocket.dcpsc.org/public/public_comments.

6. Copies of WGL's PIPES 2 Plan may be obtained by visiting the Commission's website at www.dcpsc.org or at cost, by contacting the Commission Secretary at the address provided above. Persons with questions concerning this Notice should call (202) 626-5150 or send an email to psc-commissionsecretary@dc.gov.

MAYOR'S OFFICE OF VETERANS AFFAIRS

PUBLIC NOTICE

2019 ADVISORY BOARD ON VETERANS AFFAIRS MEETINGS

The Mayor's Veterans Affairs Advisory Board serves as an advisory body to the Mayor, the Mayor's Office of Boards and Commissions, the Office of Veterans Affairs, the Department of Employment Services, the Department of Health, the Department of Human Services, and other District government departments, agencies, and offices on all matters pertaining to Veterans in the District of Columbia.

The Mayor's Veterans Affairs Advisory Board meets monthly on the first Tuesday of each month. When that date falls on a holiday or another conflict is present, the Board will vote the month prior to move the meeting date. Any changes to the meetings will be reflected on the Mayor's Office of Veterans Affairs (MOVA) website ova.dc.gov and will be published via a supplemental notice in the D.C. Register. Please contact MOVA at 202-724-5454 with any questions.

Meeting Location:

441 4th Street NW/One Judiciary Square
11th floor, Suite 1114
Washington DC 20001

Meeting Time:

6:30 p.m. – 8:00 p.m.

Call In Information:

Dial in: 712-451-0862
Passcode: 821260

2019 Meeting Dates:

Tuesday, February 5, 2019
Tuesday, March 5, 2019
Tuesday, April 2, 2019
Tuesday, May 7, 2019
Tuesday, June 4, 2019
Tuesday, July 2, 2019
Tuesday, August 6, 2019
Tuesday, September 3, 2019
Tuesday, October 1, 2019
Tuesday, November 5, 2019
Tuesday, December 3, 2019

WASHINGTON LATIN PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO ENTER A SOLE SOURCE CONTRACT

Echo Hill Outdoor School

Pursuant to the School Reform Act, D.C. 38-1802 (SRA) and the D.C. Public Charter Schools procurement policy, Washington Latin PCS hereby submits this Notice of Intent to award the following Sole Source Contract:

Vendor: Echo Hill Outdoor School.
Description of Service Procured: Echo Hill Outdoor School hosts an academic learning environment on the Chesapeake Bay estuary with immediate access to farmland, wetlands, marshlands and a mile of coast line on the Chesapeake Bay. The staff provides academic, hands on classes in ecology and history and human interactions with the environment through the lens of the Chesapeake Bay. EHOS also conducts team/community building exercises as a part of their program. They also provide constant care and supervision for visitors/students on a residential campus capable of accommodating and feeding a large number of students/guests, well over 100.
Amount of Contract: $30,000
Selection Justification: The Echo Hill Outdoor School is the only operation that offers academic level classes on a campus with immediate access to working farmland, swamplands, marshlands, and a significant stretch of shoreline on the Chesapeake Bay, who also has facilities to comfortably accommodate and feed the number of students/teachers (nearly 100) attending, while also providing 24 hour supervision and care for visitors.

For further information regarding this notice contact Geovanna Izurieta at gizurieta@latinpcs.org no later than 4:00 PM January 7, 2019.

Washington Latin Public Charter School
5200 2nd Street NW
Washington, DC 20011

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19674 of Kimberly Ziegler, as amended,[1] pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle E § 5201, from the lot occupancy requirements of Subtitle E § 304.1 and the nonconforming structure requirements of Subtitle C § 202.2, to construct a rear and third-story addition to an existing dwelling unit in the RF-1 Zone at premises 1139 6th Street, N.E. (Square 855, Lot 236).

HEARING DATES: February 14, February 21, and April 25, 2018[2]
DECISION DATE: April 25, 2018

DECISION AND ORDER

Kimberly Ziegler (the "Applicant") filed an application with the Board of Zoning Adjustment (the "Board" or "BZA") on November 10, 2017, for a special exception under Subtitle E § 5201, from the lot occupancy requirements of Subtitle E § 304.1 and the nonconforming structure requirements of Subtitle C § 202.2, to construct a rear and third-story addition to an existing dwelling unit in the RF-1 Zone at premises 1139 6th Street, N.E. (Square 855, Lot 236) (the "Subject Property"). For the reasons explained below, the Board voted to approve the application.

PRELIMINARY MATTERS

Self-Certification. The zoning relief requested in this case was self-certified, pursuant to Subtitle Y § 300.6. (Exhibits 66 (Final Revised) and 58 (Notes and Computations); Exhibits 20 and 47 (Prior Revised); Exhibit 19 (Original).) In granting the certified relief, the Board made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

Notice of Application and Notice of Hearing. By memoranda dated December 27, 2017, the Office of Zoning ("OZ") sent notice of the filing of the application to the D.C. Office of Planning ("OP"), the D.C. Department of Transportation ("DDOT"), Advisory Neighborhood

[1] The original application included a request for relief to modify the existing rooftop architectural elements under Subtitle E § 206.1, which was withdrawn by the Applicant based on revised plans. The Applicant also added relief for nonconforming structure under Subtitle C § 202.2, based on the recommendation of the Office of Planning. The Applicant submitted a revised self-certification form to the record at the Board's request. (Exhibit 66.) The caption has been revised accordingly.

[2] The hearing was originally scheduled for February 14, 2018, but postponed at the Applicant's request to February 21, 2018 and April 25, 2018.

Commission ("ANC") 6C, the ANC within which the Property is located, the Single Member District 6C06 representative, the Councilmember for Ward Six, and the At-Large Councilmembers and the Council Chair. A public hearing was scheduled for February 14, 2018. Pursuant to 11-Y DCMR § 402.1(a), the Office of Zoning published notice of the hearing on the application in the *D.C. Register*. (64 DCR 12437.) On December 27, 2017, OZ sent notice of the public hearing to the Applicant, ANC 6C, and all owners of property within 200 feet of the Subject Property.

Request for Party Status. The parties to this case were the Applicant and ANC 6C. There were no requests for party status.

OP Report. OP submitted a report dated April 13, 2018, recommending approval of the amended request for special exception relief. (Exhibit 63.) OP also indicated that relief under the nonconforming structure provisions of Subtitle C § 202.2 appears necessary. The Applicant further amended the application to include that relief. (Exhibit 66.)

DDOT Report. DDOT submitted a timely report indicating that it had no objection to the approval of the application. (Exhibit 45.)

ANC Report. ANC 6C submitted a written report, dated April 23, 2018, indicating that at a duly noticed and scheduled public meeting on April 11, 2018, at which a quorum was present, it voted 5-1 to oppose the application. (Exhibit 64.) The ANC raised concerns about the proposed third-story addition's visibility from street frontage, finding that it does not meet the requirement of 11-E DCMR § 5201.3(c) that an addition "not substantially visually intrude upon the character, scale, and pattern of houses along the subject street frontage." Specifically, the ANC determined that the addition would have a substantial adverse visual impact, on the basis that the addition would disrupt the consistent pattern of the rowhouses along the block. The ANC points out that the Subject Property "stands in a series of nearly identical rowhouses constructed as a group. Numbers 1135 through 1141 all retain their original pyramidal turrets. None of these houses - indeed, none of the houses along the entire block face from Morton Place to Orleans Place - have any rooftop additions, let alone a third story visible from the public right-of-way." (Exhibit 64.)

Persons in Support. Five neighbors, including both adjacent property owners, signed letters stating that they have no objection to the proposed project. (Exhibit 13.)

Persons in Opposition. The Board received no letters nor testimony from persons in opposition to the application.

FINDINGS OF FACT

The Property and the Surrounding Neighborhood

1. The property is located at premises 1139 6th Street, N.E. (Square 855, Lot 236) (the "Subject Property").

2. The Subject Property is currently improved with a two-story attached building with one dwelling unit. (Exhibits 59 and 61.)

3. The Subject Property is in the RF-1 Zone. The surrounding neighborhood is developed primarily with attached dwellings.

4. The Subject Property is located in the middle of a block of attached dwellings that were constructed as a group. (Exhibit 64.) The interior dwellings each have a pyramidal turret situated on top of a pyramidal bay. The end dwellings were built with a conical turret atop a round bay, one of which no longer exists. (Exhibits 7, 8, and 63.)

Project Description

5. The Applicant proposes to construct a third-story and rear addition to the existing structure on the Subject Property. (Exhibits 59 and 61.)

6. The Applicant originally proposed to modify existing rooftop architectural elements by removing the existing turret to construct a new cornice and turret on the third floor. (Exhibits 5 and 14.)

7. The architectural plans were subsequently revised to preserve the original architectural elements in the design, set back the third-story addition by three feet, and reduce the building height to 30 feet. (Exhibit 50; BZA Hearing Transcript of April 25, 2018 ("Tr."), p. 190.)

8. The proposed three-story rear addition would extend six feet beyond the existing rear wall of the structure. (Exhibit 48.)

9. With the proposed rear addition, the Subject Property would have a rear yard of 24 feet, eight inches. (Exhibit 58.)

10. The footprint of the existing structure has a lot occupancy of 61.66%. (Exhibit 58.) The proposed addition would increase the lot occupancy to 69.16%. (Exhibit 58.)

Zoning Relief

11. Pursuant to Subtitle E § 304.1, the maximum lot occupancy permitted in the RF-1 Zone is 60%; therefore, zoning relief from this provision is required.

12. Because the lot occupancy of the existing structure exceeds the matter-of-right limit, and the proposed addition would increase that nonconformity, the proposal also requires relief under Subtitle C § 202.2. This provision requires that any enlargement or addition to a nonconforming structure "[n]either increase or extend any existing, nonconforming aspect of the structure." (11-C DCMR § 202.2(b).)

13. Relief from both provisions is available as a special exception under Subtitle E § 5201.1, as evaluated under the criteria of Subtitle E §§ 5201.3 through 5201.6.

Impact of the Proposal

14. The proposed rear addition would extend six feet beyond the rear wall of the adjacent property to the south. The adjacent property to the north has an existing addition that extends further than the proposed addition on the Subject Property. (Exhibit 48.)

15. The rear addition would not cause a substantial impact on light and air available to adjacent properties, as it would extend the structure by only six feet and would allow for a rear yard of at least 24 feet.

16. The rear addition has no windows on the side and no balconies or decks that would interfere with neighbor's privacy. (Exhibit 49.)

17. Both adjacent property owners submitted signed letters for the record stating that they have no objection to the proposed project. (Exhibit 13.)

18. As demonstrated in the Applicant's renderings, the third-floor addition is visible from street frontage, but is minimally visible when viewed from the side. (Exhibit 54 (front view); Exhibits 52, 53, and 56 (side views).)

19. The design preserves the existing turret and cornice, which are consistent with the patterns of houses on the block. OP testified that the "design is maintaining the integrity of the original architectural features." (Tr., pp. 196-97.)

20. The third-floor addition is within the matter-of-right height limitation in the RF-1 Zone. (Exhibit 50; Tr., p. 190.)

21. The six-foot rear addition would be visible from the alley, but the proposed rear addition would not substantially intrude on the character of the block. The proposed rear addition would be in keeping with the designs of similar rear additions on the block. (Exhibit 55.)

22. Pursuant to Subtitle E § 300.1, the purpose and intent of the RF-1 Zone is "provide for areas predominantly developed with attached row houses on small lots within which no more than two (2) dwelling units are permitted."

CONCLUSIONS OF LAW

The Applicant requests special exception relief under Subtitle E § 5201, from the lot occupancy requirements of Subtitle E § 304.1 and the nonconforming structure requirements of Subtitle C § 202.2, to construct a rear and third-story addition to an existing attached dwelling unit in the RF-1 Zone at premises 1139 6th Street, N.E. (Square 855, Lot 236). The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001) to grant special

exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. (11-X DCMR § 901.2.)

In addition to meeting the general special exception standard, the Applicant must satisfy the "specific conditions" of Subtitle E § 5201 to be granted special exception relief. Specifically, an applicant must show that: (a) the light and air available to neighboring properties shall not be unduly affected; (b) the privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and (c) the addition or accessory structure, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale, and pattern of houses along the subject street frontage. (Subtitle E § 5201.3.) In order to demonstrate compliance with paragraphs (a), (b) and (c), an applicant must provide graphical representations such as plans, photographs, or elevation and section drawings sufficient to represent the relationship of the proposed addition or accessory structure to adjacent buildings and views from public ways. (11-E DCMR § 5201.3(d).) Finally, the Board may approve lot occupancy of all new and existing structures on the lot up to a maximum of 70% for attached residential buildings in the RF-1 Zone. (11-E DCMR § 5201.3(e).)

Based on the findings of fact, the Board concludes that the request for special exception relief satisfies the requirements of Subtitle E § 5201. The Board finds that the Applicant has provided sufficient plans, photographs, and elevations to meet the requirement of Subtitle E § 5201.3(d), and finds that the addition would not increase the lot occupancy above 70%; therefore, the requirement of Subtitle E § 5201.3(e) is met. The Board will address the criteria of Subtitle E § 5201.3 (a), (b), and (c) in turn.

First, the Board finds that the Applicant has demonstrated that the light and air available to neighboring properties shall not be unduly affected. The proposed three-story rear addition would extend the rear of the structure by only six feet. The proposed addition would extend six feet beyond the adjacent property to the south, but would not extend as far as the rear wall of the adjacent property to the north. The rear addition would provide a rear yard with a depth of over 24 feet. Based on the modest nature of the extension, the rear addition is unlikely to have a significant impact on the light and air available to those adjacent properties. In addition, the Board finds that the privacy of use and enjoyment of neighboring properties shall not be unduly compromised by the addition. The Board finds that there are no windows on the side of the addition and that there are no balconies or decks that would cause privacy impacts on adjacent neighbors. Further, the Board credits the letters of no objection submitted by neighbors, including both adjacent property owners, in finding that the use and enjoyment of neighboring properties will not be unduly compromised.

The Board finds that the addition, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale, and pattern of houses along the subject street frontage and from the rear alley. ANC 6C raised concerns regarding this criterion in its written report, opining that the proposed addition would disrupt the consistent pattern of the

attached dwellings along the block. Concerning the impact of the addition as viewed from street frontage, the Board considered the renderings provided by the Applicant, the recommendation of OP, and the concerns raised by the ANC. Though the third-floor addition is visible from street frontage, the Board finds that the third-story is set back sufficiently so that the addition does not substantially intrude on the visual character of the block. Further, the Board finds that the preservation of the turret and cornice prevents the pattern of houses from being significantly disrupted. In making this finding, the Board credits OP's testimony that the design maintains the integrity of the original architectural features and notes that the height of the addition is within the matter-of-right limitation. For these reasons, the Board found that the Applicant's proposal, as revised to preserve the existing architectural elements, does not intrude on the character of the neighborhood. Finally, the Board finds that the rear addition, as viewed from the rear alley, would not substantially intrude on the character of the block. Supporting this finding, the Board notes that the proposed addition is shallower than the adjacent rear addition to the north. Based on the renderings provided by the Applicant, the rear addition will be in keeping with the designs of similar rear additions on the block. The Board therefore concludes that the proposed addition will be in keeping with the character, scale, and pattern of houses in the neighborhood.

For these same reasons, the Board concludes that the request for special exception relief meets the general special exception standards in Subtitle X § 901.2. The Board finds that granting a special exception in this case would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps as required by Subtitle X § 901.2(a). Further, the Board concludes that the proposed addition would not adversely affect the use of neighboring properties, as required by Subtitle X § 901.2(b). As discussed in the analysis of the special exception standard of Subtitle E § 5201, the proposed addition would not have an adverse impact on light and air available to adjacent properties, privacy of use and enjoyment of adjacent properties, or the visual character of the street frontage or public alley.

The Board concludes that the Applicant has met its burden of proof for the special exception requested.

Great Weight to ANC and OP

Section 13 of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(A)) (2014 ed.) requires that the Board's written orders give "great weight" to the issues and concerns raised in the written recommendations of the affected ANC. To give "great weight" the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

In this case, ANC 6C submitted a written report recommending denial of the application. (Exhibit 64.) The ANC specifically raised concerns related to the visual impact of the third-story addition on the character and scale of houses on the block. The ANC found that the addition would disrupt the consistent pattern of the attached dwellings along the block. The Board considered this concern, but ultimately determined that the addition would not substantially

visually intrude upon the character, scale, and pattern of houses along the subject street frontage, as the turret and cornices would be preserved and the third-story addition would be set back from the front of the façade to decrease its visibility. As discussed in more detail above, the Board was not persuaded to deny the application on these grounds.

The Board is also required under D.C. Official Code § 6-623.04(2001) to give "great weight" to OP's recommendation. For reasons stated in this Order, the Board concurs with OP's recommendation to approve the relief requested. Also, based on the recommendation of OP, the Board encouraged the Applicant to use a darker color for the front face of the third-story addition; however, the Board did not find that the proposed addition would create an adverse impact that would require this recommendation be adopted as a condition of the Board's Order.

Based upon the record before the Board and having given great weight to the ANC and OP reports, the Board concludes that the Applicant has met the burden of proof that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBITS 49, 61, and 62 – REVISED A1-1 (PROPOSED FLOOR PLANS), A6-1 PROPOSED FRONT ELEVATION, AND A6-2 PROPOSED REAR ELEVATION** respectively.**)**

VOTE: **4-0-1** (Carlton E. Hart, Lesylleé M. White, Lorna L. John and Robert E. Miller to APPROVE; Frederick L. Hill not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 19, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE

APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19844 of Richard Gbolahan, as amended[1] pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions from the penthouse requirements of Subtitle C § 1500.4 and the penthouse setback requirements of Subtitle C § 1502.2, and pursuant to 11 DCMR Subtitle X, Chapter 10, for variances from the front setback requirements of Subtitle B § 315.1(c), the lot width and lot area requirements of Subtitle E § 201.1, and the side yard requirements of Subtitle E § 307.1, to construct a new flat in the RF-1 Zone at premises 1033 16th Street, N.E. (Square 4074, Lot 828).

HEARING DATES: November 7, 2018 and December 12, 2018[2]
DECISION DATE: December 12, 2018

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum, dated July 9, 2018, from the Zoning Administrator ("ZA"), certifying the required relief. (Exhibit 9 (original).) The original ZA memo cited the relief as special exceptions for front setback, side yard, and penthouse. Two revised ZA memos were submitted to correct the relief. (Exhibits 43 and 44.) The final revised memo clarified that front setback and side yard relief are variances and added relief for lot area/width and penthouse setback. (Exhibit 44.)

The Board of Zoning Adjustment ("Board") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 5D and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 5D, which is automatically a party to this application. The ANC submitted two reports recommending approval of the application. The ANC's first report, dated November 1, 2018, stated that at a regularly scheduled, properly noticed public meeting on October 9, 2018, at which a quorum was present, the ANC voted 4-0-0 to support the application. (Exhibits 38 and 39.) After meeting with the Applicant on the amended application (as requested by the Board), ANC 5D filed

[1] The Applicant amended the application (Exhibit 53) based on the revised Zoning Administrator memorandum (Exhibit 44), by adding to the original request a special exception for penthouse setback relief under Subtitle C § 1502.2 and variance relief from the lot width and lot area requirements of Subtitle E § 201.1, as well as changing the original request for special exceptions to one for variances for side yard relief under Subtitle E § 307.1 and front setback relief under Subtitle B § 315.1(c).

[2] On November 7, 2018, the Board continued the hearing to allow the Applicant an opportunity to revise the posting on the property to reflect the amended relief, and present the amended application to the ANC.

another letter, dated December 11, 2018, expressing support for the amended relief. The ANC letter of December 11, 2018, indicated that at a properly noticed public meeting on November 13, 2018, at which a quorum was present, the ANC voted 5-0 in support of the amended application. (Exhibit 57.)

The Office of Planning ("OP") submitted timely reports and testified at the hearing, recommending approval of the application as originally submitted, and as amended. (Exhibit 34 – original; Exhibit 54 – supplemental.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application. (Exhibit 33.)

Six letters of support (Exhibit 35) and two letters of concern/opposition (Exhibits 41 and 42) were submitted into the record.

Variance Relief

As directed by 11 DCMR Subtitle X § 1002.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 1002.1 for area variances from the front setback requirements of Subtitle B § 315.1(c), the lot width and lot area requirements of Subtitle E § 201.1, and the side yard requirements of Subtitle E § 307.1, to construct a new flat in the RF-1 Zone. The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be averse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that in seeking variances from 11 DCMR Subtitle B § 315.1(c), and Subtitle E §§ 201.1 and 307.1, the Applicant has met the burden of proof under 11 DCMR Subtitle X § 1002.1, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Special Exception Relief

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for special exceptions from the penthouse requirements of Subtitle C § 1500.4 and the penthouse setback requirements of Subtitle C § 1502.2. The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2 and Subtitle C §§ 1500.4 and 1500.2, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 51 – UPDATED ARCHITECTURAL PLANS AND ELEVATIONS.**

VOTE: **5-0-0** (Frederick L. Hill, Lesylleé M. White, Lorna L. John, Carlton E. Hart, and Peter A. Shapiro to APPROVE).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 18, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19845 of Potomac Electric Power Company, as amended,[1] pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under Subtitle C § 703.1 from the vehicle parking requirements of Subtitle C § 701.5, under Subtitle C § 807.1 from the bicycle parking requirements of Subtitle C § 802.1, and under Subtitle U § 320.1(a) from the utility use requirements of Subtitle U § 203.1(p), to construct an electrical substation in the RF-1 Zone at premises 1000 1st Street N.W. (Square 559, portion of Lot 82).

HEARING DATE: November 7, 2018
DECISION DATE: December 12, 2018

SUMMARY ORDER

SELF-CERTIFICATION

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 13 (Original); Exhibit 48A (Revised).) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 6E and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6E, which is automatically a party to this application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on October 2, 2018, at which a quorum was present, the ANC voted 7-0-0 to support the application with conditions. (Exhibit 59.) The Board adopted several of the conditions proposed by the ANC, finding that they were relevant to mitigating potential impacts of the zoning relief requested. The Board determined that the ANC's proposed condition requiring the Applicant to make a monetary contribution to neighborhood non-profits was not sufficiently connected with the relief requested to be adopted as a condition of this Order; however, the Board notes that the Applicant has agreed to abide by this condition nonetheless.

[1] The Applicant originally sought relief for vehicle parking and bicycle parking as area variances, (Exhibit 13), but amended the application to instead request relief from these requirements by special exception. (Exhibit 48A.) The original application also included area variance relief from the trash room requirements under Subtitle C § 907.1, but that relief was withdrawn based on revised plans that meet this requirement. (Exhibits 48A and 48C.)

The Office of Planning ("OP") submitted a timely report recommending approval of the application. (Exhibit 53.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the application. (Exhibit 54.) The Department of Health filed a response, indicating that it has no comments on the project and that the appropriate agency to respond to the issues raised is the Department of Energy and Environment ("DOEE"). (Exhibit 57.) DOEE filed an initial response noting that it is engaged in litigation before the Public Service Commission on the project and did not have additional comments at that time. (Exhibit 56.) In advance of the hearing, DDOE filed additional testimony from its Chief Science Advisor of Risk Assessment/Toxicology to comment on the concerns raised about electromagnetic fields ("EMF"). (Exhibit 71.) DDOE indicated that the "low levels of EMF anticipated from the Mount Vernon substation are comparable (perhaps even generally lower) to the levels to which we are exposed on a daily basis from typical household appliances, or the normally occurring background levels." (Exhibit 71.) Based on DDOE's research, it opined that the public health and safety are not likely to be compromised as a result of the proposed substation. (Exhibit 71.)

Thirteen letters in support were submitted to the record. (Exhibits 33-36, 44, 45, 62-67, and 72.) Additional petitions and letters in support were submitted by the Applicant. (Exhibit 58.) Five letters in opposition were filed from community members and individuals raising environmental, health, and safety concerns. (Exhibits 17, 41, 43, 68, and 69.) Multiple petitions in opposition were also submitted, signed by many neighbors and parents of students at the adjacent Walker-Jones Education Campus. (Exhibits 14, 15, 37-40, and 46.)

At the public hearing on November 7, 2018, the Board heard testimony in support from Rosemary Segero and Bernadette Harvey. The Board also heard testimony in opposition from Robert Robinson of the D.C. Consumer Utility Board, Parisa Norouzi of Empower DC, Camila Thorndike of Chesapeake Climate Action Network, Nikhil Balakumar of Greentel Group, Tiffany Aziz of Not In My Community Project, Nick Firmand, Ra Amin, and Zulfekar AnsarBey.

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for special exceptions under Subtitle C § 703.1 from the vehicle parking requirements of Subtitle C § 701.5, under Subtitle C § 807.1 from the bicycle parking requirements of Subtitle C § 802.1, and under Subtitle U § 320.1(a) from the utility use requirements of Subtitle U § 203.1(p), to construct an electrical substation in the RF-1 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2, Subtitle C §§ 703.1, 701.5, 807.1, and 802.1, and Subtitle U §§ 320.1(a) and 203.1(p), that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes

that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 48C AND WITH THE FOLLOWING CONDITIONS:**

1. Before the construction of the substation begins, the Applicant shall relocate the community garden ("The Farm at Walker Jones") currently in place at New Jersey Avenue and K Street, N.W.

2. The Applicant shall support the creation of a Mt. Vernon Triangle Community Advisory Group ("CAG"), with the participation of the ANC, for ongoing engagement, and to provide guidance and issue recommendations on topics, including, but not limited to:

    a. Future land use (in particular the parcel of land located at K Street and New Jersey Avenue, N.W., which had no designated use at the time Pepco presented at ANC 6E's September 4th and October 2nd meeting) and themes for art;

    b. Installation of an artistic construction fence;

    c. Support for the relocation of The Farm at Walker Jones; and

    d. Pepco's future support for nonprofits serving the community focusing on students, children and seniors for 2021, and subsequent years.

VOTE: **5-0-0** (Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Peter A. Shapiro to Approve.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 17, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19845-A of Potomac Electric Power Company, as amended,[1] pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under Subtitle C § 703.1 from the vehicle parking requirements of Subtitle C § 701.5, under Subtitle C § 807.1 from the bicycle parking requirements of Subtitle C § 802.1, and under Subtitle U § 320.1(a) from the utility use requirements of Subtitle U § 203.1(p), to construct an electrical substation in the RF-1 Zone at premises 1000 1st Street N.W. (Square 559, portion of Lot 82).

HEARING DATE: November 7, 2018
DECISION DATE: December 12, 2018

CORRECTED SUMMARY ORDER[2]

SELF-CERTIFICATION

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 13 (Original); Exhibit 48A (Revised).) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 6E and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6E, which is automatically a party to this application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on October 2, 2018, at which a quorum was present, the ANC voted 7-0-0 to support the application with conditions. (Exhibit 59.) The Board adopted several of the conditions proposed by the ANC, finding that they were relevant to mitigating potential impacts of the zoning relief requested. The

[1] The Applicant originally sought relief for vehicle parking and bicycle parking as area variances, (Exhibit 13), but amended the application to instead request relief from these requirements by special exception. (Exhibit 48A.) The original application also included area variance relief from the trash room requirements under Subtitle C § 907.1, but that relief was withdrawn based on revised plans that meet this requirement. (Exhibits 48A and 48C.)

[2] This Corrected Summary Order was issued to correct the approved plans cited in the Order. The original Summary Order cited only Exhibit 48C (Updated Site Plan); however, the final plans approved by the Board are reflected in Exhibit 10, as modified by Exhibit 48C. This is the only change to the Order as originally issued.

Board determined that the ANC's proposed condition requiring the Applicant to make a monetary contribution to neighborhood non-profits was not sufficiently connected with the relief requested to be adopted as a condition of this Order; however, the Board notes that the Applicant has agreed to abide by this condition nonetheless.

The Office of Planning ("OP") submitted a timely report recommending approval of the application. (Exhibit 53.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the application. (Exhibit 54.) The Department of Health filed a response, indicating that it has no comments on the project and that the appropriate agency to respond to the issues raised is the Department of Energy and Environment ("DOEE"). (Exhibit 57.) DOEE filed an initial response noting that it is engaged in litigation before the Public Service Commission on the project and did not have additional comments at that time. (Exhibit 56.) In advance of the hearing, DDOE filed additional testimony from its Chief Science Advisor of Risk Assessment/Toxicology to comment on the concerns raised about electromagnetic fields ("EMF"). (Exhibit 71.) DDOE indicated that the "low levels of EMF anticipated from the Mount Vernon substation are comparable (perhaps even generally lower) to the levels to which we are exposed on a daily basis from typical household appliances, or the normally occurring background levels." (Exhibit 71.) Based on DDOE's research, it opined that the public health and safety are not likely to be compromised as a result of the proposed substation. (Exhibit 71.)

Thirteen letters in support were submitted to the record. (Exhibits 33-36, 44, 45, 62-67, and 72.) Additional petitions and letters in support were submitted by the Applicant. (Exhibit 58.) Five letters in opposition were filed from community members and individuals raising environmental, health, and safety concerns. (Exhibits 17, 41, 43, 68, and 69.) Multiple petitions in opposition were also submitted, signed by many neighbors and parents of students at the adjacent Walker-Jones Education Campus. (Exhibits 14, 15, 37-40, and 46.)

At the public hearing on November 7, 2018, the Board heard testimony in support from Rosemary Segero and Bernadette Harvey. The Board also heard testimony in opposition from Robert Robinson of the D.C. Consumer Utility Board, Parisa Norouzi of Empower DC, Camila Thorndike of Chesapeake Climate Action Network, Nikhil Balakumar of Greentel Group, Tiffany Aziz of Not In My Community Project, Nick Firmand, Ra Amin, and Zulfekar AnsarBey.

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for special exceptions under Subtitle C § 703.1 from the vehicle parking requirements of Subtitle C § 701.5, under Subtitle C § 807.1 from the bicycle parking requirements of Subtitle C § 802.1, and under Subtitle U § 320.1(a) from the utility use requirements of Subtitle U § 203.1(p), to construct an electrical substation in the RF-1 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2, Subtitle C §§ 703.1, 701.5, 807.1, and 802.1, and Subtitle U §§ 320.1(a) and 203.1(p), that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 10, AS MODIFIED BY EXHIBIT 48C, AND WITH THE FOLLOWING CONDITIONS:**

1. Before the construction of the substation begins, the Applicant shall relocate the community garden ("The Farm at Walker Jones") currently in place at New Jersey Avenue and K Street, N.W.

2. The Applicant shall support the creation of a Mt. Vernon Triangle Community Advisory Group ("CAG"), with the participation of the ANC, for ongoing engagement, and to provide guidance and issue recommendations on topics, including, but not limited to:

    a. Future land use (in particular the parcel of land located at K Street and New Jersey Avenue, N.W., which had no designated use at the time Pepco presented at ANC 6E's September 4th and October 2nd meeting) and themes for art;

    b. Installation of an artistic construction fence;

    c. Support for the relocation of The Farm at Walker Jones; and

    d. Pepco's future support for nonprofits serving the community focusing on students, children and seniors for 2021, and subsequent years.

VOTE: **5-0-0** (Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Peter A. Shapiro to Approve.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 18, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR

PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19847 of Elton Investment Group, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle E §§ 205.5 and 5201 from the rear addition requirements of Subtitle E § 205.4, to construct a third-story and rear addition to a principal dwelling unit and convert the dwelling into a flat in the RF-1 Zone at premises 329 16th Street, S.E. (Square 1074, Lot 80).

HEARING DATES: November 7, 2018 and December 12, 2018[1]
DECISION DATE: December 12, 2018

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum, dated June 27, 2018, from the Zoning Administrator, certifying the required relief. (Exhibit 5.)

The Board of Zoning Adjustment ("Board" or "BZA") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 6B and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. The ANC submitted a report recommending approval of the application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on November 13, 2018, at which a quorum was present, the ANC voted 10-0-0 to support the application. (Exhibit 37.)

The Office of Planning ("OP") submitted a timely report, dated November 30, 2018, in support of the application. (Exhibit 36.) The District Department of Transportation ("DDOT") submitted a report, dated October 19, 2018, of no objection to the approval of the application. (Exhibit 30.) DDOT noted in its report that there may be Heritage Trees or Special Trees on site which would require a separate permitting process.

Letters of support from the adjacent neighbor to the north (327 16th Street, S.E.) and from the owners of 335 16th Street, S.E. were submitted to the record. (Exhibits 34D and 39.)

[1] The case was originally scheduled for a public hearing on November 11, 2018, but postponed to December 12, 2018 at the Applicant's request. (Exhibit 29.) The BZA Chair granted the Applicant's request. (Exhibit 31.)

Letters in opposition to the application from the adjacent neighbor to the south (331 16th Street, S.E.) and from the Capitol Hill Restoration Society were submitted to the record. (Exhibits 41 and 42.) Also, Joseph Harris of 306 16th Street, S.E. and Jessica Buechler of 331 16th Street, S.E. testified as persons in opposition to the application.

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for a special exception under Subtitle E §§ 205.5 and 5201 from the rear addition requirements of Subtitle E § 205.4, to construct a third-story and rear addition to a principal dwelling unit and convert the dwelling into a flat in the RF-1 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2, and Subtitle E §§ 205.5, 5201, and 205.4, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 34B.**

VOTE: **5-0-0** (Frederick L. Hill, Lorna L. John, Lesylleé M. White, Carlton E. Hart, and Peter A. Shapiro to APPROVE.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 14, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY

AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19873 of Julia Bunch, as amended, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle D §§ 306.4 and 5201 from the rear addition requirements of Subtitle D § 306.3, to construct a one-story, rear addition to an existing, semi-detached principal dwelling unit in the R-2 Zone at premises 724 Burns Street S.E. (Square 5378, Lot 13).

HEARING DATE: December 12, 2018
DECISION DATE: December 12, 2018

SUMMARY ORDER

SELF-CERTIFICATION

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibits 5 (Original) and 28 (Amended).) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register and by mail to Advisory Neighborhood Commission ("ANC") 7E and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 7E, which is automatically a party to this application. The ANC did not submit a report for this application.

The Office of Planning ("OP") submitted a timely report recommending approval of the application. (Exhibit 29.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application. (Exhibit 32.)

Four neighbors submitted letters in support of the application. (Exhibit 11.)

Special Exception Relief

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for a special exception under Subtitle D §§ 306.4 and 5201 from the rear addition requirements of Subtitle D § 306.3, to construct a one-story, rear addition to an existing, semi-detached principal dwelling unit in the R-2 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2, and Subtitle D §§ 306.3, 306.4, and 5201, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 7.**

VOTE: **5-0-0** (Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Peter A. Shapiro to APPROVE)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 18, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS

APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19882 of Jubilee Housing, Inc., as amended[1], pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle C § 703.2 from the parking requirements of Subtitle C § 701.5, to construct a one-story and penthouse addition and convert the existing office building to a mixed-use building in the RC-3 Zone at premises 1724 Kalorama Road N.W. (Square 2567, Lot 90).

HEARING DATE: December 12, 2018
DECISION DATE: December 12, 2018

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibits 5 (original) and 37 (revised).) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 1C and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 1C, which is automatically a party to this application. The ANC submitted a timely report in support of the application. The ANC report indicated that at a duly noticed and scheduled public meeting on December 5, 2018, at which a quorum was present, the ANC voted 5-0-0 in support of the application. (Exhibit 39.)

The Office of Planning ("OP") submitted a timely report, recommending approval of the application. (Exhibit 35.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application with conditions. (Exhibit 36.)

Testimony in support of the application was presented by Samuel Buggs. Testimony in opposition to the application was presented by Eric Blodnickar.

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for a special exception under Subtitle C § 703.2 from the parking requirements of Subtitle

[1] The original application included a request for lot occupancy relief (Exhibit 5), which was withdrawn.

C § 701.5, to construct a one-story and penthouse addition and convert the existing office building to a mixed-use building in the RC-3 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X §§ 901.2, and Subtitle C §§ 701.5 and 703.2, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBITS 31C1-31C9 AND THE FOLLOWING CONDITIONS:**

1. The Applicant shall provide information on and/or links to current transportation programs and services to employees either electronically (via a website) or in hard-copy format. Examples of information that may be provided include:
    a. WMATA,
    b. goDCgo.com,
    c. Capital Bikeshare,
    d. Car□sharing services,
    e. Uber,
    f. Ridescout,
    g. Commuter Connections Rideshare Program, which provides complimentary information on a variety of commuter programs to assist in determining which commuting options work best for commuters,
    h. Commuter Connections Guaranteed Ride Home, which provides commuters who regularly (twice a week) carpool, vanpool, bike, walk or take transit to work with a free and reliable ride home in an emergency, and
    i. Commuter Connections Pools Program, which incentivizes commuters who currently drive alone to carpool. Participants can earn money for carpooling to work and must complete surveys and log information about their experience.

2. The Applicant shall provide convenient and covered secure bike parking facilities for a minimum of one required long□term bicycle space.

3. The Applicant shall provide shower and changing facilities for the Jubilee office staff in the penthouse office space.

4. The Applicant shall offer employees a transit subsidy of $100/month that can be used for the Metro or off-street parking and will continue to offer the benefit.

5. The Applicant shall, through its group membership with Capital Bikeshare, allow employees to enroll for an annual membership for $10 (regular memberships cost $85/year). Membership includes a helmet.

6. A member of the property management team shall be designated as the Transportation Management Coordinator ("TMC"). The TMC shall be responsible for ensuring that information is disseminated to tenants of the building. The position may be part of other duties assigned to the individual.

7. The property management website shall include information on and/or links to current transportation programs and services, such as:
    a. Capital Bikeshare,
    b. Car-sharing services,
    c. Ride-hailing services (e.g. Lyft or Uber),
    d. Transportation Apps (e.g. Metro, Citymapper, Spotcycle, Transit),
    e. Other transportation sources (e.g. DDOT's DC Bicycle Map, goDCgo.com, WMATA),
    f. Commuter Connections Rideshare Program, which provides complimentary information on a variety of commuter programs to assist in determining which commuting options work best for commuters,
    g. Commuter Connections Guaranteed Ride Home, which provides commuters who regularly (twice a week) carpool, vanpool, bike, walk or take transit to work with a free and reliable ride home in an emergency, and
    h. Commuter Connections Pools Program, which incentivizes commuters who currently drive alone to carpool. Participants can earn money for carpooling to work and must complete surveys and log information about their experience.
    i. A current list of neighborhood retail, services, and amenities such as grocers, pharmacies, dry cleaners, and salons/barbershops and publish the list on the property management website.

8. An electronic display shall be provided in a common space shared by residents in the building and will provide real-time public transit information such as nearby Metrorail stations and schedules, Metrobus stops and schedules, car-sharing locations, and nearby Capital Bikeshare locations indicating the number of bicycles available at each location.

9. The Applicant shall provide convenient and covered secure bike parking facilities in a bicycle storage room in the residents' portion of the building. Nine long□term bicycle spaces shall be provided in lieu of the required eight spaces.

10. The Applicant shall, through its group membership with Capital Bikeshare, allow residents to enroll for an annual membership for $10 (regular memberships cost $85/year). Membership includes a helmet.

11. Six short-term bicycle parking spaces shall be provided in public space in front of the proposed building for visitor use.

12. Shower and changing facilities shall be provided on the ground□ floor for Sitar employees.

13. Sitar shall continue to offer its employees a $50/month transit subsidy.

14. Convenient and covered secure bike parking facilities shall be provided in a bicycle storage room in the Sitar portion of the building. Four long□term bicycle spaces shall be provided in lieu of the required one space.

VOTE: **5-0-0** (Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Peter A. Shapiro to APPROVE.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 14, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING

THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19888 of SOME, Inc., pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle C § 909.2 from the loading requirements of Subtitle C § 901.1, to construct 139 affordable housing units, in a new 14-story building in the D-5 Zone at premises 1509-1519 North Capitol Street N.E. (Square 668, Lots 41, 67, 810, 809).

HEARING DATE: December 14, 2018
DECISION DATE: December 14, 2018

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 5.) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 5E and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 5E, which is automatically a party to this application. The ANC submitted a timely report in support of the application. The ANC report indicated that at a duly noticed and scheduled public meeting on November 18, 2018, at which a quorum was present, the ANC voted 9-0-0 in support of the application. (Exhibit 37.)

The Office of Planning ("OP") submitted a timely report, recommending approval of the application subject to the Applicant's Loading Management Plan. (Exhibit 35.)

The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application with conditions. (Exhibit 36.)

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for a special exception under Subtitle C § 909.2 from the loading requirements of Subtitle C § 901.1, to construct 139 affordable housing units, in a new 14-story building in the D-5 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2, and Subtitle C §§ 901.1 and 901.2, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 33C AND THE FOLLOWING CONDITIONS:**

The Applicant shall implement the Loading Management Plan in Exhibit 31A, which states that:

1. A loading manager shall be designated by the building management, who will coordinate with residents to schedule deliveries, shall direct residents in applying for parking restrictions curbside, and will be on-duty during delivery hours.

2. Residents shall be required to schedule move□ins and move-outs with the loading manager as required by the leasing regulations.

3. No move□ins or move□outs shall occur during peak hour restricted time periods, as emergency no-parking signs for on-street spaces are not permitted during these hours.

4. The loading manager shall coordinate with trash pick□up contractors to minimize the time trash trucks need to use the curbside loading area. Trash shall only be collected curbside during off-peak times, when parking is permitted on North Capitol Street.

5. Trash collections shall utilize the existing curbside parking along the site frontage on North Capitol Street. If this area is occupied with parked vehicles, trash operations shall take place within the existing loading zone on North Capitol Street, immediately south of the site. Both the on-street parking and the loading zone on North Capitol Street are located immediately south of the site and are restricted during morning and afternoon commuting hours. Building management shall utilize rolling dumpsters to transfer waste from the trash room to the waste collection truck.

6. Trucks using the curbside loading zone will not be permitted to idle and must follow all District guidelines and regulations for heavy vehicle operation, including, but not limited to, 20 DCMR Chapter 9, Section 900 (Engine Idling), DDOT's Freight Management and

Commercial Vehicle Operations document and the primary access routes listed in the DDOT Truck and Bus Route System.

7. The loading manager shall be responsible for disseminating DDOT's Freight Management and Commercial Vehicle Operations document to drivers to encourage compliance with District laws and DDOT's truck routes. The loading manager shall post these documents in a prominent location on-site.

VOTE: **5-0-0** (Frederick L. Hill, Peter A. Shapiro, Lesylleé M. White, Lorna L. John, and Carlton E. Hart to APPROVE.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: December 14, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME

MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 08-07D(1)
Z.C. CASE NO. 08-07D
Four Points Development, LLC
(PUD Time Extension @ Square 5785, Lot 839 and Part of Lot 906)
ORDER DENYING WAIVER TO PERMIT THE FILING BY A NON-PARTY OF A MOTION TO RECONSIDER Z.C. ORDER NO 08-07D
November 19, 2018

Pursuant to Z.C. Order No. 08-07D, effective as of October 12, 2018, the Zoning Commission for the District of Columbia ("Commission") granted a request submitted by Four Points Development, LLC ("Applicant") for a two-year extension of the time period in which to begin construction of the approved second-stage planned unit development ("PUD") for "Building 1" located at Lot 839 and part of Lot 906 in Square 5785 ("Property").

No new parties may be added to a case when a time extension is being considered. Therefore, the parties to Z.C. Case No. 08-07D were the same as in Z.C. Case No. 08-07A, which was the case that granted the second stage PUD. Those parties were the Applicant and Advisory Neighborhood Commission ("ANC") 8A.

Subtitle Z § 700.3 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR") provides the following:

> A motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 ***may be filed by a party*** within ten (10) days of the order having become final. The motion shall be served upon all other parties.

(Emphasis added.)

Subsection 101.9 of Subtitle Z provides that the "Commission may, for good cause shown, waive any of the provisions of this subtitle if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law."

On October 22, 2018, the Current Area Residents East of the River ("CARE"), which was not a party to Z.C. Case No. 08-07A, requested a waiver of the party status requirement ("Waiver Request") (Exhibit ["Ex."] 8.). On October 29, 2018, the Applicant filed a letter requesting that the Commission deny the waiver. (Ex. 9.)

Although the Waiver Request was embedded within what was entitled a Motion to Reconsider, no such motion could be deemed filed unless the waiver was granted. Therefore, at its public meeting held on November 19, 2018, the Commission first considered the Waiver Request and,

for the reasons stated below, voted to deny the request, such that the Motion to Reconsider is not considered as having been filed.

As set forth below, CARE did not demonstrate any good cause for waiving the party status requirement.

CARE's Waiver Request argued that the good cause to waive the party requirement was based on Z.C. Case No. 08-07, which granted the first-stage PUD for the Property and which was decided over 10 years ago when there was no ANC for the single member district ("SMD") for the Property. Thus, CARE alleged that community members believed that the project had been approved and nothing could be done to contest it. (*See* Waiver Request, p. 1.) However, CARE's argument ignores the fact that the extension was for the second-stage approval for Building 1, which was granted in 2015, not 10 years ago as claimed by CARE. During the second-stage approval process the ANC, the SMD, and many other community organizations and individuals participated in the public hearing process. For example, there was testimony presented by SMD Commissioner Fuller at the December 18, 2014 public hearing; there was an ANC letter dated December 3, 2014, submitted to the case record with a draft community benefits agreement; there was a party status request filed by the Concerned Citizens of Anacostia; there was testimony from five individuals in support of the application and two individuals in opposition to the application at the public hearing; and there were letters in support of the application filed by 43 individuals and local organizations. (*See* Z.C. Case No. 08-07A public hearing transcript dated 12/18/2014 and Ex. 23, 26-31, 34-68, 70-71, 76, and 78.)

In addition, the Applicant indicated in its Request for Denial that it presented and described the extension request for Building 1 at ANC 8A's regularly-scheduled public meetings on May 1, 2018 and June 5, 2018, and at an SMD meeting on May 8, 2018. There is nothing in the record to controvert this assertion.

Thus, the Commission finds that CARE's argument that the party requirement should be waived now because of alleged inadequate ANC representation 10 years ago is unfounded as it applies to this Commission's review and approval of the second-stage PUD for Building 1 and the extension thereof. Therefore, the Commission concludes that CARE did not provide any legitimate basis for waiving the party requirement of 11-Z DCMR § 700.3.

The Commission also finds that reopening the case record to allow a non-party to file documents after the PUD extension application was thoroughly reviewed by the Commission following deliberations at a public meeting, would be prejudicial to the Applicant. The Commission's rules precluded the Applicant from filing for a building permit while its time extension request was pending. Allowing for this non-party to file for reconsideration in the absence of good cause would needlessly cause further delay and likely increase the costs of establishing a project that the Commission has already determined to provide benefits greater than matter of right development on the site.

In numerous orders the Commission has repeatedly stated the importance of the party status requirement. (*See, e.g.* Z.C. Order No. 11-24, p. 3 (denying a waiver request to by a non-party and reiterating that "only the existence of 'extraordinary circumstances' would justify the waiver of the requirement that only a party may file a motion for reconsideration, such as when no notice of a hearing is given"); Z.C. Order No. 16-07(1), p. 2) CARE has failed to meet this standard. Therefore, for the reasons stated above, the Waiver Request is hereby **DENIED**.

On November 19, 2018, upon the motion of Chairman Hood, as seconded by Vice Chairman Miller, the Zoning Commission **DENIED** CARE's request to waive the party status requirement as described in the Waiver Request at its public meeting by a vote of **5-0-0**. (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to deny.)

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is on December 28, 2018.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-19A
Z.C. CASE NO. 14-19A
M Street Development Group, LLC
(PUD Time Extension @ Square 772, Lots 803-804)
November 19, 2018

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia ("Commission") was held on November 19, 2018. At the meeting, the Commission approved a request from M Street Development Group, LLC ("Applicant") for a two-year extension of the time period in which to begin construction of the approved building located at Square 772, Lots 803 and 804) ("Property"). The Commission considered the application pursuant to Subtitle Z, Chapter 7 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR").

FINDINGS OF FACT

1. Pursuant to Z.C. Order No. 14-19, dated September 21, 2015, and effective on November 20, 2015, the Commission approved a consolidated planned unit development ("PUD") and a related Zoning Map amendment from the from the C-M-1 Zone District to the C-3-C Zone District for the Property.[1] The Property is bounded by N Street, N.E. to the north, 4th Street, N.E. to the east, M Street, N.E. to the south, and 3rd Street, N.E. to the west.

2. The approved PUD was for a mixed-use building consisting of approximately 408,496 square feet of gross floor area devoted to residential use (416 residential units, plus or minus 10%) and approximately 10,302 square feet of gross floor area devoted to retail use ("Project").

3. Pursuant to Z.C. Order No. 14-19, Decision No. D(2), the Applicant was required to file a building permit application for the Project by November 20, 2017, and was required to commence construction of the Project by November 20, 2018.

4. The Applicant filed a building permit application for the Project on August 24, 2016, thus meeting the first condition of Decision No. D(2). However, due to delay related to the Property's environmental contamination and ongoing remediation, the Applicant was unable to begin construction by November 20, 2018.

[1] At the time that Z.C. Order No. 14-19 was issued, the Property was known as Lots 1, 2, 6, 7, 19, 801, and 802 in Square 772. In 2017, new tax lots were assigned to the Property, which is now known as Lots 803 and804 in Square 772.

The original PUD was approved under the 1958 Zoning Regulations ("ZR58"). On September 6, 2016, the provisions of ZR58 were repealed and replaced with the 2016 Zoning Regulations.

5. On October 9, 2018, the Applicant filed a request for a two-year extension of the time period in which to begin construction of the Project, such that construction would be required to begin no later than November 20, 2020.

6. The Applicant's request for a two-year time extension was supported by evidence describing the Property's history of gasoline station use and resultant soil contamination on a portion of the Property that had not yet been fully remediated. The Applicant submitted a detailed history of the remediation work, including the following:

   a. The Applicant negotiated a Corrective Action Plan ("CAP") with BP Oil Company, the responsible party for completing soil remediation measures, ("BP") to establish a remediation plan for the Property. The CAP was required to be approved by the Department of Energy and the Environment ("DOEE") before issuance of a building permit or commencement of construction. The extension application described the extensive negotiations with BP and DOEE that were involved in establishing the CAP;

   b. On July 29, 2016, BP submitted the proposed CAP to DOEE, which was ultimately not approved despite the Applicant's best efforts to finalize its terms and coordinate with BP and DOEE. Following feedback, BP submitted a revised CAP, which incorporated DOEE's suggestions and which DOEE approved on January 5, 2017;

   c. From May to December, 2016, the Applicant engaged in negotiations with BP to establish field procedures under the proposed CAP for remediating contaminated soil and/or groundwater during construction of the PUD. The Applicant engaged environmental consultants and counsel at that time and prepared a draft Coordination Agreement, but was unable to reach a final agreement with BP due to BP's position that an existing access agreement was sufficiently detailed to guide the remediation work in the field while under construction;

   d. Following the initial PUD approval, the Applicant solicited and compiled bids from subcontractors with construction pricing, which the Applicant incorporated into its financial models. On September 9, 2016, the Applicant issued the numbers to its prospective construction lender;

   e. On March 6-10, 2017, contaminated soil was excavated and removed from the contaminated portion of the Property in accordance with the DOEE-approved CAP, and on March 19, 2017, a Soil Excavation Summary Report of Observations was issued. The Applicant reviewed the report with DOEE, and DOEE indicated that it was satisfied with the results;

   f. Due to the time for DOEE to approve the CAP and for BP to complete the excavation work required by the CAP, the construction pricing that the Applicant's general contractor previously issued on September 9, 2016 could no

longer be relied upon. Once the construction pricing was lost, the Applicant had to take the Project back out into the marketplace to be re-priced;

g. On June 28, 2017, the project was re-priced in the subcontractor market, which resulted in an almost $7.2 million increase. Based on this change, the Applicant spent additional time exploring potential options for value engineering the Project. Losing the construction pricing also placed the capital structure and related project financing at risk. As a result, the Applicant's previously-identified capital partner that had spent many months reviewing the Project's budget, design, and market studies, determined that it was not able to adequately finance the Project;

h. In the first quarter of 2018 the Applicant identified and reached an agreement with a replacement capital partner and subsequently worked through an on-boarding process that included sharing the budget and pro-forma, negotiating design work, and undertaking market studies; and

i. During this time an environmental services firm studied and issued recommendations for a protective soil barrier to be installed over the contaminated portion of the Property, as recommended in the CAP. However, the Applicant's efforts to design and install the most effective system were still ongoing as of the date that the extension application was filed, as a result of evolving technologies.

7. In its application materials, the Applicant indicated that the Project was back in debt markets to obtain construction financing, and that the Applicant was reviewing financing term sheets from local construction lenders. The application also explained that once the Applicant identifies a construction lender, the general contractor will be able to obtain final construction pricing so that the Applicant can make final preparations to commence construction of the Project. Based on the foregoing, the Applicant indicated that construction of the approved Project would be able to commence well in advance of November, 2020.

8. Outside of the Applicant's financing and environmental efforts, the Applicant also described how it continued to pursue permits for the approved Project as follows:

a. A raze permit was issued on July 17, 2016, and was re-filed in August, 2018 pursuant to the expired DOH Vector Clearance and DDOT Occupancy Permit;

b. A sheeting permit was issued on October 17, 2017, followed by approval of a six-month extension that extended the permit to April 18, 2019;

c. A foundation permit was issued on July 18, 2017, followed by approval of a six-month extension that extended the permit to January 18, 2019; and

d. A building permit application was filed on August 24, 2016, and the Applicant sent comment responses to the permit expeditor on September 26, 2018.

9. The application also stated that the Applicant engaged WDG Architecture in the summer of 2015 to complete construction drawings for the Project. By December 18, 2015, the design document architectural drawing set was complete; by February 2, 2016, 50% of the construction drawing set was complete; by March 9, 2016, the foundation to grade drawings were complete; by July 15, 2016, the permit/construction bid set was complete; and by May 19, 2017, the construction drawings were 100% complete.

10. The Applicant also indicated that as of the time of filing the extension application, it had already undertaken the following actions required to move forward with redevelopment of the Property:

a. Executed a First Source Employee Agreement with the District's Department of Employment Services on August 30, 2016;

b. Completed extensive geotechnical due diligence in August, 2016;

c. Submitted an initial service application to Washington Gas regarding utility distribution systems on April 1, 2016;

d. Submitted an initial service application to Pepco regarding utility distribution on November 24, 2014;

e. Submitted water and sewer plans to DC Water in 2016, and posted $350,330 in cash for water and sewer pipe inspection deposits on August 18, 2016; and

f. Engaged a general contractor and underwent two rounds of construction bidding with subcontractors.

11. Other than the Applicant, the only party to this case was Advisory Neighborhood Commission ("ANC") 6C. As indicated on the Certificate of Service included in Exhibit 1, the Applicant served the PUD extension request on ANC 6C on October 9, 2018.

12. The Office of Planning ("OP") submitted a report to the record (Ex. 5) dated November 9, 2018, recommending that the Commission approve the two-year extension request. OP indicated that the Applicant demonstrated good cause for the extension request due to environmental remediation negotiations with BP, which led to significant construction price increases and the need for renegotiation of financing agreements. OP also acknowledged that remediation negotiations and subsequent revisions to remediation techniques delayed consideration by District agencies, and that while plan revisions were made in time to complete construction drawings and file for a building permit within two years of the effective date of Z.C. Order No. 14-19, it was not possible for the Applicant to

secure all environmental-related reviews and sign-offs from District agencies in time to begin construction by November 20, 2018.

13. Because the Applicant demonstrated good cause with substantial evidence pursuant to 11-Z DCMR § 705.2(c) of the Zoning Regulations, the Commission finds that the request for the two-year time extension should be granted.

CONCLUSIONS OF LAW

1. Pursuant to 11-Z DCMR § 705.2, the Commission may extend the validity of a PUD for good cause shown upon a request made before the expiration of the approval, documenting the following:

   a. The request is served on all parties to the application by the applicant, and all parties are allowed 30 days to respond;

   b. There is no substantial change in any material facts upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for approving the original PUD; and

   c. The applicant demonstrates with substantial evidence one or more of the following criteria:

      i. An inability to obtain sufficient project financing for the development, following an applicant's diligent good faith efforts to obtain such financing, because of changes in economic and market conditions beyond the applicant's reasonable control;

      ii. An inability to secure all required governmental agency approvals for a development by the expiration date of the order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or

      iii. The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control that renders the applicant unable to comply with the time limits of the order.

2. The Commission concludes that the Applicant complied with the notice requirements of 11-Z DCMR § 702.2(a) by serving all parties with a copy of the application and allowing them 30 days to respond.

3. The Commission concludes there has been no substantial change in any material facts that would undermine the Commission's justification for approving the original PUD.

4. The Commission also concludes that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11-Z DCMR § 705.2(c). Specifically, the Applicant provided substantial evidence that there are significant environmental constraints at the Property that are beyond the Applicant's reasonable control and which prevented the Applicant from beginning construction of the Project by November 20, 2018.

5. The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give great weight to the affected ANC's recommendations. In this case, ANC 6C received notice of the application and was given 30 days to respond. However, ANC 6C did not submit a report on the application, and therefore there is nothing to which the Commission can give great weight.

6. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2001)), to give great weight to OP recommendations. The Commission has carefully considered the OP's recommendation in support of the application and agrees that approval of the requested two-year time extension is warranted.

7. Pursuant to 11-Z DCMR § 705.7, the Commission must hold a public hearing on a request for an extension of the validity of a PUD only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the PUD concerning any of the criteria set forth in 11-Z DCMR § 705.2. The Commission concludes that a hearing is not necessary for this request since there are not any material factual conflicts generated by the parties concerning any of the criteria set forth in 11-Z DCMR § 705.2.

8. The Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

DECISION

In consideration of the Findings of Fact and Conclusions of Law herein, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the application for a two-year extension of the time period in which to begin construction of the Project located at Square 772, Lots 803 and 804, such that construction must begin by November 20, 2020.

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., ("Act") the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identify or expression, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, genetic

information, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On November 19, 2018, upon the motion of Chairman Hood, as seconded by Commissioner Turnbull, the Zoning Commission **APPROVED** the application at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on December 28, 2018.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 15-18A(1)
Z.C. Case No. 15-18A
Initio, LP
(Minor Modification of Consolidated PUD and Related Map Amendment @ Square 1194, Lot 811)
ORDER DENYING MOTION FOR LEAVE TO FILE UNTIMELY MOTION FOR RECONSIDERATION FILED BY AS A NON-PARTY
February 26, 2018

By Z.C. Order No. 15-18, the Zoning Commission for the District of Columbia ("Commission") granted the application of Initio, LP ("Applicant") for approval of a consolidated planned unit development ("PUD") and a related Zoning Map amendment from the C-2-A Zone District/unzoned to the W-2 Zone District for Lot 811 in Square 1194 ("PUD Site"). In connection with the PUD, the Commission waived the minimum land area requirements §. 2401.1 of the 1958 Zoning Regulations to an extent greater than permitted by § 2401.2, having lawfully found that it had the authority to exceed a self-imposed limitation on its waiver authority.

The original parties to Z.C. Case No. 15-18 were the Applicant and Advisory Neighborhood Commission ("ANC") 2E

After the effective date of the Zoning Regulations of 2016, the Commission, through ZC Order No. 15-18A, granted a minor modification of the PUD to vacate Findings of Fact Nos. 37 and 38 and Conclusion of Law No. 4 in ZC Order No. 15-18 to in change the basis of its waiver of the minimum land area requirements to Subtitle X § 301 of the new regulations, which permitted the extent of the waiver granted under the 1958 regulations.

On February 2, 2018, Z.C. Order No. 15-18A was published in the *DC Register* and became final and effective upon publication. 11-Z DCMR § 604.9.

Subsection § 700.3 of the Zoning Commission's Rules of Practice and Procedure (Title 11-Z DCMR) provides:

> A motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 ***may be filed by a party*** within ten (10) days of the order having become final. The motion shall be served upon all other parties.

(Emphasis added.)

Subsection 101.9 of those rules provides that the Commission may, for good cause shown, waive any of the provisions of Title 11-Z if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

On February 13, 2018, one day after the ten-day period expired, the Committee of 100 on the Federal City ("Committee"), which was not a party to the case, filed a Motion to Reopen the

Record for an untimely Motion to Reconsider Z.C. Order 15-18A ("Motion") (Exhibit 9.)[1] The Commission will treat the Committee's Motion as requesting two waivers, one from the requirement that a motion for reconsideration be filed by a non-party and a second from the requirement to file a motion for reconsideration within 10 days of the order having become final. The Applicant filed an opposition.

Because the Committee was not a party to the original proceeding and the Motion to Reconsider was not timely filed, technically the Commission must grant the two waivers sought before it could formally accept the Committee's Motion to Reconsider into the case record.

The Commission voted not to grant either request because the Committee made no effort to demonstrate good-cause as to why the waivers should be given, Instead the Commission simply argued the merits of its reconsideration request. However, proving the merits of a motion for reconsideration and proving good-cause to accept it are two different things.

For the reasons stated above, the Motion for Leave to file is hereby **DENIED** and the extent to which the Motion included a motion for reconsideration, that motion is deemed not to have been filed.

On February 26, 2018, upon the motion of Chairman Hood, as seconded by Commissioner Turnbull, the Zoning Commission **DENIED** the Motion at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to deny).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the D.C. Register; that is, on December 28, 2018.

[1] Oddly the form submitted by the Committee was dated May 11, 2017.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 15-18B
Z.C. Case No. 15-18B
Initio, LP
(Modification of Consequence for PUD @ Square 1194, Lot 811)
November 19, 2018

Pursuant to notice, the Zoning Commission for the District of Columbia ("Commission") held a public meeting on November 19, 2018, to consider an application by Initio, LP ("Applicant") for a modification of consequence for the planned unit development ("PUD") approved by Z.C. Order No. 15-18 for the parcel located at 2715 Pennsylvania Avenue, N.W., and more particularly identified as Square 1194, Lot 811 ("Property"). The modification of consequence request was made pursuant to Subtitle Z, Chapter 7, Title 11 of the District of Columbia Municipal Regulations ("DCMR"). For the reasons stated below, the Commission hereby approves the application.

FINDINGS OF FACT

A. The Application, Parties, Hearing, and Post-Hearing Filings

1. Pursuant to Z.C. Order No. 15-18, dated January 30, 2017, and effective March 10, 2017 ("Order"), the Commission approved an application for consolidated review of a PUD and a related Zoning Map amendment from the C-2-A Zone District/unzoned to the W-2 Zone District for the Property in order to permit the redevelopment of the Property with a mixed-use building that has a restaurant on the ground floor and a four-story apartment house with seven residential units above. In connection with the PUD, the Commission waived the minimum area requirements of Sec. 2401.1 of the 1958 Zoning Regulations to permit a land area of 7,413 square feet.

2. Pursuant to Z.C. Order No. 15-18A, the Commission granted a minor modification of the PUD in order to vacate Findings of Fact Nos. 37 and 38 and Conclusions of Law No. 4 in Z.C. Order No. 15-18 in order to affirm the waiver of the minimum lot area requirements pursuant to Subtitle X § 301 of the Zoning Regulations of 2016 and not § 2401 of the 1958 Zoning Regulations.

3. The Applicant filed Z.C. Case No. 15-18B on August 10, 2018, seeking either a technical correction or modification of consequence to change the size of the subject property from 7,413 square feet to 7,211 square feet. The reduction was due to a discrepancy in the land area noted on the assessment and taxation plat that created Lot 811 and the land area noted on the underlying record lot for Lot 15.

4. Pursuant to a letter dated August 22, 2018, the Applicant amended the application to seek a modification of consequence for all of the following:

(a) A reduction in the size of the subject property from 7,413 square feet to 7,211 square feet;

(b) Minor changes to the roof structures, including an increase in the height of the elevator overrun from 15'-0" to 18'-1 ½"; and

(c) A change in the brick color on the building from red to a mid-tone gray.

(Exhibit ("Ex.") 5.)

5. In a letter dated September 18, 2018, the application was further amended to include a request from flexibility from the lot occupancy requirements. (Ex. 9.) Specifically, the Applicant requested flexibility to have a lot occupancy of 76.9% where a maximum of 75% is permitted for the W-2 Zone District. The PUD was originally approved with a lot occupancy of 74.8%; however, the reduction in the size of the property from 7,413 square feet to 7,211 square feet, resulted in an increase in the lot occupancy.

6. Advisory Neighborhood Commission ("ANC") 2E was the only other party to the case.

7. In a letter to the Commission dated September 13, 2018, ANC 2E acknowledged that it was provided with a copy of application seeking to reduce the size of the property from 7,413 square feet to 7,211 square feet, that it was afforded the opportunity to comment on the amendment, and that it took no position on the matter. (Ex. 8.)

8. After the application was amended to include the additional modification requests, ANC 2E filed letters with the Commission dated October 9, 2018, acknowledging that it was provided a copy of the proposed amendments to the PUD, that it was afforded the opportunity to comment on the amendments, and that it took no position on the matter. (Ex. 10-11.)

9. In satisfaction of 11-Z DCMR § 703.13, the Applicant provided a Certificate of Service, which noted that ANC 2E was served with the application.

10. The Office of Planning ("OP") submitted a report on September 7, 2018. (Ex. 7.) The OP report recommended approval of the application.

CONCLUSIONS OF LAW

1. Pursuant to 11-Z DCMR § 703.1, the Commission, in the interest of efficiency, is authorized is authorized to make "modifications of consequence" to final orders and plans without a public hearing. A modification of consequence means "a modification to a contested case order or the approved plans that is neither a minor modification nor a modification of significance." (11-Z DCMR § 703.3.) Examples of modifications of consequence "include, but are not limited to, a proposed change to a condition in the final

order, a change in position on an issue discussed by the Commission that affected its decision, or a redesign or relocation of architectural elements and open spaces from the final design approved by the Commission." (11-Z DCMR § 703.4.)

2. The Commission concludes that the modifications requested and as described in the above Findings of Fact, are modifications of consequence and, therefore, can be granted without a public hearing.

3. Although the request for flexibility of the lot occupancy constitutes additional flexibility from the Zoning Regulations for the PUD, the Zoning Commission concludes that said flexibility should be approved as a modification of consequence without a public hearing. There are no issues or concerns that would benefit from a public hearing. As noted in the OP report, there is no change in the bulk, size and intensity of use of the approved PUD, and no change to any impacts generated by the PUD that were not already considered in the original PUD approval.

4. The Commission is required under D.C. Code Ann. § 1-309.10(d)(3)(A) (2001) to give great weight to the affected ANC's recommendation. In this case, ANC 2E voted to take no position on the application. (*See* Ex. 8, 10.)

DECISION

In consideration of the above Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of a modification of consequence to the consolidated PUD and related Zoning Map amendment application approved in Z.C. Case No. 15-18, as modified in Z.C. Case No. 15-18A as follows:

1. The size of the Property shall be reduced from 7,413 square feet to 7,211 square feet.

2. The PUD shall be developed in accordance with the plans titled "2715 Pennsylvania Avenue" prepared by Souto Moura Arquitectos, dated July 1, 2016 and marked as Exhibits 28H1 and 28H2 in Z.C. Case No. 15-18, and the supplemental lighting plans, dated October 11, 2016, and marked as Exhibits 49A1 and 49A2 ("Plans") in Z.C. Case No. 15-18, except as modified as follows:

   (a) The Applicant shall have flexibility to provide a lot occupancy of 76.9% where a maximum of 75% is permitted in the W-2 Zone District, as reflected on the zoning chart marked as Exhibit 6A of the record;

   (b) The permitted height of the elevator overrun for the PUD shall be 18'-1 ½" as reflected on the plans marked as Exhibit 5G of the record; and

   (c) The brick color on the building shall be a mid-tone gray as reflected on the architectural renderings and plans marked as Exhibit 5I of the record.

3. All of the other conditions in Z.C. Order No. 15-18 and 15-18A shall remain unchanged.

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., ("Act") the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identify or expression, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, genetic information, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On November 19, 2018, upon the motion of Commissioner Miller, as seconded by Commissioner Shapiro, the Zoning Commission **APPROVED** the application at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on December 28, 2018.