SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SAFE HEALTHY PLAYING FIELDS INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 2020 CA 4979 B**
	:	**Judge Todd E. Edelman**
DISTRICT OF COLUMBIA,	:	
	:	
Defendant.	:	

ORDER

This matter comes before the Court upon Plaintiff Safe Healthy Playing Fields, Inc.'s Motion for Partial Summary Judgment ("Plaintiff's Motion"), filed November 3, 2021, and Defendant District of Columbia's Motion for Summary Judgment ("Defendant's Motion"), filed November 3, 2021. Defendant filed its Opposition to Plaintiff's Motion on November 22, 2021, to which Plaintiff filed its Reply on December 3, 2021; Plaintiff likewise filed its Opposition to Defendant's Motion on November 22, 2021, to which Defendant filed its Reply on December 3, 2021. Because the parties' cross-motions for summary judgment largely turn on the same issues, the Court analyzes the substance of both Motions together. In the end, the Court agrees with the Plaintiff's position in most, but not all, respects, and thus grants each party's motion in part.

I. Factual and procedural history

This case arises from Plaintiff's[1] request under the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531-539, to the District of Columbia Department of

[1] Plaintiff Safe Healthy Playing Fields "is an environmental and public health 501(c)(3) nonprofit organization that advocates for grass and natural surfaces on athletic fields and children's play areas by educating the public about the

General Services ("DGS"). Plaintiff alleges that in early 2019, it collected "crumb rubber" samples from poured-in-place ("PIP") playground surfaces at various District of Columbia Schools ("DCPS") and sent them to the Ecology Center, a certified laboratory, for lead testing. Pl. Mot. Mem. at 1; Am. Compl. ¶¶ 19-20. In May and June of 2019, the Ecology Center sent letters on Plaintiff's behalf to various DCPS and District of Columbia officials alerting them to high lead levels in some of the DCPS PIP samples it had analyzed. Pl. Mot. Mem. at 1; Am. Compl. ¶ 23; Ans. ¶ 23. In response, and following media coverage concerning the presence of lead on DCPS playgrounds, the DGS contracted in June 2019 with Soil and Land Use Technology, Inc. ("SaLUT"), a third-party industrial hygienist, to conduct lead testing of almost 320 PIP surfaces at 87 DCPS sites. Am. Compl. ¶ 28; Ans. ¶ 28. SaLUT released a preliminary report in September 2019 and a final report in March 2020 showing significant lead presence at many of DCPS's PIP playgrounds. *See* Am. Compl. ¶¶ 32-37; Ans. ¶¶ 32-37. According to SaLUT's September 2019 report, 21.5% of DCPS PIP playgrounds tested had lead levels over 400 parts per million—an amount deemed by DCPS and SaLUT to pose an unacceptable lead exposure risk for students. Am. Compl. ¶ 32; Ans. ¶ 32. The March 2020 SaLUT report did not, however, disclose the exact lead levels detected at any particular DCPS PIP playground or the lead levels that persisted at the DCPS PIP playgrounds following SaLUT's subsequent remediation efforts. Am. Compl. ¶¶ 38-39; Ans. ¶¶ 38-39.

Plaintiff submitted a FOIA request (No. 2020-FOIA-03257) to DGS on February 10, 2020 seeking ten categories of documents.[2] Am. Compl. ¶ 62; Ans. ¶ 62; Am. Compl., Ex. A;

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financial, environmental, and public health problems associated with artificial turf fields and poured-in-place ("PIP") rubber playgrounds." Pl. Mot. Mem. at 1; *see also* Am. Compl. ¶ 7.

[2] According to Plaintiff, "Categories 1 through 3 sought communications between DGS personnel and employees of various industrial hygienist or artificial turf companies; Category 4 sought documents provided to DGS from artificial turf manufacturers or suppliers; Category 5 sought all test results and data underlying SaLUT's September 2019 and March 2020 lead testing reports; Category 6 sought public statements from D.C. officials concerning lead

Def.'s Statement of Undisputed Material Facts (SUMF) ¶ 1. On March 5, 2020, DGS notified Plaintiff that it was electing to take the ten-day extension available for unusual circumstances, Am. Compl. ¶ 63; *see* Def. Opp'n at 2, and, according to Plaintiff, established a response date of March 19, 2020.[3] The parties agree that the District of Columbia Council enacted legislation on March 17, 2020 suspending all FOIA deadlines during the public health emergency declared by Mayor Muriel Bowser, and enacted successive measures extending the suspension of agency deadlines to respond to FOIA requests through January 15, 2021. Def. Opp'n at 2; Def.'s SUMF ¶¶ 4-6.

DGS delivered its initial response via email on March 10, 2020, providing its "purported" response to Categories 5 through 9.[4] Pl. Statement of Undisputed Material Facts (SUMF) ¶ 39; *see also* Ans. ¶ 64. In response to Category 5, DGS provided in its March 10, 2020 email two weblinks to public DGS webpages—one directed to a DGS webpage containing 2019 G-MAX surface hardness impact test results for DC synthetic turf fields, and the other directed to SaLUT's final report page. Compl. ¶ 64; Ans. ¶ 64. In response to Category 6, the email included an attachment containing testimony from a Facilities Management Division[5] hearing. Compl. ¶ 64; Ans. ¶ 64. DGS asserted in the email that it was unable to locate or identify records responsive to Categories 7 and 9, and noted that DGS's Office of the Chief Technology Officer (OCTO) would require two additional weeks to generate a report in response to Category

on DCPS playgrounds; Categories 7 through 9 sought records of citizen complaints or concerns regarding lead on DCPS playgrounds; and Category 10 sought risk assessments concerning artificial turf fields or playgrounds installed at DCPS." Pl. Mot. Mem. at 2 n1.

[3] Defendant states this deadline was March 18, 2020. Def. Opp'n at 2.

[4] For the sake of clarity, the Court will adopt Plaintiff's practice of referring, for example, to the requests made in Category 9 of its February 10, 2020 FOIA request simply as "Category 9."

[5] DGS's Facilities Management Division contracted with SaLUT to test DCPS playgrounds for lead. Compl. ¶ 71; Ans. ¶ 71.

8. Compl. ¶ 64; Ans. ¶ 64. The email did not address Categories 1 through 4 or 10, but stated that DGS was continuing to process the request and would provide a response by March 19, 2020. Compl. ¶ 64; Ans. ¶ 64.

On March 11, 2020, DGS sent Plaintiff an email stating that OCTO generated a report discovering 395 potentially responsive emails with attachments, but did not state whether the emails were responsive to Category 8 of the request. Compl. ¶ 65; Ans. ¶ 65. DGS claimed in that email that it would release the records on a rolling basis by April 8, 2020, but failed to do so. Compl. ¶¶ 65-66; Ans. ¶¶ 65-66.

On March 20, 2020, DGS sent Plaintiff an email stating it had conducted a search for Categories 1 through 3—without mention of Categories 4 or 10—and was unable to locate any responsive records. Compl. ¶¶ 68; Ans. ¶¶ 68.

On March 23, 2020, Plaintiff emailed DGS FOIA Specialist Victoria Johnson asking DGS for an explanation of its search for materials that could fall within Categories 1 through 3; DGS responded by saying it was still processing emails that might produce communications, and that Cassidy Mullen of DGS's Capital Construction Team had conducted the search and determined there were no responsive records. Compl. ¶¶ 69-70; Ans. ¶¶ 69-70. DGS did not detail why Mr. Mullen had been assigned to conduct the search. Compl. ¶ 70; Ans. ¶ 70. After DGS directed Plaintiff to Mr. Mullen, Plaintiff emailed him to inquire about the search terms he used and how he conducted the searches for records responsive to Plaintiff's requests. Compl. ¶ 74; Ans. ¶ 74. Mr. Mullen did not respond. Compl. ¶ 75; Ans. ¶ 75. Plaintiff again emailed Mr. Mullen on July 3, 2020 requesting a response to its earlier email; Mr. Mullen once more did not respond. Compl. ¶ 76; Ans. ¶ 76.

DGS emailed Plaintiff on July 6, 2020 stating that Mr. Mullen's search discovered no records responsive to Categories 1 through 4, 7, and 9, and that DGS was still processing records responsive to Category 8. Compl. ¶ 77; Ans. ¶ 77. DGS also asserted that it had finished its search for emails with OCTO; that the search terms used were "complaints" and "DCPS"; and that the email boxes of Paul Blackman (Deputy Director of the Capital Construction Services Division), Keith Anderson (DGS Director), Brian Butler (former DGS Executive Program Manager), and Allam Al-Alami (Executive Program Manager) had been searched. Compl. ¶ 77; Ans. ¶ 77. Finally, the email relayed that DGS had located 394 emails with attachments that were responsive to Plaintiff's request in Category 8 and that it would take around four more weeks to review those records. Compl. ¶ 77; Ans. ¶ 77. Plaintiff emailed DGS that same day asking whether "complaints" and "DCPS" were the search terms used for the whole request or merely for Category 8; requesting that DGS provide search terms used for each category of the request; and asking that DGS explain why it chose to search the emails of the individuals selected. Compl. ¶ 78; Ans. ¶ 78. Plaintiff had not received a response from DGS to this email as of December 11, 2020, when Plaintiff originally filed this lawsuit. Compl. ¶ 79; Ans. ¶ 79.

On August 13, 2020, Plaintiff filed an administrative appeal for its FOIA request with the Mayor, on which the Mayor's Office had not yet made a decision as of March 12, 2021. Compl. ¶ 88, 90-91; Ans. ¶ 88, 90-91. Plaintiff and DGS received an email from the Mayor's Office of Legal Counsel on August 14, 2020 indicating that under the Mayor's emergency legislation, the D.C. Council had suspended the timeline for FOIA responses by an agency as well as the timeline for appeal decisions until the end of the public health emergency period. Compl. ¶ 89. Plaintiff contends that because the initial COVID-19 closure ended on January 15, 2021, D.C. Code § 2-539(c)(2), and because the Mayor failed to respond to Plaintiff's administrative appeal

within the mandatory ten business day statutory deadline following the end of the initial COVID-19 closure as required by D.C. Code § 2-537(a), Plaintiff has exhausted its administrative remedies concerning its FOIA request and has standing to seek judicial review. Compl. ¶¶ 90, 92.

Plaintiff filed its Complaint in this case on December 15, 2020. On December 16, 2020, DGS emailed Anthony Van Vuren, Plaintiff's former attorney who had submitted the FOIA request, to provide a response to Category 8 and to inform Plaintiff that portions of records responsive to Category 8 contained privileged "inter-agency or intra-agency memorandums or letters" under D.C. Code 2-534(a)(4) (the "deliberative process privilege").[6] Pl. Am. Compl. ¶ 80; Ans. ¶ 80. In response to Category 8, the email disclosed a DCPS Playground Surfaces fact sheet summarizing the use of PIP and other materials installed at DCPS as well as a "series of redacted and unredacted emails," including (1) correspondence between the Deputy Chief of Facilities at DCPS and employees of DGS concerning the drafting of the DCPS Playground Surfaces factsheet and (2) two identical email chains containing redacted communications between DGS and DCPS staff concerning a noise complaint from a D.C. resident due to construction at an elementary school. Pl. Am. Compl. ¶ 80; Ans. ¶ 80. The email did not describe the information redacted under D.C. Code § 2-534(a)(4). Compl. ¶ 82; Ans. ¶ 82.[7] DGS neglected to respond to Category 10, Pl. SUMF ¶ 70, and the District admits that it "inadvertently left off Request 10 from the list of requests to which it had no responsive

[6] Exemption 4 of the D.C. FOIA lists as shielded from disclosure "[i]nter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body," which encompasses documents within the deliberative process privilege. *See Fraternal Order of Police v. District of Columbia*, 79 A.3d 347, 354 (D.C. 2013) (citing D.C. Code § 2-534 (2012 Repl.)).

[7] Plaintiff claims in its Amended Complaint that DGS' December 16, 2020 response did not include a *Vaughn* Index. *See Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973); *see also Vining v. Council of D.C.*, 140 A.3d 439, 442 (D.C. 2016).

documents[.]" Def. Opp'n at 9; *see also* Def. Opp'n, Ex. 8 ¶¶ 46-47 (Victoria Johnson Declaration). The District alleges that it told Plaintiff on December 20, 2020 that it had no responsive documents to Category 10. Def. Opp'n at 9. Moreover, Ms. Johnson declared on November 2, 2021 that the 24 pages of results to G-Max testing in response to Category 5 are also responsive to Category 10. Def. Opp'n, Ex. 8 ¶¶ 46-47 (Victoria Johnson Declaration).

Plaintiff filed an Amended Complaint on March 12, 2021 seeking injunctive and declaratory relief.

II. Legal standard

To prevail on a motion for summary judgment, the moving party must establish, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact and that it is therefore entitled to judgment as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). A trial court considering a motion for summary judgment must view the evidence in the light most favorable to the non-moving party and may grant the motion only if a reasonable finder of fact could not find for the non-moving party based upon the evidence in the record. *Grant*, 786 A.2d at 583 (internal citation omitted); *Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995). In deciding a motion for summary judgment, the court may not weigh the evidence, but must only determine whether there is any genuine issue for trial. *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244–45 (D.C. 2009). The Court is precluded from granting summary judgment where an issue of material fact exists. *Copeland v. Cohen*, 905 A.2d 144, 147 (D.C. 2006). The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute. *Grant*, 786 A.2d at 583. If the moving party carries this burden,

then the non-moving party assumes the burden of establishing that an issue of material fact genuinely in dispute does exist. *Id.* (internal citation omitted). There must be "some significant probative evidence tending to support the complaint so that a reasonable fact-finder could return a verdict for the non-moving party." *Lowrey v. Glassman*, 908 A.2d 30, 36 (D.C. 2006) (internal quotation and citation omitted).

FOIA cases are "typically and appropriately decided on motions for summary judgment." *Marshall v. F.B.I.*, 802 F. Supp. 2d 125, 131 (D.D.C. 2011). "[T]he Freedom of Information Act declares it to be '[t]he 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.'" *Fraternal Order of Police v. District of Columbia*, 79 A.3d 347, 353-54 (D.C. 2013) (quoting D.C. Code § 2-531 (2012 Repl.)) (alteration in original). The "core purpose of the FOIA" is to "contribut[e] significantly to public understanding of the operations or activities of the government," *Fraternal Order of Police v. D.C.*, 124 A.3d 69, 77 (D.C. 2015) (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994)), and to allow the public to "know what their government is up to." *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 (D.C. 1989). Hence, "FOIA's provisions are to 'be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." *Fraternal Order of Police*, 79 A.3d at 354 (quoting D.C. Code § 2-531). "[T]his strong policy of disclosure is the reason FOIA. . . places the burden on the administrative agency 'to sustain its action[.]'" *Id.* (quoting *Padou v. District of Columbia*, 29 A.3d 973, 980 (D.C. 2011)). "[T]he provisions of the Act giving citizens the right of access are to be generously construed, while the statutory exemptions from disclosure are to be narrowly construed, with ambiguities resolved in

favor of disclosure." *Riley v. Fenty*, 7 A.3d 1014, 1018 (D.C. 2010) (internal quotations omitted). Cases interpreting the federal Freedom of Information Act serve as "instructive authority with respect to" the District of Columbia Freedom of Information Act. *Fraternal Order of Police*, 79 A.3d at 354.

III. Analysis

Plaintiff brings two main arguments in support of its Motion for Summary Partial Judgment: (i) that the District, acting by and through DGS, failed to conduct an adequate search; and (ii) that the District, acting by and through DGS, failed to adequately justify its withholdings. The District counters these contentions in its own Motion for Summary Judgment, arguing that its production of the results of an adequate search for responsive documents moots Plaintiff's FOIA claims, and that it appropriately redacted documents under D.C. Code § 2-534(a)(4). The District also maintains that Plaintiff failed to exhaust its administrative remedies, and that it thus cannot proceed with this lawsuit.

A. Plaintiff has not failed to exhaust administrative remedies and its claim remains viable for judicial review

The District argues that "Plaintiff has not administratively exhausted its claim under FOIA because (1) Plaintiff never timely appealed DGS's responses to Requests 6, 8, and 10; and (2) the time limits for public bodies to respond, and for the Mayor's Office to decide any administrative appeals, were stayed during the COVID-19 public health emergency." Def. Mot. Mem. at 6. Specifically, the District argues that Plaintiff's filing of its initial Complaint on

December 21, 2020, prior to the Mayor's January 21, 2021 deadline for rendering a decision on Plaintiff's appeal, stood in derogation of administrative exhaustion requirements. *Id*. at 9.

A FOIA requester is generally required to exhaust administrative appeal remedies prior to seeking judicial review. *See* D.C. Code §§ 2-532(c)(1), 2-537(a); *see also Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 184 (D.C. Cir. 2013). The exhaustion requirement is not, however, jurisdictional, "because the FOIA does not unequivocally make it so." *Hidalgo v. F.B.I,*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (citations omitted); *see also EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 962 (D.C. Cir. 1999) (quoting *LAM. Nat. 7 Pension Fund Benefit Plan C v. Stockton Tri. Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984)) ("Exhaustion is a jurisdictional prerequisite . . . only when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision."); *Taylor v. Appleton*, 30 F.3d 1365, 1367 n.3 (11th Cir. 1994) (holding that exhaustion under FOIA is not a jurisdictional requirement); *Oglesby v. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). Where no statutory exhaustion provision bars judicial review, "courts usually look at the purposes of exhaustion and the particular administrative scheme in deciding whether they will hear a case or return it to the agency for further processing." *Oglesby*, 920 F.2d at 61. Defendant argues that "FOIA's administrative scheme favors treating failure to exhaust as a bar to judicial review," Def. Mot. Mem. at 8 (citing *Hidalgo*, 244 F.3d at 1258-59)), noting that the D.C. Council did not modify FOIA's exhaustion requirements in response to the COVID-19 emergency and arguing that allowing Plaintiff to proceed with its case would "undercut 'the purposes of exhaustion, namely, 'preventing premature interference with agency processes[.]'"" Def. Mot. Mem. at 8 (citing *Hidalgo*, 244 F.3d at 1259).

Specifically, Defendant first argues that Plaintiff failed to timely file any administrative appeal as to Requests 6, 7, and 10, which Plaintiff disputes in its Opposition by asserting that Plaintiff's August 13, 2020 appeal to the Mayor's Office "covers each of the Plaintiff's ten Requests." Pl. Opp'n at 10. The undersigned accepts Plaintiff's argument and finds that Plaintiff sufficiently exhausted its administrative appeal remedies as to each Request by way of its August 13, 2020 appeal.

To Defendant's second argument—that Plaintiff sought judicial review before exhausting the administrative appeals process by filing its Complaint prior to the Mayor's deadline for rendering a decision on Plaintiff's appeal—Plaintiff cites *National Railroad Passenger Corp. v. Morgan*, 526 U.S. 101, 133 (2002) for the proposition that exhaustion claims are "subject to equitable doctrines such as tolling or estoppel." Pl. Opp'n at 7. Plaintiff maintains that the Court should consider the inequity of granting summary judgment in this case on exhaustion grounds, as (i) the District did not move to dismiss either the initial Complaint or the amended complaint on exhaustion grounds; (ii) Plaintiff was required to adhere to statutory schedules even while the Mayor's Office had its deadlines suspended; (iii) Defendant's exhaustion argument—which it did not raise in any motion to dismiss—is "belated" and curtails "clear notice" which is central to due process, *see Jones v. Flowers*, 547 U.S. 220, 226 (2006)); and (iv) requiring Plaintiff to start this suit from scratch would increase, not minimize, the "costs and time delays" to Plaintiff. *See* Pl. Opp'n at 8-9. Plaintiff further argues that dismissing the action would counteract the purpose of the exhaustion doctrine in FOIA cases, which is "to ensure that 'the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision,' and 'to correct mistakes made at lower levels and thereby obviate[] unnecessary judicial review.'" Pl. Opp'n at 7 (quoting *Oglesby*, 920 F.2d at 61) (internal citation omitted).

Plaintiff also notes the District's failure to contend that it was prejudiced by Plaintiff's allegedly premature filing. Pl. Opp'n at 7. Finally, Plaintiff claims that the District wrongly assumes that an amended complaint cannot cure defects based on an alleged failure to exhaust. *See Young v. City of Mt. Rainier*, 238 F.3d 567, 573 (4th Cir. 2001) (holding that a properly filed amended complaint supersedes the original complaint, rendering it "of no effect"); *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 357-59 (3d Cir. 1984) (finding abuse of discretion in trial court's refusal to allow plaintiff to amend Title VII complaint after receipt of a "right to sue" letter).

Considering the equitable concerns raised by Plaintiff and the court's discretion to consider them, *see Nat'l R.R. Passenger Corp*, 536 U.S. at 133; the District's failure to move to dismiss either complaint on exhaustion grounds; and the Plaintiff's filing of an Amended Complaint after the deadline for the Mayor's decision on Plaintiff's appeal had passed, the undersigned finds that entry of judgment on exhaustion grounds would be inequitable, and will not grant summary judgment on this basis.

B. The District failed to provide sufficient detail to meet its burden of showing that it conducted an adequate search as to Categories 1, 2, 3, 4, 5, 6, 7, 9, and 10, but has provided sufficient detail to show the reasonableness of its search in response to Category 8

In FOIA cases, "the burden of proof is always on the agency to demonstrate that it has fully discharged its obligations under the FOIA." *Fraternal Order of Police, Metro. Labor Committee v. District of Columbia*, 82 A.3d 803, 814 (D.C. 2014) (quoting *McKinley v. Fed. Deposit Ins. Corp.*, 756 F.Supp.2d 105, 110-11 (D.D.C. 2010). As such, the Court must determine whether the agency has "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," *Fraternal Order of Police*, 79 A.3d at 360, and "whether the agency has sustained its burden of

demonstrating the documents requested are exempt from disclosure under the FOIA." *Fraternal Order of Police*, 82 A.3d at 813 (quoting *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008)). The agency "must adequately explain both how the search was conducted and why it was conducted in that manner; only then can the trial court assess the reasonableness of the District's efforts." *Fraternal Order of Police v. District of Columbia*, 139 A.3d 853, 853 (D.C. 2016). Agencies often submit affidavits to show that "an adequate search was conducted, proper exemptions were claimed, and reasonably segregable records were released." *Marshall*, 802 F.Supp. 2d at 132; *see also Fraternal Order of Police*, 139 A.3d at 865. "A reasonably detailed affidavit . . . is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the . . . court to determine if the search was adequate in order to grant summary judgment." *Doe v. District of Columbia Metro. Police Dept.*, 948 A2d 1210, 1221 (D.C. 2008) (citation omitted). The affidavit "must demonstrate with reasonable detail, that the search method. . . was reasonably calculated to uncover all relevant documents." *Fraternal Order of Police*, 79 A.3d at 360 (internal quotation and citation omitted). The adequacy of a search is "measured by the reasonableness of the effort in light of the specific request," and an agency "must establish 'beyond material doubt' that it expended reasonable efforts 'to uncover all relevant documents.'" *Fraternal Order of Police*, 139 A.3d at 864-65 (quoting *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)). Reasonableness, moreover, is measured by the "appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (regarding the federal FOIA).

Where an agency withholds all or part of a requested record, it must name the statutory exemption authorizing non-disclosure, D.C. Code § 2-533(a)(1) & § 2-534, and justify the

withholding by providing a list "itemizing each item withheld, the exemptions claimed for that item, and the reasons why the exemption applies to that item." *Fraternal Order of Police*, 79 A.3d at 352 n.3 (quoting *Lykins v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir, 1984)). The agency must likewise provide such a list "when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." *District of Columbia v. Fraternal Order of Police*, *Metro. Police Dep't Labor Comm.,* 75 A.3d 259, 264 (D.C. 2013). Where an agency withholds a portion of a record, it must disclose "[a]ny reasonably segregable portion" of the record. D.C. Code § 2-534(b).

Plaintiff argues that the record demonstrates that the District "failed to conduct an adequate, good faith search, reasonably calculated to uncover records responsive to each of the ten categories of Plaintiff's FOIA request," asserting that "the paltry production of records – one document and a handful of emails – undercuts any claim of reasonableness." Pl. Mot. Mem. at 6-7. Plaintiff specifically notes that it has received "no information from DGS about the search terms used, the document systems searched, or other key details about the nature of DGS' search" for all but one of the categories in its request—Category 8—and thus "is left with little basis to evaluate DGS' claims of no responsive records for Categories 1, 2, 3, 4, 7, and 9; or to contest the completeness of DGS' search for Categories 5 and 6." *Id.* at 7.

i. Categories 1, 2, 3, 4, 5, 6, 7, and 9

In this case, the District's failure to delineate the scope and nature of the searches it conducted in response to Categories 1, 2, 3, 4, 5, 6, 7, and 9 resulting in its "no responsive records" determinations requires a finding that it has not demonstrated the adequacy or reasonableness of its search. The Court of Appeals clarified in *Fraternal Order of Police* that

> [i]t is not enough for an affidavit merely to state in conclusory terms that the locations searched were 'most likely to contain the information which had been requested'; rather, the affidavit must demonstrate 'with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents.

79 A.3d at 360. If an agency fails to meet its burden, "a FOIA requester may prevail on a motion for summary judgment 'merely by showing that the agency might have discovered a responsive document had the agency conducted a reasonable search.'" *Id.* (internal citations omitted).

In *Fraternal Order of Police*, for example, our Court of Appeals found that two declarations submitted by the D.C. FOIA Specialist for the Metropolitan Police Department in support of the adequacy of Defendant the District's FOIA search were insufficient to "meet its burden of establishing that it conducted a search 'reasonably calculated to uncover all relevant documents.'" 79 A.3d at 361 (internal citation omitted). In the declarations, the specialist averred that she had "arranged for the Office of the Chief Technology Officer to search 'all MPD electronic correspondence, including data . . . stored on District computer servers,' of seventeen named MPD employees"; that she "selected 'these particular custodians based on [her] determination that they were—by virtue of their positions, titles, and responsibilities—the individuals within MPD most likely to possess [responsive] electronic communications'"; and that she "forwarded the FOIA request to the departments within MPD that would 'most likely have' responsive documents." *Id.* The Court of Appeals found that these declarations did "not enable a judicial arbiter to evaluate whether the search was, in fact, reasonably comprehensive," in part because the declarations did "not disclose anything about the 'positions, titles, and responsibilities'" of several of the employees whose electronic communications were searched, preventing a judge from "knowing whether they were in fact 'most likely' (or likely at all) to have responsive documents or, whether MPD other employees should have been added to the search list." *Id.* at 361-62. The Court also noted that it was "unclear how thoroughly the two

named offices were searched" and observed that the specialist's assertion than a certain employee was the "'only' employee likely to have hard copies of documents responsive to the request" was "somewhat conclusory." *Id.*

While it is true that "[a]n agency's search conducted in response to a FOIA request 'need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request," *Id.* at 360 (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)), the District's conclusory argument that FOIA Specialist Victoria Johnson in "a comprehensive declaration," "methodically identified relevant officials within DGS who had the appropriate subject matter knowledge to respond," Def. Opp'n at 7, and who then identified responsive documents, does not satisfy its burden. *See Fraternal Order of Police*, 79 A.3d at 360. Nor is it correct, as the District claims, that Ms. Johnson explains "how and why specific efforts were made" with requisite detail. *See* Def. Opp'n at 7. As in *Fraternal Order of Police*, the declaration provided by Ms. Johnson fails to bolster the adequacy of the District's search with respect to Categories 1, 2, 3, 4, 5, 6, 7, and 9. The most Ms. Johnson provides in the way of elucidation as to the District's response to Categories 1-3 (the request for communications between DGS and three contractors) is that she "identified Brian Butler, Executive Project Manager in the Capital Construction Division, as being the most likely individual to communicate with the contractors identified in Requests 1, 2, and 3," Def. Opp'n, Ex. 8 ¶¶ 7-8; that Butler informed her that he did not have any communications with the identified contractors, nor was he aware of any other members of the Capital Construction Division who had communications with the contractors, Def. Opp'n, Ex. 8 ¶ 9; and that, "[b]ased on the above search, [she] concluded there were no responsive documents to Requests 1, 2, and 3," Def. Opp'n, Ex. 8 ¶ 10. This section of the declaration is almost entirely void of explanation or

reasoning, and fails even to identify the document systems searched or the other methodology employed by Butler in concluding that no communications existed.

Regarding Category 4, which sought "promotional materials, warranties, product descriptions, care and maintenance instructions, or other statements from playground and artificial field manufacturers and suppliers related to lead," Def. Opp'n, Ex. 8 ¶ 14, Ms. Johnson states that she "identified Allam Al-Alami, Operational Manager of the Capital Construction Division, as having knowledge of artificial surface manufacturers and suppliers," Def. Opp'n, Ex. 8 ¶ 15; that Al-Alami coordinated with Brian Butler and Cassidy Mullen, Senior Project Manager of the Capital Construction Division, to search for responsive documents, Def. Opp'n, Ex. 8 ¶ 17; that both Butler and Mullen indicated "there were no responsive documents for the relevant time period," Def. Opp'n Ex. 8 ¶ 18; and that, "[b]ased on the above search, [she] determined that there were no responsive documents to this request," Def. Opp'n, Ex. 8 ¶ 19. While Ms. Johnson does describe to some extent the position and responsibilities of the individuals who participated in the search—unlike in *Fraternal Order of Police*, 79 A.2d at 361—she does not explain why those individuals would be most likely to have the responsive documents, identify the document systems searched, or provide any suggestion of the search's scope. As with Categories 1-3, Ms. Johnson's Declaration concerning Category 4 is thus insufficient to carry the District's burden to provide reasonable detail to indicate that DGS' search method was "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983).

On the search process for Category 5, which sought lead testing results at DCPS playgrounds and athletic fields, Def. Opp'n, Ex. 8 ¶ 20, Ms. Johnson states that she was "informed that Brian Killian oversaw the lead testing at DCPS facilities," Def. Opp'n, Ex. 8 ¶ 21;

that "Killian identified G-Max Testing Reports and PIP Playground Test Reports as responsive to Request 5," Def. Opp'n, Ex. 8 ¶ 22; and that DGS produced links to the documents Killian identified, including 24 pages of G-Max testing results and over 3,000 pages of other potentially responsive documents, Def. Opp'n, Ex. 8 ¶ 23. The District's response to this r request was particularly summary in nature. Indeed, Ms. Johnson's Declaration simply states that "Killian identified G-Max Testing Reports and PIP Playground Test Reports as responsive to Request 5," Def. Opp'n, Ex. 8 ¶ 22; it does not state that no other documents fall within the ambit of Category 5. Again, the Declaration does not state that Killian would have had knowledge of all Category 5 documents, and does nothing to explain the scope of his search for responsive documents or the locations of his search.

In response to Category 6, which sought public statements related to lead at playgrounds and athletic fields, Ms. Johnson states that "[b]ased on [her] knowledge and experience at DGS, [she] identified Matthew Scalf, Associate Director of Legislative Affairs, as having information related to DGS Director Keith Anderson's public statements," Def. Opp'n, Ex. 8 ¶ 25; that "[b]ased on [her] consultation with Matthew Scalf, DGS identified and produced a copy of Director Anderson's testimony before the D.C. Council as responsive to Request 6," Def. Opp'n, Ex. 8 ¶ 26; and that documents provided in response to Request 5 included three DGS press releases also responsive to Request 6, Def. Opp'n, Ex. 8 ¶ 27. For the same reasons noted in the preceding paragraphs, this brief description falls short of meeting the District's burden; in particular, it provides no information as to the nature and scope of Scalf's search for responsive documents.

Finally, concerning Categories 7 and 9, which "sought whistleblower, administrative, or other legal complaints related to lead in playgrounds or athletic fields," Def. Opp'n, Ex. 8 ¶ 28,

Ms. Johnson declares that "[b]ased on [her] knowledge and experience in DGS, [she] contacted Danielle Meadors, Deputy Chief Operating Officer, who identified Olivia Warren, Certified Business Enterprise Inclusion Officer in the Office of the Director, who in her role has knowledge of public whistleblower complaints against DGS," Def. Opp'n, Ex. 8 ¶ 29; that C. Vaughan Addams, Senior Assistant General Counsel in the DGS Office of General Counsel who supervises all litigation-related matters for the Department, "confirmed that DGS is not aware of any whistleblower, administrative, or other legal complaints related to lead playgrounds or athletic fields," Def. Opp'n, Ex. 8 ¶ 30; that the DGS Office of General Counsel also noted that complaints are not always public, and "DGS would not typically be aware of complaints filed with other agencies such as the Office of Inspector General unless a formal investigation were opened," Def. Opp'n, Ex. 8 ¶ 31; and that, "[b]ased on the above search, [she] concluded DGS did not have any responsive documents to Requests 7 and 9," Def. Opp'n, Ex. 8 ¶ 32. Again, however, the thoroughness of the search for whistleblower and other complaints—and what the search entailed beyond possibly passing communications with the individuals mentioned—is indiscernible from Ms. Johnson's statements. *See Fraternal Order of Police*, 79 A.2d at 362.

As no issue of material fact exists surrounding the disbursement of records addressing these requests, and as the District has failed to "establish 'beyond material doubt' that it expended reasonable efforts 'to uncover all relevant documents,'" *Fraternal Order of Police*, 139 A.3d at 864-65 (internal citation omitted), Plaintiff is entitled as a matter of law to declaratory relief with respect to Categories 1, 2, 3, 4, 5, 6, 7, and 9.

ii. Category 8

Plaintiff further argues that the District has not met its burden to demonstrate the adequacy or reasonableness of its search regarding Category 8, which sought "communications from District residents or community groups to DGS related to the presence or absence of lead at DCPS playgrounds or athletic fields." Pl. Mot. Mem. at 11. In her declaration, Ms. Johnson explains that in response to this request and "[b]ased on [her] knowledge and experience at DGS, [she] identified four individuals who would most likely be notified of any community complaints,[8] Def. Opp'n, Ex. 8 ¶ 34; that "[b]ased on [her] knowledge and experience in DGS, it is very likely that any complaints regarding lead in artificial playing surfaces at DCPS properties would be forwarded to the Capital Construction Division," Def. Opp'n, Ex. 8 ¶ 36; that she "consulted with the Office of the Technology Officer (OCTO) to determine the best method of searching these individuals' email inboxes," Def. Opp'n, Ex. 8 ¶ 37; that pursuant to OCTO's advice, DGS used the broad search terms "DCPS" and "complaints" to search the individuals' email inboxes between May 1, 2019 and February 10, 2020, Def. Opp'n, Ex. 8 ¶ 38; that the "search term 'complaints' was used instead of more specific terms to cast a wider net in search of responsive documents," Def. Opp'n, Ex. 8 ¶ 39; that the search produced 394 documents, which Ms. Johnson attests to have reviewed for responsiveness, Def. Opp'n, Ex. 8 ¶ 40; and that DGS provided to Plaintiff the emails she determined were responsive to Category 8, Def. Opp'n, Ex. 8 ¶ 41.

[8] Ms. Johnson stated that these individuals were "(1) DGS Director Keith Anderson, who would be apprised of the most serious complaints and would be aware of lead-related complaints in connection with his testimony at oversight hearings before the D.C. Council; (2) Paul Blackman, the Director of Capital Construction Division, who attended the oversight hearings before the D.C. Council and as part of his managerial role would also be made aware of complaints involving DCPS; (3) Allam Al-Alami, who in his managerial role would be aware of complaints involving DCPS and supervised Brian Butler; and (4) Brian Butler, who in his role would generally be aware of complaints involving DCPS." Def. Opp'n, Ex. 8 ¶ 35.

Considering the thoroughness of the District's explanation of the search process undertaken to address this particular request—including the reasoning behind the search terms used and the selection of individuals with certain exposure or proximity to the subject matter of the request—the District has met its burden of showing that an adequate search was conducted. *See Marshall*, 802 F.Supp. 2d at 132; *Fraternal Order of Police*, 139 A.3d at 865. On this point, the affidavit "demonstrate[s] 'with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents.'" *Fraternal Order of Police*, 79 A.3d at 360. Summary judgment is thus appropriate for Defendant—rather than Plaintiff—as to Category 8.

iii. Category 10

Finally, Plaintiff directs the same arguments it makes concerning Categories 1, 2, 3, 4, 5, 6, 7, 8, and 9 to Category 10 and further argues that the District's response to this request is plainly insufficient as "DGS *has not responded at all to Category 10 of Plaintiff's FOIA request*." Pl. Mot. Mem. at 14-15 (emphasis in original). In her Declaration, Ms. Johnson admits her inadvertence in omitting Request 10 in the list of requests to which DGS had no responsive documents, and avers that she later clarified this point in the agency's response to the administrative appeal. Def. Opp'n Ex. 8 ¶ 46. Even so, her Declaration provides minimal detail concerning the search process employed to address this request. Ms. Johnson states that "[b]ased on [her] knowledge and experience at DGS, [she] identified James Stealey, Management Analyst in the Facility Management Division, as having knowledge of documents related to risk assessment [in using artificial playgrounds and athletic fields], including G-Max testing," Def. Opp'n, Ex. 8 ¶¶ 42, 43; that "Stealey indicated that he had no responsive documents to the Request," Def. Opp'n, Ex. 8 ¶ 44; and that "[b]ased on the above search, [she] concluded DGS had no responsive documents to Request 10," Def. Opp'n, Ex. 8 ¶ 45. Nowhere does Ms.

Johnson expound upon her estimation that Mr. Stealey—and no one else—could source information responsive to this request, or give any detail as to the process engaged in by Mr. Stealey in determining that no responsive documents exist.

The District thus has not met its burden to show the adequacy and reasonableness of its search in response to this request. As no issue of material fact exists surrounding the disbursement of records addressing these requests, Plaintiff is entitled to declaratory relief with respect to Category 10.

C. The District failed to adequately justify its non-disclosure

The Court has found *supra* that the District has conducted an adequate search for those materials that may fall within Category 8. Plaintiff argues, however, that the District has not met its burden to "supply[] the Superior Court 'with sufficient information' to allow the court to determine whether the public body correctly applied the [deliberative process] exemption" with respect to the documents it withheld in response to Request 8. *See Vining v. Council of District of* Columbia, 140 A.3d 439, 442 n. 8 (D.C. 2016) (quoting *Fraternal Order of Police*, 70 A.3d at 355); Pl. Mot. Mem. at 15. Plaintiff claims that "DGS has failed to meet its burden to justify its withholdings" by neglecting to explain why only twenty-six emails were produced in response to Plaintiff's FOIA request and by failing to clarify whether the approximately 368 emails withheld were done so because DGS determined that they were exempt or because DGS deemed them to be non-responsive. Pl. Mot. Mem. at 16; *see also Fraternal Order of Police, Metro. Police Dep't Labor Comm.*, 75 A.3d at 264. However, with regard to the latter contention, the District explains in its Opposition that the more than 300 emails in question were not produced simply because they were non-responsive. Def. Opp'n at 9; Def. Opp'n, Ex. 8 ¶ 41. More specifically,

Plaintiff argues that DGS has failed to explain why the material redacted from certain documents that were disclosed falls within the scope of the deliberative process exemption. Pl. Mot. Mem. at 16 (citing Am. Compl. ¶ 82; Ans. ¶ 82). The District responds that it did, in fact, appropriately redact documents responsive to Request 8 consistent with D.C. Code § 2-534(a)(4) with the support of a *Vaughn* index. Def. Opp'n at 9.

To meet its burden for justifying its withholdings, the District is required to provide "the reasons why the exemption applies to [an] item." *Fraternal Order of Police*, 79 A.3d at 352 n.3. The FOIA exemption in D.C. Code § 2-534(a)(4) encompasses "the deliberative process privilege," *Maydak v. U.S. Dep't of Justice*, 254 F. Supp. 2d 23, 36 (D.D.C. 2003), which "'shelters documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,'" *Fraternal Order of Police*, 79 A.3d at 354-55 (quoting *Petroleum Info. Corp v. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992)). Information must be both "predecisional" and "deliberative" to warrant extension of the privilege. *Id.* A record is "'predecisional' if it was prepared in order to assist an agency decision maker in arriving at his decision rather than to support a decision already made," and "'deliberative' if it reflects the give-and-take of the consultative process." *Id.* When citing its reasons for claiming that certain documents are exempt, an agency must do so in such a way that

> 'permit[s] adequate adversary testing of the agency's claimed right to an exemption, and enable[s] the [trial] [c]ourt to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves . . . [and] without thwarting the [claimed] exemption's purpose.'

Id. at 355-56 (quoting *King v. United States Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987)). Moreover, "[t]he burden is on agencies withholding information to 'supply the courts with sufficient information to allow [them] to make a reasoned determination that they were

correct." *Id*. at 356 (internal quotation omitted). Summary judgment in favor of the District is appropriate "if an agency's submission 'describe[s] the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate[s] that the information withheld logically falls within the claimed exemption, and [is] not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Id.* (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)).

While the District failed to describe the basis for its invocation of the deliberative process privilege concerning documents responsive to Category 8 in its initial December 16, 2020 correspondence, *see* Def. Opp'n at 9; Ans. ¶ 80, it has articulated justifications for withholding these documents in its Opposition. The District claims to have redacted or withheld portions of two email chains. Def. Opp'n at 10. Specifically, the District alleges to have "redacted and withheld discussions in response to a citizen complaint discussing what response would be appropriate"; it also claims to have "produced an email discussing a draft statement about playground surfacing," but to have "withheld a single document attached to that [December 16, 2020] email, entitled 'DCPS-Playground-Surfacing-Draft.pdf.'" *Id.* Defendant claims that the redacted email chains the District produced were predecisional and deliberative because they reflected "the agency's discussions on how best to respond to a particular complaint and what position to take on a particular funding issue." *Id.* The District also points to the *Vaughn* index included in its exhibits describing the redacted documents, and indicates in a footnote that it is willing to provide the unredacted documents for *in camera* review if the Court so orders. Def. Opp'n at 11; Def. Opp'n, Ex. 9 (*Vaughn* index).

Plaintiff is correct, however, in arguing that the District's explanation in its Opposition is somewhat conclusory and ultimately insufficient to meet its burden. Like that appended by the

District in *Fraternal Order of Police*, the District's *Vaughn* index in the present case does not "supply enough information to enable the court to assess whether the District properly invoked the privilege" as no substantive information is provided beyond a brief reason for redacting the documents in question.[9] 79 A.3d at 358-59. It is similarly conclusory and "too cryptic and unenlightening to enable the court to assess the propriety of the District's decision to withhold the material." *Id.* at 359. Furthermore, the *Vaughn* index is not accompanied by an affidavit or declaration to explain why the documents fall within the privilege, which would have been accorded a presumption of good faith. *Fraternal Order of Police*, 79 A.3d at 356, 358 (considering affidavit sufficient to establish the proper invocation of the deliberative process privilege as to certain documents).

Because a genuine issue of material fact remains as to whether the District properly invoked the deliberative process privilege to redact the documents listed in its *Vaughn* index in response to Plaintiff's Category 8, the undersigned will conduct an *in camera* review of the District's redacted documents. *See id.* at 358. Plaintiff's Motion for Partial Summary Judgment is, accordingly, denied on this point.[10]

[9] These bases include: "Internal communication from DCPS to DGS regarding" either "construction methods and practices in response to citizen complaint" or "regarding pushback from small cap projects" and "Draft document withheld entirely." Def. Opp'n Ex. 9.

[10] Plaintiff's assertion that the records sought in Category 8 are not internal agency letters or memoranda covered by D.C. Code § 2-534(a)(4) is irrelevant to the exemption inquiry; it is better suited to an argument about the adequacy and responsiveness of the District's record search and production. *See* Pl. Mot. Mem. at 118. That Plaintiff is merely "seeking factual information about the serious risk of lead contamination of DCPS's playgrounds and athletic fields [in Category 8], not records reflecting behind the scenes policy formation" does not alter the applicability of the exemption to a qualifying document—even if that document does not respond accurately to Plaintiff's request. *See* Pl. Mot. Mem. at 18; *see also Fraternal Order of Police*, 79 A.3d at 355 ("Generally speaking. . . '[f]actual material *that does not reveal the deliberative process* is not protected' by the privilege or the associated FOIA exemption.") (emphasis in parenthetical added).

IV. Conclusion

For the foregoing reasons, it is this 20th day of January, 2022, hereby

ORDERED that Plaintiff's Motion is GRANTED IN PART and DENIED IN PART; and it is

FURTHER ORDERED that Defendant's Motion is GRANTED IN PART and DENIED IN PART; and it is

FURTHER ORDERED that the parties shall appear for a Status Hearing on January 21, 2022 at 9:30 a.m. in Courtroom JM-4.[11]

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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[11] The hearing will be conducted remotely. Parties may participate in the hearing via WebEx by going to https://dccourts.webex.com/meet/ctbJM4, or by phone by calling 202-860-2110 and using meeting code 129 797 7557. Additional information about remote participation is available at https://www.dccourts.gov/services/remote-hearing-information.