

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION

TORMELL DUBOSE DDS, : Case No. 2018 CA 378 B  
*Plaintiff,* :  
 :  
v. :  
 :  
DISTRICT OF COLUMBIA *et al.,* :  
*Defendants.* : Judge Heidi M. Pasichow

**ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION  
FOR SUMMARY JUDGMENT AND (2) DENYING PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT**

This matter is before the Court based upon (1) Defendants’ Motion for Summary Judgment, filed on December 24, 2018 and (2) Plaintiff’s Motion for Summary Judgment, filed on April 2, 2019.

**I. Procedural History**

On January 20, 2018, Plaintiff filed a Complaint, a Motion for Temporary Restraining Order, and a Motion for Preliminary Injunction against the District of Columbia, the District of Columbia Department of Health, and the District of Columbia Board of Dentistry. The Complaint contains one count for violation of the District of Columbia Freedom of Information Act (“FOIA”). Plaintiff alleges that “[o]n or about August 23, 2017, Plaintiff submitted a written letter and email for a FOIA request to Defendant D.C. Board of Dentistry to Dr. Renee’ A. McCoy-Collins, DDS, Chairperson, seeking the disclosure of six (6) categories of public data[.]” Compl. ¶ 16. Plaintiff then alleges that he received an e-mail from the District of Columbia Department of Health stating that the request would cost \$9,000.00. Compl. ¶ 17.

On January 23, 2018, Defendants filed a Motion to Dismiss the Complaint. On January 24, 2018, the parties appeared before Judge Stephen F. Eilperin for a Hearing on the Motion for Temporary Restraining Order. Judge Eilperin denied the Motion for Temporary Restraining

Order, writing that the FOIA request was “of minimal or no relevance” to Plaintiff’s administrative hearing regarding his dentistry license. Order at 1. Judge Eilperin further clarified that he made “no determination with regard to the merits of Plaintiff’s FOIA request and D.C.’s insistence on payment to process it.” Order at 2. On February 2, 2018, the parties appeared before Judge Neal E. Kravitz for a Status Hearing on the Preliminary Injunction. At the hearing, Judge Kravitz denied both Plaintiff’s Motion for a Preliminary Injunction and Defendants’ Motion to Dismiss. On April 5, 2018 Defendants filed an Answer to the Complaint. On April 20, 2018, the parties appeared before Judge Kravitz for an Initial Scheduling Conference and a Track 1 Scheduling Order was entered. On October 15, 2018, Judge Kravitz issued an Order (1) Granting Defendant’s Motion to Amend Scheduling Order and (2) Denying as Moot Defendant’s Motion for Sanctions. The Amended Scheduling Order provided a discovery deadline of November 15, 2018 and a deadline for filing of motions of December 14, 2018.

On December 14, 2018, Defendants filed the instant Motion for Summary Judgment. On January 2, 2019, the case was transferred from Judge Kravitz to Judge Fern Flanagan Saddler. On January 26, 2019, Plaintiff filed an Opposition to Defendants’ Motion for Summary Judgment. On January 30, 2019, Defendants filed a Reply. On March 18, 2019, Judge Saddler issued an Order of Recusal. The case was then transferred to Judge Heidi M. Pasichow on Civil II Calendar 12 on April 2, 2019.

On April 2, 2019, Plaintiff filed his Motion for Summary Judgment. On April 17, 2019, Defendants filed an Opposition. On May 5, Plaintiff filed a Reply. On July 26, 2019, the Court held a hearing on the Motions for Summary Judgment. In addition to elaborating on arguments contained in the briefs, the Court asked the District to provide evidence regarding its argument that much of the information sought by Plaintiff through the FOIA process was publicly

available. At the Motion Hearing, while the District demonstrated to the Court that some of the decisions from the Board of Dentistry sought by Plaintiff were publicly available on the DC Health website, it could not establish that all of the decisions sought by Plaintiff were indeed contained on the website. The case then remained scheduled for Mediation on August 14, 2019. However, the Mediation was canceled by the Multi-Door Dispute Resolution Division as the District submitted a Mediation Readiness Certificate representing that the parties were not prepared to mediate due to the pending Motions for Summary Judgment.

## **II. Legal Standard**

FOIA provides that “[t]he public policy of the District of Columbia is 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. Code § 42-351. FOIA is designed to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Washington Post Co. v. Minority Business Opportunity Commission*, 560 A.2d 517, 521 (D.C. 1989) (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Because many of its provisions parallel those in its federal counterpart, “except where the two acts differ, [courts] have treated case law interpreting the federal FOIA as instructive authority with respect to [the District’s] Act.” *Washington Post Co.*, 560 A.2d at 521 n.5 (citation omitted).

“FOIA cases typically and appropriately are decided on motions for summary judgment.” *MuckRock, LLC v. Central Intelligence Agency*, 300 F. Supp. 3d 108, 118 (D.D.C. 2018) (quotations and citations omitted). “Summary judgment is appropriate only when the record, including pleadings together with affidavits, indicates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *District of*

*Columbia v. FOP*, 75 A.3d 259, 264 (D.C. 2013). “In the FOIA context, this requires that we ascertain whether the agency has sustained its burden of demonstrating the documents requested are exempt from disclosure under FOIA.” *Id.* (quoting *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008)). Whether the agency has sustained its burden “is a question of law.” *Id.*

### **III. The Motions for Summary Judgment**

#### *A. Defendants’ Motion for Summary Judgment*

Defendants first argue that the Court lacks jurisdiction to consider Plaintiff’s FOIA claim because they did not deny his FOIA request, but rather required him to pay a fee for the requested records, the imposition of which is not reviewable. Defendants argue that in addition to there being no formal denial of a request for records, Plaintiff’s claim is not one for constructive denial either as (1) even though the District responded more than fifteen (15) days after the request was made, a plaintiff’s claim for constructive denial is extinguished once an agency responds to the request and (2) the constructive denial provisions of FOIA “do[] not permit a requestor to seek the production of records through judicial intervention absent paying the fees for the cost of searching for and compiling the records.” More specifically, Defendants argue that “D.C. FOIA does not provide for a review of a denial of a public interest fee waiver request” as the statute states that “[d]ocuments *may* be furnished without charge or at a reduced charge[.]” *See* D.C. Code § 2-532(b) (emphasis added). Defendants points out that the federal FOIA states that “[d]ocuments *shall* be furnished without any charge . . . if disclosure of the information is in the public interest,” 5 U.S.C. § 552(a)(4)(a)(iii) (emphasis added), whereas D.C. FOIA merely states that a waiver “*may* be furnished.”

Second, Defendants argue that even if Plaintiff is permitted to proceed on his claim for failure to apply a fee waiver, Defendants are entitled to summary judgment on this claim because Plaintiff has not established that his records request is in the public interest, or in other words, that the disclosure “can be considered as primarily benefiting the general public.” *See* D.C. Code § 2-532(b). Defendants contend that Plaintiff has admitted that the records were to be used for his defense in the disciplinary action before the Board of Dentistry and that any claims of benefit to the general public were merely conclusory. Defendants further contend that the \$9,000.00 charge quoted to Plaintiff is not unreasonable as it was made according to the fee schedule set forth in 1 DCMR § 408.

Lastly, Defendants contend that the Department of Health and the Board of Dentistry are *non sui juris* and, therefore, the suit against them must be dismissed.

#### *B. Plaintiff's Motion for Summary Judgment*

Plaintiff argues generally that Defendants have failed to provide the documents in violation of DC FOIA. Plaintiff also emphasizes that his request was made in the public interest as has the “right to as much information as the city’s bodies to ensure effective regulation and oversight of health professional so that they do not lose their right of choice of doctors and are protected against others.” Pl.’s Mot. at 3. Further, Plaintiff contends that he should be awarded attorney’s fees if summary judgment is granted in his favor.

### **IV. Discussion**

#### *A. Proper Defendants*

As a threshold matter, Defendants the District of Columbia Department of Health and the District of Columbia Board of Dentistry are indeed *non sui juris* and they must be dismissed as Defendants with Plaintiff proceeding solely against the District of Columbia. *Braxton v. Nat’l*

*Capital Hous. Auth.*, 396 A.2d 215, 216 (D.C. 1978) (“[B]odies within the District of Columbia government are not suable as separate entities.”).

### *B. Fee Waiver*

As to the District, the instant case is atypical in that the District has not refused to turn over documents by claiming a FOIA exemption. Much of the case law cited by Plaintiff regarding the District’s burden to properly claim an exemption is, therefore, inapplicable or at least relatively unhelpful to the Court’s disposition of the instant case. Here, the issue is whether the Court should compel the District to provide the requested documentation to Plaintiff free of charge or, at least, for a reduced fee.

Critically, the section of the DC FOIA statute regarding payment differs from its federal counterpart in that DC FOIA provides that “[d]ocuments *may* be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.” D.C. Code § 2-532(b) (emphasis added). And although there is no case law discussing the permissive/mandatory nature of the fee waiver in D.C. Code § 2-532(b), the Court of Appeals in *Fraternal Order of Police v. District of Columbia* discussed the Council’s use of the word “may” in the context of attorneys fees in DC FOIA cases. 52 A.3d 822, 827–28 (D.C. 2012). In that case, the Court of Appeals held that because D.C. Code § 2-537(c) states that a successful party in a DC FOIA suit “*may* be awarded reasonable attorney fees and other costs of litigation[,]” the fee provision “is expressly permissive.” *FOP*, 52 A.3d at 828. In general, unless the context of the statute dictates otherwise, “use of the word ‘may’ in a statute ordinarily denotes discretion.” *In re Langon*, 663 A.2d 1248, 1250 (D.C. 1995); *see also In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) (“[M]ay’ is quintessentially permissive.”).

The context of D.C. Code § 2-532 then supports the position that the Council’s use of “may” in the fee waiver provision means that the application of a fee waiver is permissive and not mandatory even “where a public body determines that waiver or reduction of the fee is in the public interest[.]” D.C. Code § 2-532(b). For example, in subsection b-2, the Council made the precise amount charged reviewable by this Court, stating that “[r]eview costs *shall* include only the direct costs incurred during the initial examination of a document to determine whether the documents must be disclosed or withheld in part as exempt under this section.” D.C. Code § 2-532(b-2); *see also* § 2-532(b-1)(4) (“Any fee schedules adopted by the Mayor, an agency or a public body shall provide that . . . [o]nly the direct costs of search, duplication, or review may be recovered.”). Further, the section of DC FOIA specifically addressing administrative appeals to the Superior Court, § 2-537, does not mention any right to review the denial of a fee waiver. *See* D.C. Code § 2-537(a)–(e). Applicable regulations also reiterate that an agency “may” but is not required to waive the fee for production of documents. *See* 1 DCMR § 408.9 (“An agency may waive all or part of any fee when it is deemed to be either in the agency’s interest or in the interest of the public.”).

Given the Court’s conclusion that the District may decline to grant a fee waiver even if it determines that the request for production is made in the public interest, the Court grants Defendants’ Motion for Summary Judgment and denies Plaintiff’s Motion for Summary Judgment on the claim made by Plaintiff that he is entitled to a fee waiver and that the District’s refusal to grant a waiver constitutes a constructive denial of his request for records.

### *C. Reasonableness of the Fee Imposed*

The sole issue remaining, then, is whether the District has overcharged Plaintiff for the production of documents by requiring that Plaintiff pay \$9,000. While public bodies may collect

fees pursuant to DC FOIA, those fees are “not to exceed the actual cost of searching for, reviewing, redacting, and making copies of records.” D.C. Code § 2-532 (b). Moreover, D.C. Code § 2-532(b-1)(3) provides that, “fees shall be limited to reasonable standard charges for document search and duplication.”

Here, the Court is simply not able to conclude that the \$9,000.00 fee is either reasonable or unreasonable as a matter of law because the District has not offered any factual support for the estimated number of hours that the \$9,000 fee is based on. The material facts that bear on the reasonableness of a fee are “both the number of hours and the hourly rate.” *See Role Models Am. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) (evaluating the reasonableness of attorney’s fees in the FOIA context). An agency’s mere conclusory statements regarding the reasonability of the hours and hourly rate of fees imposed are, therefore, insufficient to show that there are no material facts in dispute. *Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 814 (D.C. 2014). In *Fraternal Order of Police*, the District of Columbia Court of Appeals reviewed the trial court’s decision to grant summary judgment in favor of the District following its denial of a police union’s FOIA request. *Id.* The decision to grant summary judgment was based on a Vaughn Index that contained just one sentence of relevant information and a one-page declaration that failed to address material facts. *Id.* On appeal, the Court of Appeals held that the District’s mere conclusory statements did not adequately “enable the [trial] court to assess the propriety of the District’s decision.” *Id.* at 818. Accordingly, it concluded that “under these circumstances, the District was not entitled to summary judgment as a matter of law.” *Id.*

In this case, the Court lacks sufficient information to conclude that the imposition of a \$9,000 fee is reasonable or not. Specifically, the District has only addressed the reasonableness of the hourly rate, not the number of hours. The Court, then, does not have information about



where the requested information is stored, how it could be accessed apart from some Board of Dentistry decisions on the Department of Health website, or the number of hours that it would take to access individual categories of information. The District argues that the \$9,000 fee is reasonable because it comports with the fee schedule outlined in 1 DCMR § 408. However, 1 DCMR § 408 only addresses specific hourly rate. As to the number of hours for which that rate is assessed, the District’s motion for summary judgment is silent. Thus, much like the District’s one-sentence statement in *Fraternal Order of Police*, the District’s single sentence concluding that it will take approximately 300 hours to respond to Plaintiff’s request amounts to no more than a conclusory statement. The Court is unable to evaluate whether the estimated number of hours is reasonable without some information to support the District’s conclusion that it will take approximately 300 hours to respond to this request.

Finally, D.C. Code § 2-532(b-1)(3) requires not just reasonable charges, but “reasonable *standard* charges.” Plaintiff has offered considerable information to suggest that imposing a \$9,000.00 fee is far from the agency’s standard practice. *See* Compl. ¶¶ 14–17. Among other things, Plaintiff alleges that the Department of Health collected no fees whatsoever in responding to 101 FOIA requests during the 2017 fiscal year. Compl. ¶ 15. Despite substantially deviating from its standard course of conduct in this case, the District simply suggests that “we *estimate* that the Board staff will need *approximately* 250 hours of search and compilation time and . . . 50 hours to review and redact the documents” without any further explanation. Compl. Ex. C (emphasis added).

## **V. Conclusion**

By granting Summary Judgment in favor of the District as to the specific issue of whether it needed to apply the fee waiver, the issues in this case are significantly narrowed. Moving

forward, the sole question is whether the District's \$9,000 fee, and more specifically the estimate of the number of hours to produce the documents, was reasonable. This case is currently set for a Status Hearing on September 27, 2019. The parties may suggest a schedule for the resolution of the case at the Status Hearing or either party may file a motion prior to the Status Hearing requesting a specific schedule. Additionally, the Court's denial of the parties' Motions for Summary Judgment as to the specific amount charged for the documents requested will be *without prejudice*, as the briefing on this issue was relatively slim. If helpful for the resolution of the case, the Court will entertain Renewed Motions for Partial Summary Judgment from the parties on this issue.

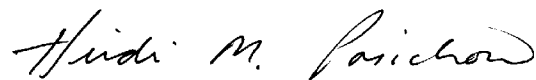
Accordingly, it is this 13<sup>th</sup> day of September 2019,

**ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED**; it is,

**FURTHER ORDERED** that Defendants District of Columbia Board of Dentistry and District of Columbia Department of Health are **DISMISSED** from the case; it is,

**FURTHER ORDERED** that Plaintiff's Motion for Summary Judgment is **DENIED**; and it is,

**FURTHER ORDERED** that this case remains scheduled for a Status Hearing on September 27, 2019 at 10:30 a.m. in Courtroom 516.



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**Heidi M. Pasichow**  
Associate Judge

**Copies e-served to:**

Anthony Rachal III  
*Counsel for Plaintiff*

Michael Tilghman  
Brendan Heath  
*Counsel for Defendants*