

**ORDER ON APPELLANT'S DISCOVERY MOTIONS**

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IN THE MATTER OF THE APPEAL OF:

**JONATHAN CAIN**, Appellant,

vs.

**DEPARTMENT OF PARKS AND RECREATION**,  
and the City and County of Denver, a municipal corporation, Agency.

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Appellant has moved for production of the Counsilman-Hunsaker report on the condition of the City's aquatics facilities, and the raw data gathered as a part of that report. The Agency objects on a number of grounds.

Before his dismissal in October 2015, Appellant worked as a Pool Technician charged with inspection and maintenance of city pools. He was dismissed for several performance errors from May to August, including overfilling a pool resulting in extensive damage to the city facility. He appeals this dismissal, and also asserts that it was imposed in retaliation for his reports of official misconduct. Appellant alleges that he informed his supervisor in early 2015 that chemically treated water was being discharged into streams, and that a design flaw in a baby pool was causing improperly treated water. The appeal asserts that the former violated EPA Regulation 40 CFR Part 122.

In support of his whistleblower claim, Appellant requests the independent report on the condition of the city's pools and the raw data used to prepare that report. He contends that the report is discoverable on his dismissal appeal and the retaliation claim. The Agency objects on the grounds that there is no final or preliminary report, and the only data yet collected is unverified, unapproved and incomplete information from initial inventory visits. It also claims that the report and data bear no relevance to Appellant's performance errors.

The report may well contain information that would tend to prove one or more of Appellant's theories of the case. However, the Agency cannot produce what doesn't yet exist. The existing raw data that relates to any of Appellant's claimed performance errors may likewise assist Appellant to prove his claims, and is a proper subject of discovery on the contested issues in this appeal.

Order

Based on the foregoing findings and conclusions, Appellant's discovery motion is **GRANTED**. On or before **December 28, 2015**, the Agency shall produce the Counsilman-Hunsaker report if it exists, and the data gathered for that report that relates to the dismissal action and/or the whistleblower claim.

DONE December 4, 2015.



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Valerie McNaughton  
Career Service Hearing Officer