

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-14R

July 29, 2011

Warner H. Session, Esq.

Dear Mr. Session:

This letter responds to your June 15, 2011 request for reconsideration of my decision dated March 18, 2011 in which I ordered the District of Columbia Water and Sewer Authority (“DC Water”), to “provide [to you] the nine requested categories of documents, with redactions for information that is clearly exempt.” At that time, no documents had been provided. In that decision, it was further stated that once DC Water had provided you with the requested documents, that “[i]f you then believe that DC Water has improperly withheld or redacted records pursuant to this decision, you may file an appeal with the Mayor.” In response to that order, DC Water provided copies of redacted documents. Your request for another remand or reconsideration of the initial decision followed.

This case involves a DC Water RFP for Annual Maintenance, Repair and Calibration of Instrumentation and Telemetry Equipment. There were three bidders who responded to the request for proposals. The appellant represents one of the losing bidders. The appellant challenges redactions on three of the documents produced.

1. On the “final proposal tabulation for each bidder,” DC Water redacted all the scores of the other losing bidder, and disclosed only the pricing scores, and Total Evaluation Scores of the winning bidder and the requester. The LSDBE Preference Points for the requester were also disclosed.
2. On the technical evaluation scoring charts reflecting scoring for each bidder (qualification, experience, and technical approach), the scores for all of the bidders were redacted.
3. The prices for all bidders were redacted on the pricing summary.

The principal arguments on reconsideration are that the documents provided by DC Water were “so extensively redacted that the information provided was non-responsive ...,” and that the trade secrets (D.C. Official Code § 2-534(a)(1)), and deliberative process exemption (D.C. Official Code § 2-534(a)(4)), do not apply to the information requested. The appellant also relies upon DC Water’s own Procurement Manual, which provides that in a debriefing, DC

Water is required to disclose to an unsuccessful offeror: source selection procedures, weakness and deficiencies in the offeror's proposal, overall technical rating and price of the successful offeror and the offeror being debriefed, and the rationale for the award.

DC Water responded that both the deliberative process exemption, and the exemption applicable to trade secrets and commercial or financial information apply to the requested information. DC Water provided redacted documents and a Vaughn index describing the redactions to the appellant, and provided unredacted copies of the responsive document to this office for *in camera* review.

Discussion

The public policy of the District of Columbia government 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. Official Code § 2-531(a). Nonetheless, that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534. Two of those exemptions are found at D.C. Official Code § 2-534(a)(1), which exempts documents containing sensitive commercial or financial information, and D.C. Official Code § 2-534(a)(4), which exempts predecisional and deliberative documents. There is little case law from the District of Columbia Court of Appeals discussing D.C. FOIA exemptions; however, "except where the two acts differ, . . . case law interpreting the federal FOIA [is] instructive authority with respect to our own Act."¹

D.C. Official Code § 2-534(a)(1) (Exemption 1), exempts from disclosure "trade 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." Pricing and other information submitted to an agency in response to requests for proposals have often been found to contain information determined to be exempt from the mandatory disclosure requirements under FOIA Exemption 1.² This exemption requires "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); *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). It also requires a showing of harm; however, "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.

¹ *Washington Post, supra*, 560 A.2d 517, 521, n.5 (D.C. 1989).

² See, e.g., *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (substantial cost savings to competitors through FOIA access to data may result in substantial competitive harm to data submitter); *Orion Research Inc. v. EPA*, 615 F.2d 551 (1st Cir. 1980) (disclosure of bid proposal would have chilling effect on willingness of potential bidders to submit future proposals); *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1980) (ability of competitors to calculate data submitter's future bids and pricing structure would be substantial competitive harm); *Environmental Technology, Inc. v. EPA*, 822 F. Supp. 1226 (E.D. Va. 1993) (unit price information voluntarily provided by government contractor to procuring agency was "confidential" and not subject to disclosure under FOIA, where information was of a kind that contractor would not customarily share with competitors); and *Cohen, Dunn & Sinclair v. General Services Administration*, Civ. No. 92-57-A (E.D. Va. Sept. 10, 1992) (pricing information was exempt because of deterrent effect on future bids and because disclosure would result in severe economic harm to some bidders).

2d 91, 94 (D.D.C. 2010); *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]").

D.C. Official Code § 2-534(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[.]" The deliberative process privilege rests "on the policy of protecting the 'decision making process of government agencies' . . . and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *Id.* at 152. According to the legislative history accompanying the federal FOIA, the purpose of federal FOIA Exemption 4 is to encourage the "frank discussion of legal and policy issues." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

It is well established that an internal letter, memorandum, or other form of written communication is protected from disclosure under the deliberative process privilege if it is both "predecisional" in nature and "deliberative" in character.³ A record in the possession, custody, or control of a public body is "predecisional" when it is "prepared in order to assist an agency decision maker in arriving at [a] decision," *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184-85 (1975), such as "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. To the extent that a record maintained by a public body contains information that "reflects the give-and-take of the consultative process", it is of a "deliberative" character. *Id.*

Generally, "the deliberative character of agency documents can often be determined through 'the simple test that factual material must be disclosed but advice and recommendations may be withheld.'" *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (quoting *Wolfe, supra*, 839 F.2d at 774). The D.C. Circuit's "decisions on the 'deliberativeness' inquiry have focused on whether the disclosure of the requested material would tend to 'discourage candid discussion within an agency.'" *Petroleum Information Corporation*, 976 F.2d at 1434 (citing *Access Reports*, 926 F.2d at 1195 (quoting *Dudman Communications v. Department of Air Force*, 815 F.2d 1565, 1567-68 (D.C. Cir. 1987)). Thus, the crucial inquiry in FOIA Exemption 4 cases is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* at 1568.

An internal memorandum or other document drafted by a subordinate employee which is ultimately routed through the chain-of-command to a senior official with decision-making

³ *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Petroleum Information Corporation v. Dep't of the Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992); *Access Reports v. Department of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

authority is likely to be a part of an agency's deliberative process because it will probably "reflect his or her own subjective opinions and will clearly have no binding effect on the recipient." *Access Reports*, 926 F.2d at 1195.

Based on the case law cited above, a review of the redacted and unredacted documents, and the representations of DC Water; I conclude that D.C. Official Code § 2-534(a)(1) applies to the pricing summary, and that section 2-534(a) (4), applies to the technical evaluation scoring charts reflecting scoring for each bidder (qualification, experience, and technical approach), and the final proposal tabulation for each bidder.⁴ That leaves to be decided the question of whether DC Water has properly segregated and redacted the exempt material from non-exempt material.

D.C. Official Code § 2-534(b) provides, in pertinent part, that "any reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section." The deliberative process exemption requires an inquiry that "focuses on the predecisional and deliberative nature of the documents' content." *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 877 (D.C. Cir. 2009).

DC Water redacted the evaluation scores for all of the bidders on the technical evaluation scoring chart, including the bidder represented by the appellant. DC Water originally redacted the final tabulation for each bidder, but following the remand, provided appellant with its LSDBE Preference Point score. It also provided pricing scores and total evaluation scores for the requester and winning bidder on the final tabulation document. Finally, DC Water contested the assertion that it did not provide the requested information to the requester at the debriefing.⁵

The technical evaluation scoring charts reflecting scoring for each bidder (qualification, experience, and technical approach); (2) final proposal tabulation for each bidder; and (3) pricing summary are "all part of a process leading up to a final decision," weighing the "pros and cons of a proposal," and are in the nature of recommendations to a superior. Here, the tabulations and evaluations were provided to the Acting Director of Procurement, making them both predecisional and deliberative. That is the essence of the deliberative process privilege. DC

⁴ The deliberative process privilege exemption has been consistently applied to documents supplied by outside contractors, as well as to internal agency documents pertaining to contract award decisions. In *MCI Telecommunications Corp. v. General Services Admin.*, 1992 U.S. Dist. LEXIS 3623, 709 (D.D.C. Mar. 25, 1992), the court found that documents that were generated and used by GSA during the evaluative stage of its procurement process "are clearly intra-agency." It was stated that the documents were "not final decisions, but rather they were reports, analyses, and recommendations which were available to the final decision-maker." They were found to be predecisional and deliberative. In *Mead Data Central v. Dept. of the Air Force*, 575 F.2d 932 (D.C. Cir. 1978), "cost comparisons, feasibility opinions, and data relevant to how the personnel involved arrived at those comparisons and opinions" were found to be deliberative documents. See also, *SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force*, No. 88-481, 1989 WL 201031, at 1-2 (D.D.C. Mar. 31, 1989) (holding technical scores and technical rankings of competing contract bidders predecisional and deliberative); and *Prof'l Review Org., Inc. v. HHS*, 607 F. Supp. 423, 427 (D.D.C. 1985) (observing that scores used to rate procurement proposals may be "numerical expressions of opinion rather than 'facts'").

⁵ DC Water's Procurement Manual does require the information the requester lists, but also includes a statement that "The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors." See, section 7.5.2 of the DC Water Procurement Manual, Date Issued: June 12, 2009, http://www.dcwasa.com/business/DCWASA_Procurement_Manual.pdf

Water has demonstrated that release of the pricing data to the requester reveals the existence of potential competitive injury or economic harm to the person submitting the data justifying the withholding of that information. The requester is in direct competition with the winning bidder and disclosure of pricing information would likely result in economic harm.

Conclusion

FOIA's purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). That purpose has been served by the disclosures that have been made in this case. Therefore, we **UPHOLD** the decision of DC Water. The Appeal is hereby **DISMISSED**.

This is a final decision of this office. If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Brian K. Flowers
General Counsel to the Mayor

cc: Katherine Cahill – DC Water