

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-101**

October 9, 2015

VIA ELECTRONIC MAIL

Mr. Vincent Trivelli

RE: FOIA Appeal 2015-101

Dear Mr. Trivelli:

This letter responds to the administrative appeal you filed with 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 Public Service Commission of the District of Columbia (“PSC”) improperly redacted records you requested on behalf of your client.

Background

On June 9, 2015, you sent a request to the PSC for 6 categories of records and information pertaining to Verizon Washington, DC Inc. (“Verizon”). Pursuant to Commission Rule 704.4, on July 9, 2015, the PSC notified Verizon of your request because it involves potentially proprietary information pertaining to Verizon. On July 17, 2015, Verizon responded by asserting that portions of the requested records are exempt from disclosure under D.C. Official Code § 2-534(a)(1) (“Exemption 1”)<sup>1</sup> because: (1) the District’s telecommunications market is highly competitive; (2) information on Verizon’s timeliness in meeting customer orders and restoring service is not published or disclosed in any other manner and Verizon’s competitors cannot obtain this performance data; (3) the information would allow competitors to understand the costs of entering the market, what kinds of advertising to pursue, and the level of service that they must meet or exceed in the marketplace; and (4) some of Verizon’s principal competitors are not obligated to supply the PSC with comparable data, so Verizon would be at a competitive disadvantage if the information were publicly disclosed. On July 22, 2015, you responded to Verizon’s position, challenging its assertion of Exemption 1.

On September 3, 2015, the PSC responded to your FOIA request by granting in part and denying in part each of the 6 categories of records you requested. The responsive records disclosed were identified as Attachments A through H.<sup>2</sup> For each responsive record, the PSC identified and

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<sup>1</sup> Exemption 1 exempts from disclosure “trade 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.”

<sup>2</sup> The attachments also contained sample disclosures (e.g., Attachment D) and agreements to disclose voluminous responsive documents on a rolling basis (e.g., Attachment E).

explained the exemptions justifying the redactions it made. The redactions were based on Exemption 1, as well as D.C. Official Code § 2-534(a)(2)<sup>3</sup> and D.C. Official Code § 2-534(a)(4) (“Exemption 4”).<sup>4</sup> Regarding its reliance on Exemption 1, the PSC summarized and considered both Verizon’s request and your challenge of the exemption and determined that certain redactions were appropriate to protect Verizon from substantial competitive harm that would result from the release of Verizon’s confidential and proprietary commercial information. With respect to Exemption 4, the PSC asserted that it prevents disclosure of “information from intra-agency memoranda generated by Commission Staff that reflects advice, recommendations, and or the give-and-take of the consultative process.”

On appeal, you challenge redactions the PSC made pursuant to Exemptions 1 and 4. For Exemption 1, you reassert the arguments that you made in challenging Verizon’s response and raise additional arguments challenging the PSC’s partial disclosure. These arguments include: (1) there is insufficient proof for both the existence of competition and that substantial harm would result from disclosure; (2) the legal authorities the PSC cited are insufficient to prevent disclosure; (3) the selective redaction of the disclosed material undermines the basis for applying the exemption; (4) similar data is made publically available in New York; and (5) disclosure of the information would benefit public consumers in the District. You challenge Exemption 4 on the basis that the PSC “cites no law for the fact that it fails to demonstrate that the documents or information withheld would not be available to a party other than a public body in litigation with a public body.”

In response to your appeal, on September 21, 2015, the PSC reaffirmed its original determination and declined the opportunity to supplement its response. Subsequently, we requested that the PSC provide our office with unredacted versions of some of the disclosed attachments for this Office’s *in camera* review. We also requested further explanation of the redactions made in Attachment D. On September 28, 2015, the PSC provided the requested unredacted attachments and explained that the redactions in Attachment D:

were determined to be confidential and proprietary information as they detail duration of the outage, exact causes of the outage, as well as repair methods utilized by Verizon to fix the outages. Publically releasing this information would allow Verizon’s competitors to mimic Verizon’s business practices; advertise their products, services, or response times as better than Verizon’s; and or provide competitors with necessary information to compete against Verizon for service contracts. Therefore, this information, if released would result in substantial harm to Verizon’s competitive position.<sup>5</sup>

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<sup>3</sup> D.C. Official Code § 2-534(a)(2) prevents disclosure for “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

<sup>4</sup> Exemption 4, known as the “deliberative process privilege” or “litigation privilege,” exempts from disclosure “inter-agency or intra-agency memorandums or letters ... which would not be available by law to a party other than a public body in litigation with the public body.”

<sup>5</sup> A copy of this explanation 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 right to inspect a public record, however, is subject to exemptions. *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). 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).

In response to your FOIA request, the PSC did not withhold any documents in their entirety; therefore, our determination shall address the redactions the PSC made pursuant to Exemptions 1 and 4.

### *Exemption 1*

To defend withholding a document under Exemption 1, the PSC must show that the redacted information: (1) is a trade secret or commercial or financial information; (2) 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 has also instructed that the terms “commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Id.* at 1290. Generally, records are “commercial” so long as the submitter has a “commercial interest” in them. *See Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). *But see Chicago Tribune Co. v. FAA*, 1998 U.S. Dist. LEXIS 6832, \*6 (N.D. Ill. May 5, 1998) (finding that chance events that happened to occur in connection with a commercial operation were not commercial information regarding documentation of medical emergencies during commercial fights).

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); *see 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]). In the context of federal FOIA, the D.C. Circuit has held that a requester cannot bolster the case for disclosure by claiming an additional public benefit in release. *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999).

It is evident from our review of the documents at issue that they contain commercial information provided by a party outside the government. Further, many of the documents are labeled as confidential, and Verizon and the PSC assert that the information is not made available by other means. We find merit in Verizon and PSC’s position that actual competition exists in the District’s telecommunications market and that disclosure of certain commercial information would likely cause substantial harm to Verizon by allowing competitors to copy Verizon’s practices and methods, make targeted advertisements against Verizon, or gain an advantage competing against Verizon for service contracts. Accordingly, the majority of the information the PSC redacted meets the threshold for protection under Exemption 1, in that the information would likely result in substantial harm to Verizon’s competitive position if it were disclosed. By way of example, the numerical values and percentages in the attachments were properly redacted under Exemption 1.

Nevertheless, not all of the information the PSC redacted is protected under Exemption 1. In Attachment D, a sample outage report, the commercial value of some of the redacted information is not readily apparent. Based on our lack of expertise in the telecommunications field, we are hesitant to order disclosure of information that could potentially result in substantial competitive harm; however, the majority of the content on pages 8 and 9 of the outage report is a description of a basic repair process related to an outage caused by environmental conditions. We find little to no commercial value in this information and little to no risk of harm from its disclosure. *See Chicago Tribune Co.*, 1998 U.S. Dist. LEXIS 6832, \*6 (finding that reports of chance events which happened to occur in connection with a commercial operation were not protected commercial information). Therefore, we find that the information on pages 8 and 9 of Attachment D under the heading “Explanation of Outage Duration” should be disclosed except for the specific duration (hours and minutes) of the outage, which may be redacted. In addition, information under the headings “Description of Incident,” “Description of Cause,” “Root Cause,” “Name/Type of Equipment that Failed,” and “Method(s) Used to Restore Service” should be disclosed in full.

Having addressed specific redactions the PSC made pursuant to Exemption 1, we now address your general arguments with respect to why the PSC’s application of this exemption was erroneous. Although you point out that information similar to that withheld by the PSC is publically available in New York, we note that the District has a different regulatory structure and telecommunications market. In light of the D.C. Circuit’s interpretation of the analogous provision of federal FOIA, we also reject your argument that the public interest here weighs in favor of disclosure, *See Public Citizen Health Research Group* 185 F.3d at 904 (stating that public interest arguments do not support disclosure of information protected by the federal FOIA equivalent of Exemption 1). Moreover, while the records you seek may be informative to telecommunications consumers, it is not clear that their disclosure would shed light on the functions of PSC or the District government, which is the statutory purpose of FOIA. *See*

*Gilmore v. DOE*, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998) (stating that for public interest to be a countervailing factor it should shed light on an agency's performance of its duties).

Finally, you argue that the selective redaction of records is improper under Exemption 1. Under DC FOIA, even when an agency establishes that application of an exemption is proper, 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)). As a result, we find that the PSC's selective use of redactions is consistent with the principle of segregability. With the exception of the portions of Attachment D previously discussed, we believe that the PSC consistently disclosed segregable information as required under D.C. Official Code § 2-534(b).

#### *Exemption 4*

Exemption 4 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). Privileges in the civil discovery context include the deliberative process privilege. *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 an 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.*

While the ability to pinpoint a final decision or policy may bolster the claim that an earlier document is predecisional, courts have found that an agency does not necessarily have to point specifically to an agency's final decision to demonstrate that a document is predecisional. *See e.g., Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 136 (D.D.C. 2011) (rejecting plaintiff's contention that "the Board must identify a specific decision corresponding to each [withheld] communication"); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 26-27 (D.D.C. 2011).

The only redactions the PSC made pursuant to Exemption 4 are found in Attachment G. Based on our *in camera* review of an unredacted copy of Attachment G, it is clear that the withheld information is protected under Exemption 4. The redacted provisions are found in pre-decisional memoranda sent from analysts at the Office of Technical and Regulatory Analysis to the Chairman of the PSC for the purpose of guiding the PSC's decision making. The redacted portions are also deliberative, as they reflecting the opinions and analysis of the staff member who sent the letter. Consequently, the redactions the PSC made to Attachment G under Exemption 4 were proper.

### Conclusion

Based on the foregoing, we affirm the PSC's decision in part and remand it in part. Within seven (7) business days of the date of this decision, the PSC shall disclose a revised version of Attachment D in accordance with the guidance provided in this determination.

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,

/s Melissa C. Tucker

Melissa C. Tucker  
Associate Director

/s John A. Marsh\*

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cc: Naza N. Shelley, Attorney Advisor, PSC (via email)

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