

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

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October 29, 2007

Office of the General Counsel to the Mayor

BY EMAIL AND U.S. MAIL

[REDACTED]
Washington, DC 20000

Re: Freedom of Information Act Appeal

Dear [REDACTED]

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. § 2-531 *et seq.* (the "DC FOIA"), dated August 16, 2007 (the "Appeal"). We forwarded the Appeal to the Office of the Chief Financial Officer ("OCFO") with a request for a response. The OCFO responded by memorandum dated August 28, 2007 ("OCFO Response"). Subsequently, you ("Appellant") responded to the OCFO Response by letter dated August 31, 2007 ("Appellant's Rebuttal"). The record consists of the Appeal, the OCFO Response, Appellant's Rebuttal and a copy of a document marked "DRAFT," and referred to as the "KPMG Report," a copy of which has not been provided to Appellant.

In your initial FOIA Request, dated March 20, 2007, you sought:

1. A copy of all reports prepared by KPMG in connection with an audit/study performed in 2006 to confirm employee identity/employment status of DCPS employees; and
2. A copy of all e-mail and written correspondence and reports from OCFO, OCFO/DCPS and DCPS administration concerning the need for the KPMG study before it was done and the results of the study/audit.

OCFO responded to the FOIA Request in a letter dated August 15, 2007 (the "OCFO Denial"), denying Appellant's request because, with respect to the first request, the requested information is: (i) part of a deliberative process antecedent to the adoption of agency policy and (ii) for the purpose of enabling the OCFO to make recommendations relating to policy. With respect to the second request the requested information is: (i) part of a deliberative process antecedent to the adoption of agency policy and (ii) a direct part of [the] deliberative process related to the making of policy. OCFO Denial at 1.

Appellant argues on appeal that: (i) the KPMG report is not exempt because it is not written or created by staff-level employees of the government; rather it was created by third party consultants; (ii) even if portions of the KPMG report are protected, the exemption does not cover purely factual portions of pre-decisional documents; and (iii) portions of the FOIA request did not seek pre-decisional documents.

Discussion

It is the public policy of the District 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, 2001 Ed. § 2-531. In aid of that policy, the FOIA creates the right “to inspect ... and ... copy any public record of a public body” *Id.* § 2-532(a). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. D.C. Official Code, 2001 Ed. § 2-534.

The OCFO denial was based on D.C. Official Code § 2-534(a)(4), which exempts from disclosure “inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff of 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.” This statute mirrors Federal FOIA “Exemption 5,” otherwise known as the “deliberative process privilege,” found at 5 U.S.C. § 552(b)(5) (2000). Thus, case law interpreting that federal statute would apply similarly to the DC statute.

Exemption 5 exempts from disclosure documents reflecting recommendations and deliberations comprising part of the process by which agency decisions and policies are formulated. People for the American Way Foundation v. National Park Service, ___ F.Supp.2d ___, 2007 WL 2416113 (D.D.C. 2007). While the D.C. statute refers only to inter-agency and intra-agency memorandums or letters, the exemption has been construed more broadly. In fact, the Court of Appeals for the District of Columbia Circuit noted that Congress did not intend “inter-agency” or “intra-agency” to be rigidly exclusive terms, but rather to include nearly any record that is part of the deliberative process. *Freedom of Information Act Guide & Privacy Act Overview*, U.S. Dept. of Justice, May 2002 Ed., p.274, citing Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980).

In this Appeal, the initial question is whether the KPMG Report is covered by Exemption 5. In the OCFO Response, the OCFO claims that the privilege extends to the document in question, relying on Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1, 121 S.Ct. 1060 (2001). OCFO Response at 1. Appellant argues that the KPMG Report is not an “intra-agency or inter-agency” document and Klamath does not support the OCFO’s position. Appellant notes correctly that the court in Klamath actually ruled against the agency’s attempted use of the deliberative process exemption in that case. Appellant’s Rebuttal at 1.

Still the Court did not hold that the exemption was inapplicable to documents prepared by outside consultants. Instead, the Court ruled narrowly that the exemption was improper because the documents sought were submitted to the agency: (i) by a third party at the request of the agency; and (ii) as part of a proceeding in which that third party had a direct interest. Thus, Klamath is distinguishable from the instant case, as there is no evidence here that the consultants submitted it as part of a proceeding in which the consultants had an interest (i.e., an administrative proceeding pending before the agency where the subject of the proceeding involves the consultant). Further, the Klamath Court left open the continued viability of D.C. Circuit Court precedent applying Exemption 5 to consultant reports, by recognizing decisions in Public Citizen, Inc. v. U.S. Department of Justice, 111 F.3d 168 (C.A.D.C. 1997), and Ryan v. U.S. Department of Justice, 617 F.2d 781 (C.A.D.C. 1980), which the Court noted extend beyond typical examples of cases in which communications of outside consultants have been held to satisfy the "inter-agency or intra-agency" threshold. Klamath, 532 U.S. at 12, 121 S.Ct. at 1068, n.4. Thus, Klamath does not serve as adverse precedent.

In this Circuit, Exemption 5 covers documents generated by consultants because agencies, in the exercise of their primary functions, need recommendations and opinions from temporary consultants. *Freedom of Information Act Guide*, Id. at 275, citing Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). Such advice plays "...an integral function in the government's decision[making]." Id. at 275, citing American Society of Pension Actuaries v. Pension Benefit Guaranty Corporation, 3 Government Disclosure Service (P-H), 83,182, at 83,846 (D.D.C. June 14, 1983). The OCFO asserts, and nothing in the record contradicts, that it continues to investigate employee procedures and that final policy decisions have not yet been made with respect to the KPMG Report. OCFO Response at 3. It would appear reasonable to conclude, then, that the KPMG Report remains a part of the OCFO's decision-making process.

The second basis for Appellant's appeal is his claim that portions of the KPMG Report are purely factual and, therefore, should not be exempt from disclosure. Appellant alleges that KPMG was hired to "perform a job – a payroll verification audit." Appellant's Rebuttal at 2. And, thus, Appellant argues that the KPMG Report is not primarily deliberative. Yet, the OCFO states in the OCFO Response that the consultant was hired to assist in "obtaining information regarding the status of DCPS records as they relate to compensation of DCPS employees, and to assist the OCFO in ...making policy decisions regarding...processing payment of compensation to DCPS employees." OCFO Response at 2. Independently more telling, however, is the Executive Summary in the draft KPMG Report which describes the consultant's engagement to conduct a "personnel information audit and forensic analysis." This description suggests that the objective was far broader than identification of factual material.

There is little doubt that the KPMG Report contains factual information; yet, that does not demand disclosure of the document. Appellant failed to cite authority for his

proposition that a compilation of "matters of fact" should be subject to disclosure. A compilation of facts in document form is subject to the same analysis as any other document request under FOIA. Still, it is fairly clear that the KPMG Report is more than a set of facts. Even Appellant referred to it as an "audit" which, among other things, is "an evaluation of a person, organization, system, process, project or product...performed to ascertain the validity and reliability of information, and also provide an assessment of a system's internal control." *Wikipedia, The Free Encyclopedia*, <http://en.wikipedia.org/wiki/Audit>, October 14, 2007. Compiling the facts underlying that evaluation is only one element of the audit.

We are satisfied that the KPMG Report generally may be withheld from disclosure based on D.C. Official Code § 2-534(a)(4). However, we find: (i) that OCFO has not fully addressed Appellant's request for email and written correspondence, and (ii) that OCFO has failed to address Appellant's position that portions of the KPMG Report should be disclosed in redacted form. Accordingly, the Appeal is hereby REMANDED to the OCFO so that the OCFO can take the following actions within ten (10) days: (1) provide to this office a Vaughn index identifying emails and correspondence potentially responsive to Appellant's FOIA request and confirming that the deliberative process applies; and (2) confirm OCFO's position on whether portions of the KPMG Report may be disclosed in redacted form to the extent that portions are not subject to the deliberative process exemption.

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.

Regards,



Andrew T. Richardson, III, Esq.
Deputy General Counsel, EOM

cc: Charles F. Barbera, Esq.