

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

Freedom of Information Act Appeal: 2011-05

February 18, 2011

Elizabeth D. Horton

Dear Ms. Horton:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a) (“FOIA”), dated December 29, 2010 (the “Appeal”). The present action asserts that the District of Columbia Water and Sewer Authority (“WASA”) improperly withheld records in response to a request for information under a FOIA request dated September 16, 2010 (“FOIA Request”).

Background

Appellant’s FOIA Request sought 9 separate categories of documents relating to a WASA program to reduce or eliminate lead piping in public and private spaces. WASA denied the request, referencing pending litigation and D.C. Official Code § 2-534(a)(4), exempting the requested documents from disclosure. On Appeal, appellant challenges WASA’s claim that D.C. Official Code § 2-534(a)(4) authorizes the withholding.

We forwarded the Appeal to WASA with a request for a response. WASA requested, and was granted, an extension of time to respond until January 27, 2011. On that date, WASA responded that FOIA was not enacted to be used as a tool to circumvent the normal discovery process once a matter is in litigation, citing a May 17, 2007 opinion of this office as precedent, that the documents were available from the Department of Consumer and Regulatory Affairs, and that they did not have to produce a Vaughn Index for requests where there is pending litigation.

Discussion

It is the public policy of the District of Columbia (“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

§ 2-537(a). 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). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that the DC FOIA be “construed with the view toward “expansion of public access and the minimization of costs and time delays to persons requesting information.” Mayor’s Memorandum 2011-01, dated January 3, 2011, Transparency and Open Government Policy. Nonetheless, that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The appellant, an attorney, filed this appeal on behalf of Anchor Construction Corporation, a company engaged in active litigation with WASA. The appellant requested the following:

1. The official letter dated December 29, 2004 to DC WASA by the Administrator of the Building and Land Regulation Administration of DCRA.
2. The approval notification sent to DC WASA by the Administrator of the Building and Land Regulation Administration of DCRA in response to the December 29, 2004 letter.
3. All correspondence, daily reports, minutes of meetings and e-mails (1) prepared; (2) received; (3) retained; and/or, (4) sent in each calendar year between 2003 and 2007 by the Administrator of the Building and Land Regulation Administration regarding the request by DC WASA for blanket permits to be issued by DCRA for the lead water service replacement program.
4. All correspondence, daily reports, minutes of meetings and e-mails (1) prepared; (2) received; (3) retained; or, (4) sent to or from Denzil L. Noble of DCRA related to DC WASA’s lead water service replacement program in calendar years 2004 and 2005.
5. All correspondence, daily reports, minutes of meetings and e-mails (1) prepared; (2) received; (3) retained; or, (4) sent to or from DC WASA regarding any aspect of permitting for lead water service replacement program between August 2006 and March 2007.
6. All memoranda, correspondence, daily reports, minutes of meetings and emails (1) prepared; (2) received; (3) retained; or (4) sent to or from DC WASA related to any changes in the process for obtaining permits for lead water service replacement in public and private spaces between 2003 and 2009.
7. All correspondence, daily reports, minutes of meetings and e-mails (1) prepared; (2) received; (3) retained; or, (4) sent to or from DC WASA by Denver Boney of DCRA related to DC WASA’s lead water service replacement program between August 2006 and March 2007.

8. Permits obtained by DC WASA from DCRA for public and/or private spaces related to DC WASA's lead water service replacement program for the following months:
 - a. October 2005
 - b. August 2006
 - c. October 2006
 - d. November 2006
 - e. December 2006
 - f. January 2007
 - g. February 2007
 - h. March 2007
 - i. May 2007
 - j. October 2007
 - k. May 2008
 - l. October 2008

9. Inspections reports, notes, e-mail or memoranda received by DC WASA from DCRA inspectors between September 2006 and March 2007 regarding any aspect of permitting related to Anchor's work on DC WASA's lead water service replacement program.

WASA's original denial letter stated there was an active lawsuit between Anchor and DC WASA and that "[t]he FOIA process cannot be used to circumvent the normal discovery process, once a matter is in litigation." In support of this position, WASA cited to D.C. Official Code § 2-534(a)(4) and *Maydak v. U.S. Department of Justice*, 254 F.Supp. 2d 23 (D.D.C. 2003).

On appeal, the appellant states that the exemption cited by WASA is inapplicable and that the plain language of the FOIA statute "entitled them to the documents requested because those documents are available by law." Additionally, the appellant states that several of the specific requests, such as permits and a letter reflecting an adopted policy, are not exempt from disclosure under D.C. Official Code § 2-534(a)(4).

On appeal, WASA re-iterates its position that D.C. Official Code § 2-534(a)(4), the inter-agency/intra-agency exemption, covers the material that was requested, and that once a matter is in litigation "an entire body of law controls the manner in which documents can be discovered." For the reasons which follow, I find WASA's arguments to be unpersuasive, and WASA is ordered to respond to the FOIA request within ten days of the receipt of this decision.

WASA relies on D.C. Official Code § 2-534(a)(4), that exempts from mandatory 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" for categorically withholding all of the documents requested. D.C. Official Code § 2-534(a)(4) is a provision that mirrors federal FOIA statute "Exemption 5," found at 5 U.S.C. § 552(b)(5). Because "[m]any of the provisions of our [DC] FOIA parallel those in the federal statute," we can look to federal case law interpreting this provision as "instructive authority." *Washington Post Co. v. Minority Business Opportunity Comm'n*, 560 A.2d 517, 521 fn. 5 (D.C. 1989) (*See*

also *Doe v. District of Columbia Metropolitan Police Department*, 948 A.2d 1210 (2008)(case law interpreting the federal Freedom of Information Act is treated as instructive authority regarding the District of Columbia's own Freedom of Information Act).

Exemption 5 has been construed to "exempt those documents, and only those documents that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 incorporates "all civil discovery rules ..." The threshold requirement under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums."¹ See *Sears*, 421 U.S. at 14. While some of the document requested by the appellant may arguably be considered inter-agency or intra-agency memorandums, many of them do not. For example, minutes, approval letters and permits obtained by WASA are not inter-agency or intra-agency memorandums.

Moreover, D.C. Official Code § 2-536 (a) requires that certain information proactively be made public, and do not require a written request for information. "[M]inutes of all proceedings of all public bodies" and "authorized building permits, including the permit file" are included in the information the statute requires to be made public. See, D.C. Official Code § 2-536(a)(7) and (8A). The D.C. Court of Appeals has held that section 2-536(a) does not mandate the disclosure of information where a FOIA exemption applies. The Court based this conclusion on the introductory language of section 2-536(a), which "declares broad categories of information to be public [w]ithout limiting the meaning of other sections of this subchapter." *Office of the People's Counsel v. PSC*, 955 A.2d 169, 176 (D.C. 2008). (Construing that qualifying language denoting that information determined to be exempt from disclosure under section 2-534(a) need not be treated as public information and made available pursuant to section 2-536.). In this case, WASA has not attempted to determine which records are exempt and which are not. It is hard to imagine a scenario in which minutes of a public meeting or permits would be withheld based upon the application of another FOIA exemption.

Furthermore, I want to make it clear that there is no "pending litigation" exemption that can be asserted without reference to one of the statutorily enumerated exemptions. WASA cites to no authority supporting its position that once litigation has commenced, the only appropriate mechanism for discovery is the rules of discovery and not FOIA. The May 17, 2007 opinion of this office cited by WASA was decided based upon a finding that the request was unduly burdensome and that certain requests did not reasonably describe the requested records. In contrast, in that case, WASA had provided over 2,000 pages of documents in response to the request. Here, none have been provided. Moreover, in the case cited by WASA to justify the categorical withholding of all documents, *Maydak v. U.S. Department of Justice*, 254 F.Supp. 2d 23 (D.D.C. 2003), the agencies in that case produced responsive documents and a Vaughn Index.

The Supreme Court has stated affirmatively that the only shelter from FOIA's disclosure requirements is the proper assertion of one of the specific and particular legislatively enacted exemptions under the Act:

¹ Typically, agencies claiming an exemption under D.C. Official Code § 2-534(a)(4), assert the deliberative process privilege, attorney work product privilege, attorney client privilege, or another discrete privilege. WASA has not asserted any discrete privileges to particular documents in this matter.

Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. *But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.* (Emphasis added)

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220-221 (U.S. 1978).²

The Court went on to suggest that FOIA requesters rights are neither enhanced nor diminished by their status as litigants.³

Conclusion

Accordingly, this appeal is hereby REMANDED to WASA to provide appellant with all materials responsive to appellants FOIA request within ten (10) days of the date of this decision. If WASA does not have in its possession, custody or control the records that are being requested, then WASA must provide notice to the appellant that the agency does not have the records. WASA is also free to apply to the court in the pending litigation for a protective order mandating that discovery and the production of documents be conducted exclusively under the jurisdiction of the court.⁴

This constitutes the 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 and Sewer Authority

² At least one jurisdiction, California, has specifically adopted a pending litigation exemption in their FOIA law. *See*, Cal. Government Codes Section 6254 (b) (nothing in this chapter shall be construed to require disclosure of records that are . . . [r]ecords pertaining to pending litigation). The Council has not enacted such an exemption.

³ *Id.* at 214, 242, n23; *See also EPA v. Mink*, 410 U.S. 73, 86 (1973).

⁴ *See, Wagar v. United States Dep't of Justice*, 846 F.2d 1040, 1047 (6th Cir. Ky. 1988) (court is not limited to sealing those documents not available to individuals under the exemptions to FOIA); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) (same).

