

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

Freedom of Information Act Appeal: 2011-08

February 16, 2011

Robin D. Leone, Esq.

Dear Ms. Leone:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) (the “DC FOIA”), dated January 24, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the Deputy Mayor for Economic Development (“DMPED”) improperly withheld records in response to your request for information under DC FOIA dated November 5, 2010 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records related to a procurement for the development of real property located at 21st and M Street, N.W., known as the Stevens Elementary School. The FOIA Request contained seven categories of records. In response, by letter dated December 3, 2010, for the first five categories, DMPED provided certain records to Appellant, but withheld other documents as follows:

1. Documents related to the “initial award of opportunity” under D.C. Official Code § 2-531(a)(1) and (4) pursuant to exemptions for confidential commercial or financial information and deliberative process privilege.
2. Documents related to the negotiations of the land disposition agreement and ground lease under D.C. Official Code § 2-531(a)(1) pursuant to an exemption for confidential commercial or financial information.
3. Documents related to termination of negotiations, the best and final offer, and communications about the project with other District agencies under D.C. Official Code § 2-531(a)(4) pursuant to an exemption for deliberative process privilege.

By letter dated January 6, 2011, DMPED provided certain records to Appellant for the remaining two categories (communications to other agencies and communications to nongovernmental,

non-media third parties), but withheld other documents under D.C. Official Code § 2-531(a)(4) pursuant to exemptions for deliberative process privilege and attorney-client privilege.

On Appeal, Appellant challenges the denial, in part, of the FOIA Request. With respect to the exemption claimed for confidential commercial or financial information, Appellant contends that DMPED incorrectly applied the law regarding confidential commercial or financial information or, in the alternative, the documents should be provided in redacted form. With respect to the exemption claimed for deliberative process privilege, Appellant contends that post-decisional documents, such as ones made after a decision to terminate negotiations or after a decision to ask for a best and final offer, should be provided.

In its response, dated February 10, 2011, DMPED reaffirmed its prior position. With respect to the exemption claimed for confidential commercial or financial information, DMPED added that developers provide financial and proprietary information, the disclosure of which would harm their competitive position. With respect to the exemption claimed for deliberative process privilege, DMPED maintained that the withheld document related to policies and decisions that are not final. DMPED provided a log of documents withheld, but it appears that such log applies to requests for documents in the last two categories as provided in its January 6, 2011 response.

Discussion

It is the public policy of the District of Columbia (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 § 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, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *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), and 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).

The first challenge of the Appellant is to the withholding of documents containing confidential commercial or financial information.

D.C. Official Code § 2-531(a)(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.” This 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 *Washington Post Co. v. Minority Business Opportunity Com.*, 560

A.2d 517, 522 (D.C. 1989), citing *CNA Financial Corp. v. Donovan*. For instance, a disclosure of information submitted by a person is likely to cause substantial competitive harm if disclosure would allow a company's competitors to calculate its future bids and its pricing structure to estimate and undercut bids. *Boeing Co. v. United States Dep't of the Air Force*, 616 F. Supp. 2d 40, 45 (D.D.C. 2009).

Appellant does not vigorously argue that this exemption would not apply to the present case. The District of Columbia real estate market is highly competitive and contracts to acquire or develop District government property are no exception. Furthermore, in order to obtain such contracts, bids and proposal typically contain financial information about the offeror as well as pricing information which can be valuable. It is well recognized that such information can enable competitors to gain an advantage with respect to future procurements.

However, DMPED has withheld all documents which, as it states, contain exempt financial or commercial information. Section 1-406.3 of the District of Columbia Municipal Regulations provides: "Any reasonably segregable portion of a record shall be provided to any person requesting the record after deletion of those portions, which are exempt under this section." It is recognized that bids and proposals submitted as part of a procurement are capable of redaction of the exempt portions. See, e.g., *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517 (D.C. 1989).

Therefore, we remand this matter to DMPED. DMPED shall determine whether reasonable segregation is available for the documents withheld under D.C. Official Code § 2-531(a)(1). If so, DMPED shall provide Appellant with copy of the documents, but shall redact confidential commercial or financial information contained therein. If not, DMPED shall so state in response.

The second challenge of the Appellant is to the withholding of documents based on deliberative process privilege.

D.C. Official Code § 2-534(a)(4) 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." This exemption 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 (U.S. 1975). These privileges would include the deliberative process privilege.

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 a document is deliberative if it "reflects the give-and-take of the consultative process." *Id.*

The documents which were included in the records produced reflect that DMPED used a procurement method known as competitive sealed proposals for the Stevens Elementary School project. Unlike the procurement method known as competitive sealed bids, where bids are opened and the award is made based on such bids, the use of competitive sealed proposals is a

process which may involve several steps. Therefore, while there may be several decision points along the way, because further action is required, agency communications may quickly become predecisional. While Appellant questions whether the distinction between predecisional and postdecisional records was applied in the review and production of records, the response of DMPED to Appellant's FOIA Request and its response to the appeal, including the log with respect to withheld documents, reflect that DMPED understood and observed this distinction. Therefore, we uphold the decision of DMPED.

However, one portion of the materials submitted does raise a concern. While the documents reflect a process that occurred from at least the beginning of 2010 through October, 2010, the log submitted with the response of DMPED to the Appeal only references documents in two short periods in February and March, 2010. Therefore, it seems possible that, through inadvertence, DMPED may not have reviewed all of the records produced by the search. Accordingly, DMPED is directed to re-examine its review of the results of its search and confirm to Appellant that its production reflected the full results of its search. If, upon such re-examination, there are documents which were not reviewed, DMPED shall supplement its production accordingly.

Conclusion

Therefore, we UPHOLD, in part, the decision of DMPED, but REMAND this matter to DMPED as follows:

1. DMPED shall determine whether reasonable segregation is available for the documents withheld under D.C. Official Code § 2-531(a)(1) . If so, DMPED shall provide Appellant with a copy of the documents, but shall redact confidential commercial or financial information contained therein. If not, DMPED shall so state in response to Appellant.

2. DMPED is directed to re-examine its review of the results of its search and confirm to Appellant that its production reflected the full results of its search. If, upon such re-examination, there are documents which were not reviewed, DMPED shall supplement its production accordingly.

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,

Donald S. Kaufman
Deputy General Counsel

cc: Ayesha Abbasi

