

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

Freedom of Information Act Appeal: 2011-19

April 8, 2011

Alia L. Smith, Esq.

Dear Ms. Smith:

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) (“DC FOIA”), dated January 24, 2011 (the “Appeal”). You (“Appellant”) assert that the District Department of Transportation (“DDOT”) improperly withheld records in response to your request for information under DC FOIA dated February 22, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records related to the safety and condition of Canal Road, N.W., from January 1, 2006, through the date of the FOIA Request. In response, by letter dated March 15, 2011, DDOT provided six pages of records, but withheld the bulk of the records, 102 pages and a video, under D.C. Official Code § 2-531(a)(4) pursuant to an exemption for deliberative process privilege.

On Appeal, Appellant challenges the denial, in part, of the FOIA Request. Appellant contends that DDOT merely cited the deliberative process privilege without further explanation and did not articulate a clear rationale for its withholding of documents under the applicable standard.

In its response, dated March 31, 2011, DDOT reaffirmed its prior position. It states that the agency is engaged in an ongoing review of safety and conditions on or near Canal Road, particularly in light of an accident which occurred on January 14, 2011. It maintains that it is considering various courses of action with respect to Canal Road and that the records reflect an exchange and consideration of ideas and records assembled, or being assembled, in support of such exchange and consideration of ideas, including reports and analyses. It also contends that the records withheld do not contain segregable material which could be made available without jeopardizing the deliberative process. In addition, DDOT provided a privilege log indicating the page number, subject matter, and privilege asserted for each document. Finally, it attached copies of the documents withheld and produced.

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, 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 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).

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 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 as 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 internal communications consisting of advice, recommendations, and opinions do not pose particular problems of identification as exempt where the deliberative process is applicable, factual information or investigatory reports may present the need for additional scrutiny. The legal standard is that

purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed in an FOIA suit. . [citing, by footnote, *Environmental Protection Agency v. Mink*, 410 U.S. 73, 91 (1973)]. . . . We have held that factual segments are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process, [citing, by footnote, *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974)] or if the facts are "inextricably intertwined" with the policy-making process. [citing, by footnote, *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971)]. The Supreme Court has substantially endorsed this standard. [citing, by footnote, *Environmental Protection Agency v. Mink*, 410 U.S. 73, 92 (1973)].

Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).

For example, accident reports have been found to be exempt from disclosure, but not invariably so. See *Lloyd v. Marshall*, 526 F. Supp. 485 (M.D. Fla. 1981), where the report of an OSHA compliance officer was withheld. ("This privilege is primarily aimed at safeguarding the quality of agency decision-making, and its protection is strongest when the material to be disclosed relates to "communications received by the decision-maker on the subject of the decision prior to the time the decision is made." [citation omitted]. The opinions and conclusions reached by the compliance officer as the result of his investigation represent precisely this kind of predecisional communication, for the compliance officer's recommendations and opinions are used by the OSHA in deciding what agency action should follow. *Id.* at 486.) Cf. *Lacy v. United States Dep't of Navy*, 593 F. Supp. 71 (D. Md. 1984) ("The photographs attached to the investigative reports compiled by Navy investigators are factual in nature. They are not so intertwined with the deliberative portions of these reports that they could not have been segregated and produced. . . . In essence, the Navy is claiming that whenever photographs are attached to a report by an investigator they cannot be revealed because they would expose the deliberative processes of the investigator. Such a sweeping argument is rejected." *Id.* at 77-78.)

As stated previously, DDOT stated that it is engaged in an ongoing review of safety and conditions on or near Canal Road, particularly in light of an accident which occurred on January 14, 2011. The bulk of the records identified in response to the request of the Appellant reflect that effort. It is clear that DDOT has been actively gathering information and preparing reports in preparation for a determination of appropriate agency action. The communications reflect an exchange of thoughts and observations about conditions on Canal Road and actions needed to prepare reports or studies to reach such determination. This is the very essence of the deliberative process. DDOT is warranted in invoking the deliberative process privilege as a basis for the exemption. Notwithstanding the applicability of this exemption, we do not believe that it applies to all the documents identified in response to the request of the Appellant.

DDOT has provided all of the documents withheld to this office as part of the administrative record and that has given us the opportunity to review such documents with respect to the propriety of the assertion of the exemption. As indicated above, factual material must be disclosed, in whole or with redactions, unless the facts are inextricably intertwined with the

policy-making process or the manner of selecting or presenting those facts would reveal the deliberative process. The records which may be characterized as presenting factual information can be divided into two general groups. The first group consists of documents containing factual information which was compiled proximate to January 14, 2011, the date of the accident which galvanized the DDOT review. The internal communications in this group include factual information containing observations and assessments of current conditions which serve to identify possible issues and provide a basis to determine what studies and assessments may be necessary. These factual observations and assessments are part of, and reflect, the give-and-take of the deliberative process. Except as will be set forth below, these documents are exempt from disclosure.

The second group consists of documents containing factual information which was compiled or relates to periods between 2006 and 2008. While this information may have been retrieved as part of the current review process, the factual materials and assessments are “old and cold” and do not reveal current road and safety conditions. As such, they are unlikely to form a basis for agency action. The fact that they have been collected in conjunction with a current deliberative process does not automatically bestow exempt status. Because of their age and the likelihood of changing conditions, it is difficult to see that they would be material to a final agency decision and, given their lack of materiality, how they would reveal anything about the internal debate or impair the quality of agency decisions. Nevertheless, it may be argued that these older materials reflected internal assessments and observations which were a part of a prior deliberative process, notwithstanding that no prior agency action or policy was taken. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153, n.18 (1975) (exemption is available for materials “which do not ripen into agency decisions. . .”). Accordingly, it may be justifiable to withhold the documents on this basis. However, we are mindful of Mayor’s Memorandum 2011-01, which directs not only that DC FOIA be construed with the view toward expansion of public access, but that “records exempt from mandatory disclosure be made available as a matter of discretion when disclosure is not prohibited by law or harmful to the public interest.” Therefore, we are ordering that the documents from this group be disclosed, as follows:

1. Pages 13 through 16 (relating to late 2006/early 2007, including what appears to be citizen inquiries).
2. Pages 45 and 46 (regarding citizen appreciation of repair work).
3. Page 47 (2008 technician quality assessment report on asphalt)(page 48 is a duplicate).
4. Pages 49 and 50 (DDOT Summary of Crashes 2008-2010. Statistics reflect raw data without assessment or analysis.)
5. Page 52 (2008 technician email).
6. Pages 53 through 68 (findings and recommendations, with photographs, relating to conditions in 2006).
7. Pages 89 through 91 (photographs and drawings without assessment or analysis.)

As stated previously, the fact that materials have been collected in conjunction with a current deliberative process does not automatically bestow exempt status. In the first group, there are two documents which were generated proximate to the date of the accident. These documents do not reveal the nature of the deliberative process and will not impair agency decision-making. Accordingly, the following documents should be disclosed:

1. Page 34 (copy of newspaper article regarding accident on January 14, 2011).
2. Page 51 (spot speed study summary sheet. No assessment or analysis.)

This decision should not be construed as a finding that the agency attempted to avoid its statutory duties. In the furtherance of transparency, DDOT provided an unusually complete and detailed response, including all documents withheld and produced. Based on the response of DDOT, we are satisfied that it made a good-faith effort to comply with DC FOIA and its underlying policy; indeed, it was the unusually complete and detailed response which allowed for the relief provided to Appellant.

Conclusion

Therefore, we UPHOLD, in part, the decision of DDOT and REVERSE and REMAND, in part. DDOT is ordered to provide to Appellant pages 13 through 16, 34, 45, 46, 47, 49, 50, 51, 52, 53 through 68, and 89 through 91 of the records, as noted on pages 4 and 5 of this decision, within ten (10) days after the date of this decision.

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: Nicholas F. Simopoulos