

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

Freedom of Information Act Appeal: 2011-26

May 26, 2011

Mr. Edward H. Bruske

Dear Mr. Bruske:

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 May 3, 2011 (the “Appeal”). You (“Appellant”) assert that the District of Columbia Public Schools (“DCPS”) improperly withheld records in response to your request for information under DC FOIA dated March 8, 2011 (the “FOIA Request”) by failing to respond the FOIA Request.

Background

Appellant’s FOIA Request sought from DCPS records related to its food service management contract with Chartwells-Thompson, Inc.:

1. All submissions from the bidders on the requests for proposals issued by DCPS on or about February 17, 2008 for a food service management contract.
2. All itemized lists or reports of rebates or “volume discounts” received by Chartwells-Thompson, Inc. from vendors in connection with the food service management contract from September 1, 2008.
3. Attachments to the food service contract identified as the Contractor’s Best and Final Offer and the Contractor’s Technical and Price Proposals.
4. “Net Cash Resources” reports filed by DCPS with the Office of State Superintendent of Education from January 1, 2000.

The record indicates that the second item was substantially similar to a prior request which was denied.

By letter dated March 9, 2011, DCPS extended the 15-day response period by 10 days, as permitted by DC FOIA. The Appeal alleges that DCPS has made no further response and improperly withheld records by failing to respond to the FOIA Request. In addition, Appellant noted that in the prior request that he had made, DCPS denied a substantially similar item on the basis of the exemption for trade secrets and commercial or financial information obtained from outside the government under D.C. Official Code § 2-534(a)(1). In anticipation of a similar claim of exemption in response to the FOIA Request, Appellant asserts that the agency must demonstrate that the party from whom the information was obtained faces actual competition and that disclosure will result in substantial competitive injury, and that a conclusory statement will not suffice to carry this burden. In addition, Appellant contends that the release of the requested records is in the public interest.

In its response, dated May 24, 2011, DCPS stated as follows. First, it stated that it had responded to the FOIA Request, by letter dated May 20, 2011, and that it has not constructively denied the FOIA Request. Second, it construed the Appeal as being grounded, in part, upon the prior request and stated that the appeal rights for the prior request had expired.

The letter, dated May 20, 2011, of DCPS responded to the FOIA Request, with reference to the above-numbered items, as follows:

1. “Pursuant to DC FOIA statute located at DC Code § 2-534(a)(1), DCPS is withholding all responses to RFP issued by DCPS on or about February 17, 2008, as such submissions are trade secrets and would result in substantial harm to the food service management companies’ competitive position.”
2. “Pursuant to DC Code § 2-534(a)(1) of the DC FOIA statute, Chartwell’s volume discounts and rebates are exempt from disclosure because the documents qualify as trade secrets and disclosure would result in substantial competitive harm to Chartwell’s competitive position.”
3. “Pursuant to DC Code § 2-534(a)(1) of the DC FOIA statute, Chartwell’s Best and Final Offer is exempt from disclosure because the documents qualify as trade secrets and disclosure would result in substantial competitive harm to Chartwell’s competitive position.”
4. “DCPS does not have documents that are responsive to this request.”

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).

As an initial matter, DCPS asserts that it has not constructively denied the FOIA Request as of the date of its response, May 24, 2011, because it responded to the FOIA Request on May 20, 2011. This may be true as a technical matter, but does not fully explain what has occurred. D.C. Official Code § 2-532(e) provides that a failure of a public body to respond to request within the prescribed period—15 business days or 25 business days, as here, in the case of an extension—shall be considered as a denial of the request, i.e., a constructive denial. As of the date of the Appeal, a constructive denial had occurred. The response of DCPS cured the failure to respond and DC FOIA provides no sanctions for failure to respond timely to a request. However, the response was a denial nonetheless and Appellant has clearly asserted a challenge to the anticipated denial. Accordingly, we will consider such challenge.

In the first part of its FOIA Request, Appellant requested the submissions from the bidders on the requests for proposals issued by DCPS. As stated, DCPS withheld the requested records under the exemption for trade secrets and commercial or financial information obtained from outside the government under D.C. Official Code § 2-534(a)(1).

D.C. Official Code § 2-534(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*. 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]”).

This is the legal standard which Appellant has set forth in the Appeal. In addition, Appellant asserts that conclusory statements are not sufficient to demonstrate that an exemption applies. Appellant is correct. In Freedom of Information Act cases, “‘conclusory and generalized allegations of exemptions’ are unacceptable, *Found. Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 830 (D.C. Cir. 1979) (quoting *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820, 826 (1973)).” In *Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

In this case, DCPS has simply made a conclusory statement, not augmented in its response to the Appeal, that the exemption applies to the requests for proposals without any attempt to explain why it applies. There is no *per se* rule with respect to contracting and procurement documents. The response of DCPS is insufficient to justify the withholding of the documents. The documents must be provided to Appellant.

It would appear that DCPS believes that Appellant has not presented the issue for decision. It indicates that that Appellant “appears to assert an argument regarding a July 30, 2010, FOIA response to a 2010 FOIA request. At this late date, any appeal rights that Mr. Bruske may have held regarding any 2010 FOIA request have long expired.” However, such an argument would be unavailing. By way of background, in July, 2010, Appellant made a request for records to DCPS, which request included a request substantially similar to the second item. Part of that request was denied based on same exemption claimed in this case, but, based on the record, it does not appear that DCPS responded to the balance of the request. Rather than file an appeal then, Appellant renewed a part of, and supplemented, his request. As stated above, as of the date of the filing of the Appeal, DCPS had not responded to Appellant or indicated when a response would be forthcoming although Appellant inquired, by letter dated April 4, 2011, about the status of his request. In his Appeal, Appellant anticipated, correctly, that DCPS would assert, as it did with his prior request, the exemption under D.C. Official Code § 2-534(a)(1) as a basis for withholding the documents and so indicated. DCPS knew, or should have known, that he was challenging the assertion of this exemption. DCPS cannot dismiss it simply by characterizing it as an assertion of lapsed appeal rights.¹ The reliance of DCPS on this technical legal argument is misplaced. Appellant has properly raised the issue. Even if Appellant had not raised the issue, we believe that it is incumbent on DCPS to justify its claim of exemption where the Appeal was filed as a result of the failure to respond by the agency. It would be inconsistent with the Mayor’s policy of ““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, to require the filing of a new appeal in such a circumstance.

In the second part of its FOIA Request, Appellant requested itemized lists or reports of rebates or “volume discounts” received by Chartwells-Thompson, Inc. from vendors in connection with the DCPS food service management contract. Again, DCPS withheld the requested records under the exemption for trade secrets and commercial or financial information obtained from outside the government under D.C. Official Code § 2-534(a)(1) and simply stated, without augmentation in its response to the appeal, that “the documents qualify as trade secrets and disclosure would result in substantial competitive harm to Chartwell’s competitive position.” DCPS has not pointed to any authority, nor are we aware of any, which holds that the amount or source of rebates or volume discounts is, as a matter of law, protected commercial or financial information for the purposes of FOIA, nor is it apparent that the disclosure of such information would result in competitive harm. The conclusory statement of DCPS is insufficient to justify the

¹ As stated, DCPS contends that the appeal rights in the July 30, 2010 FOIA request have expired. Although it is not necessary to address this issue for the purposes of this decision, we note that DC FOIA provides no such limitation on the filing of an appeal. At most, the doctrine of laches could be asserted.

withholding of the documents. For the reasons stated above, the documents must be provided to Appellant.

In the third part of its FOIA Request, Appellant requested the records identified as Contractor's Best and Final Offer and Contractor's Technical and Price Proposals. Again, DCPS withheld the requested records under the exemption for trade secrets and commercial or financial information obtained from outside the government under D.C. Official Code § 2-534(a)(1). As stated above, there is no *per se* rule with respect to contracting and procurement documents. The response of DCPS is insufficient to justify the withholding of the documents. For the reasons stated above, the documents must be provided to Appellant.

In the fourth part of its FOIA Request, Appellant requested "Net Cash Resources" reports filed by DCPS with the Office of State Superintendent of Education. DCPS states that it does not have documents that are responsive to this request. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978). In this case, DCPS represents that it does not have responsive records. There is no evidence on the administrative record to indicate otherwise. Therefore, we uphold the decision of DCPS. However, the response of DCPS was made subsequent to the filing of the Appeal and Appellant has not had an opportunity to consider and challenge the response. Accordingly, our decision shall be without prejudice to re-file an appeal with respect to the fourth part of its FOIA Request.

Conclusion

Therefore, the decision of DCPS is UPHeld in part and REVERSED and REMANDED in part. DCPS is ordered to provide immediately the records identified in the first three parts of the FOIA Request, as identified above. The decision of DCPS with respect to fourth part of the FOIA Request is upheld, but without prejudice to Appellant to re-file an appeal with respect to such part.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under 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: Eboni J. Govan, Esq.