

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

Freedom of Information Act Appeal: 2011-29

June 2, 2011

Abigail and Don Padou

Dear Mr. and Ms. Padou:

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 May 13, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) improperly withheld records in response to your request for information under DC FOIA dated February 17, 2011 (the “FOIA Request”).

Appellant’s FOIA Request sought records related to the following grants issued in Fiscal Year 2010 to the following entities which are located in Ward 5:

1. Grant of approximately \$600,000 to MM Washington Redevelopment partners.
2. Grant of approximately \$300,000 to Israel Manor.
3. Grant of approximately \$145,000 to Dance Place.
4. Grant of approximately \$123,000 Academy of Hope.
5. Grant of approximately \$107,800 to Beacon House.

The FOIA Request stated that the records requested included “announcements, notifications, RFPs/RFAs, descriptions, scopes of work, applications submitted, selection of grantees, award documents, progress reports, evaluations, performance indicators, reviews, results, disbursements.”

In response, DMPED provided records to Appellant, including email exchanges related to the grants and the executed grant agreement for each grant. DMPED withheld certain records pursuant to the deliberative process privilege under D. C. Official Code § 2-534(a)(4) .

On Appeal, Appellant challenges the response of DMPED. First, Appellant states that DMPED simply made a conclusory statement that the documents were withheld pursuant to “internal deliberations,” and, therefore, insufficiently justified the withholding. Second, Appellant states

that DMPED failed to produce grant applications submitted by the grantees, quarterly reports, “close-out reports,” and “non-expendible equipment inventory reports.”

In its response, dated May 27, 2011, DMPED reaffirms and amplifies its position. First, it states that it has withheld certain documents under D.C. Official Code § 2-531(a)(4) pursuant to exemptions for attorney-client privilege and deliberative process privilege. The documents consist of twenty emails, some with attachments. DMPED provided a privilege log indicating the persons involved, date, subject matter, and privilege asserted for each document. Second, noting that documents were provided to Appellant, it stated that it withheld documents which contained the same information as in the documents provided, but which contained confidential information from grant recipients. DMPED did not indicate the nature of the confidential information.¹ The response did not address the allegations of Appellant that DMPED failed to produce grant applications submitted by the grantees, quarterly reports, “close-out reports,” and “non-expendible equipment inventory reports.” In addition, a portion of the administrative record indicated that DMPED did an “email search” for the records. On June 1, 2010, in response to an invitation to supplement its response to address these matters, DMPED provided a supplement. It indicated that its response was based on a review of all withheld documents which resulted from a search of electronic databases, but that upon further review of the original request and appeal, there were also paper-based documents that may be responsive to the original request. It also indicated that it would supplement the record with responsive documents that are not exempt under DC FOIA.

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).

¹ DMPED stated: “Additionally, several documents contained responsive information that was sent to several grant recipients. These documents were produced on the CD. Other emails contained the same information sent to all grant recipients, but also contained confidential information from grant recipients that were not responsive to the FOIA request. These documents were not produced because redacting the information that was nonresponsive would have resulted in producing only information that was already provided on the CD.”

The first contention of DMPED is that twenty of the documents, including attachments, are exempt from disclosure on the basis of the attorney-client privilege or 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 and the attorney-client 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 attorney-client privilege applies to confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 78-79 (D.D.C. 2008); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980).

The privilege log submitted by DMPED identifies communications to District government attorneys regarding the grants described by Appellant, i.e., subject to the attorney-client privilege, or communications between District government staff characterized as internal deliberations regarding various aspects of the grants described by Appellant, i.e., subject to the deliberative process privilege. We find this showing to be credible and uphold the decision of DMPED to withhold these documents based on these privileges.

The second contention of DMPED is that certain documents containing confidential information alleged to be exempt are withheld because the nonexempt information is contained in other documents produced. However, DMPED misreads the mandate of DC FOIA. 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.” If a record is responsive and any exempt portion can be reasonably redacted, the record, with redactions, must be provided, irrespective of the judgment of an agency as to the utility of the record. “FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information.” *Stolt-Nielsen Transp. Group LTD. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008).

Accordingly, DMPED shall provide this second category of documents to Appellant with such redactions as are appropriate under a claim of exemption. As Appellant has not had an opportunity to review such documents, this decision shall be without prejudice to Appellant to challenge the results of the production of this second category of documents. We note that it is not clear on the administrative record what exemption is claimed. The response of DMPED

states that the documents contain “confidential information.” It would appear that this refers to the exemption from disclosure under D.C. Official Code § 2-534(a)(1) for “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]”). Therefore, if DMPED redacts any portions of the documents, it shall set forth the basis for the assertion of the exemption to demonstrate the applicability of these requirements (or a similar demonstration if another exemption is asserted).

As noted above, in its response, dated May 27, 2011, DMPED did not address the allegations of Appellant that DMPED failed to produce grant applications submitted by the grantees, quarterly reports, “close-out reports,” and “non-expendible equipment inventory reports.” In addition, a portion of the administrative record indicated that DMPED did an “email search” for the records requested. The supplementary response, dated June 1, 2010, indicates that the original search was not complete and that there may be additional responsive records. This may account for the missing records to which Appellant refers. To its credit, prior to issuance of this decision, DMPED has recognized that an additional search is necessary to constitute an adequate search under DC FOIA and that additional documents may be forthcoming. Notwithstanding that fact, the Appeal is pending before us and requires a decision. Therefore, we are ordering DMPED to revise, and complete, a search of all repositories where the requested records are likely to be maintained. We will deem these to be unusual circumstances as may be found under D.C. Official Code § 2-532(d). Accordingly, DMPED shall complete the search and disclose the records within 10 business days. If DMPED withholds, or redacts any portions of, the documents pursuant to a claimed exemption, it shall set forth the basis for the assertion of the exemption to demonstrate the applicability of the exemption. Again, as Appellant has not had an opportunity to review such documents, this decision shall be without prejudice to Appellant to challenge the results of the production of documents pursuant to this paragraph. We also encourage DMPED to state the nature of the search that it has made so that a further appeal based on the completeness of the search may be forestalled.

Conclusion

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

1. DMPED is ordered to provide the records identified in the second category of documents set forth above, that is, the withheld documents not identified in the privilege log submitted with the appeal, with redactions for any exemptions claimed; provided, that with respect to any exemption claimed, DMPED shall fully set forth for the basis for such exemption in accordance with this decision.

2. DMPED is ordered to revise, and complete, a search of all repositories where the requested records are likely to be maintained. DMPED shall complete the search and disclose any responsive records not previously provided within 10 business days. DMPED may claim an exemption with respect to such additional records; provided, that If DMPED withholds, or redacts any portions of, the documents pursuant to a claimed exemption, it shall fully set forth the basis for such exemption in accordance with this decision.

This order shall be without prejudice to Appellant to assert any challenge to the results of the additional production ordered.

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