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

Freedom of Information Act Appeal: 2011-42

July 5, 2011

Mr. John F. Flanagan

Dear Mr. Flanagan:

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 June 20, 2011 (the "Appeal"). You ("Appellant") assert that the Office of Planning ("OP") improperly withheld records in response to your request for information under DC FOIA dated May 23, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records related to Georgetown University's 2010-2011 Campus Plan and the Office of Planning's May 5, 2011 report thereon.

In response, by email dated June 14, 2011, OP provided responsive records, but withheld two emails 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 describes the emails as detailing communication between Harriet Tregoning (Director of OP), Jennifer Steingasser (Deputy Director for Development Review and Historic Preservation of OP), and Rob Miller (employee of the Executive Office of the Mayor). These e-mails relate to communication about the Georgetown University campus plan and the May 5, 2011 report of the Office of Planning thereon (the "Report"). Appellant states that the Report includes the recommendation that Georgetown University be required to provide housing for all of its undergraduates, the implementation of which "would have significant impact on the university's finances and on student life." Based on the emails that were produced, Appellant states that written recommendations of the local Advisory Neighborhood Commission and neighborhood groups were placed "verbatim" in the Report and that there were numerous contacts and these groups had numerous meetings with the Executive Office of the Mayor. Based on the foregoing, Appellant believes that political concerns on the part of the Executive Office of the Mayor may

have influenced the Report. Although it appears that Appellant concedes the applicability of the deliberative process privilege, Appellant, citing DCMR § 1-406.1, contends that it is overcome by the public interest in disclosure. "It is in the public interest to know whether this kind of political interference into city administrative processes is indeed occurring. We believe the content of these e-mails will confirm or negate our claim because they contain dialogue between EOM and OP on the campus plan report."

In its response, dated June 27, 2011, OP reaffirmed its prior position. It has also provided emails for our review. The first email, from Harriet Tregoning to Jennifer Steingasser, is an internal discussion of possible options for OP's final recommendation to the Zoning Commission regarding approval of the campus plan. The second email, from Harriet Tregoning to Jennifer Steingasser, is substantially a forwarding of interagency (including for this purpose, an Advisory Neighborhood Commission) emails assessing the status of current aspects of the process and offering recommendations, suggestions, and ideas as to future action. In addition, OP states that there is personal information in the second email that would constitute a clearly unwarranted invasion of personal privacy if disclosed and should be redacted.

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.

OP argues, and Appellant does not appear to contest, that the two emails are exempt from disclosure under the deliberative process privilege. In fact, the emails are the classic embodiment of the deliberative process. The records are clearly predecisional. But more important, they reflect alternative proposals, recommendations, suggestions, ideas, and personal opinions. Appellant relies on the public interest in disclosure to overcome the assertion of the deliberative process privilege under the exemption. As the public interest is not a mandated requirement under the statutory text of DC FOIA or under case law, other than a privacy analysis, we view this as a rule of discretion rather than a statutory mandate. Nevertheless, to be sure, the public interest is not only a consideration under the rule cited by Appellant, but under Mayor's Memorandum 2011-01, Transparency and Open Government Policy. For instance, in Freedom of Information Act Appeal 2011-19, pursuant to the Memorandum, we ordered disclosure of certain records where the deliberative process privilege applied when the information therein had become stale. However, here, the public interest is in nondisclosure of the emails. The exemptions under DC FOIA are intended to achieve the correct balance between public access to information and, among other things, the efficient operation of government. The efficient operation of government dictates that a free exchange of ideas must be permitted in order to reach optimal decisions. Officials and employees need to be free to express unpopular opinions, make erroneous statements, or even look foolish on the road to making a decision without having such predecisional thoughts put under the microscope of public scrutiny. Without the comfort that this will not occur, such persons may feel comfort only in the oral conversations and this may eliminate important sources of communication. In the words of the *Coastal States* court, "public disclosure is likely in the future to stifle honest and frank communication." The withheld records in this case clearly fall within this category. The public interest here is in withholding the records.

Conclusion

Therefore, we uphold the decision of OP. The Appeal is DISMISSED.

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,

Donald S. Kaufman
Deputy General Counsel

cc: Michael A. Johnson