

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

**Freedom of Information Act Appeal: 2011-45**

July 13, 2011

Warner H. Session, Esq.

Dear Mr. Session:

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 June 16, 2011 (the “Appeal”). You, on behalf of Nationwide Electrical Services, Inc. (“Appellant”), assert that the District Department of Transportation (“DDOT”) improperly withheld records in response to two requests for information under DC FOIA dated March 15, 2011 (the “FOIA Requests”).

Background

Appellant’s FOIA Requests sought from DDOT records related to contracts, described by Appellant as the Reconstruction of 11<sup>th</sup> Street, from L to O Streets, N.E., project, and the Columbia Heights Streetscape and Reconstruction of Park Road project. The records sought included “all payment applications for th[e] [general] contractor, including detail for contract line item payments.”

In response, by letter dated April 6, 2011, DDOT provided the records to Appellant, but redacted certain portions of the records, citing the “trade secrets privilege. D.C. Official Code § 2-531(a)(1).” As relevant to the Appeal, DDOT redacted payment information detailing the quantity, line-item price, and total payment for each contract line-item. Upon receipt and review of the records provided by DDOT, by email dated April 8, 2011, Appellant requested that the quantity portion of such records be disclosed. By email dated April 20, 2011, DDOT declined to do so.

On Appeal, Appellant challenges the redaction of the payment information for the quantity upon which each contract line-item payment under the respective contracts was determined. Appellant explained that Nationwide Electrical Services, Inc. is a subcontractor to the general contractor on the projects and, as its subcontract provides that it will receive payments when the general contractor is paid, it is seeking the quantity detail so that it can track payments timely and reconcile its books and records. With respect to the commercial information portion of the exemption which DDOT claims under D.C. Official Code § 2-531(a)(1), Appellant asserts that DDOT has met neither of the required elements of the exemption, that is, both a showing of actual competition and a likelihood of substantial competitive injury. It also asserts that the

DDOT claim of competitive injury is based on unjustified assumptions. Appellant emphasizes that it is only seeking the unredacted information as to the quantity detail. Appellant also provided a sample page from the documents produced. Appellant does not challenge any other of the redactions.

In its response, dated July 1, 2011, DDOT reaffirmed its prior position. It stated that it properly invoked the trade secrets exemption under D.C. Official Code § 2-531(a)(1). First, it states that, as to actual competition, Nationwide Electrical Services, Inc. is a subcontractor of the general contractor and is, therefore, qualified to do the same or similar work as the general contractor. Second, it states that, as to competitive harm, if Appellant were to obtain “access to the two most important factors needed to determine the total amount paid for an item—the quantity of a good or service and the cost/value associated with that good or service,” Appellant could calculate and derive the pricing structure of the general contractor and underbid it on future contracts, resulting in competitive harm. In addition, DDOT provided a privilege log and redacted and unredacted sample pages from the documents 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, 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).

As set forth above, Appellant states that Nationwide Electrical Services, Inc. is a subcontractor to the general contractor on the projects and, as its subcontract provides that it will receive payments when the general contractor is paid, it is seeking the quantity detail so that it can track payments timely and reconcile its books and records. However, the availability of an exemption from disclosure is not evaluated based on the identity of the requester or the use for which the information is intended. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004). Nevertheless, the standards for the claimed exemption must be met.

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]”).

“Constituent or line-item pricing information in a Government contract falls within [the exemption] . . . if its disclosure would . . . “cause substantial harm to the position of the person from whom the information was obtained. [citation omitted].” *Canadian Commer. Corp. v. Dep't of Air Force*, 514 F.3d 37, 40 (D.C. Cir. 2008). As set forth above, DDOT maintains that Appellant could calculate and derive the pricing structure of the general contractor and underbid it on future contracts, resulting in such competitive harm, if the quantity detail was disclosed. The possible competitive harm which could result from the disclosure of the pricing structure of the general contractor is a legitimate concern. In Freedom of Information Act Appeal 2011-16, we upheld the decision of DDOT where the appellant sought line-item pricing information by the winning bidder in a contract procurement.

However, this case does not present the same request or provide the Appellant with the ability to calculate or derive line-item pricing information. To derive such information, the Appellant would need two of the following three factors: unit price, quantity, and total price paid for the line item. Indeed, the response of DDOT to the Appeal speaks to obtaining “access to the two most important factors needed to determine the total amount paid for an item—the quantity of a good or service and the cost/value associated with that good or service.” We have examined the sample pages submitted by the parties and have found that DDOT has redacted the information regarding all three factors. With the disclosure of only one of the factors, here the quantity detail requested by Appellant, Appellant would not be able to derive the pricing structure of the general contractor. Accordingly, the redaction of the quantity detail on the records provided is not necessary to protect the general contractor from the competitive harm which DDOT identified and the exemption claimed does not apply. We note that in Freedom of Information Act Appeal 2011-16, in responding to the original request, DDOT produced records which redacted the unit price and total price paid for the line item price, and total price paid for the line item, but disclosed the quantity. In this case, we are ordering the same disclosure.

### Conclusion

Therefore, the decision of DDOT is REVERSED and REMANDED. DDOT is ordered to provide the quantity detail requested by Appellant.

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: Angela Addison Freeman, Esq.