

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

Freedom of Information Act Appeal: 2011-50

August 3, 2011

Mr. Alex Cimoch

Dear Mr. Cimoch:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated July 6, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the Chief Financial Officer (“OCFO”) improperly withheld records in response to your request for information under DC FOIA, undated (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records regarding contracts CFOPD-07-051, CFOPD-07-R-056, and CFOPD-07-R-057 as follows:

1. The signed contract and winning proposal.
2. The evaluation or scoring of proposals, including prices submitted by vendors.
3. A list of companies that requested the request for proposals and that submitted a proposal.
4. Any reports related to contract performance.

In response, by letter dated June 14, 2011, OCFO provided copies of the contracts, but stated that it could not locate any vendor proposals and that records relating to the third and fourth categories do not exist. As to the second category of records, OCFO stated that it was withholding responsive records 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 states that it had been provided the information requested in the second category of records under previous requests under DC FOIA and that Appellant should receive such information under the FOIA Request.

In its response, dated July 28, 2011, OCFO reaffirmed its prior position. OCFO explained that its contracting officer impaneled a “Source Selection Evaluation Board” for the purpose of evaluation of vendor proposals in response to the requests for proposal issued by OCFO and which are the subject of the FOIA Request. The Source Selection Evaluation Board produced evaluation/scoring documents which “include the consensus scores of the SSEB, narrative explanations as to each overall rating for each vendor and a recommendation to the Contracting Officer as to which vendor submitted the best technical proposal.” In addition, a contract specialist prepared a memorandum for the contracting officer advising the contracting officer as to the best price proposal and the best value combining the technical and price evaluations. These documents, which are the records which have been withheld, were submitted to the contracting officer and it was the contracting officer who made the final price decision. Thus, OCFO asserts that these documents are both predecisional and deliberative and meet the legal standard applicable to the exemption for deliberative process privilege.

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 § 2-531. 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 (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.

“Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975).

The deliberative process privilege has been applied to exempt from disclosure internal agency documents pertaining to contract award decisions. In *MCI Telecommunications Corp. v. General Services Admin.*, 1992 U.S. Dist. LEXIS 3623 (D.D.C. Mar. 25, 1992), like this Appeal, the court considered a claim of exemption for documents, including evaluations and a final recommendation, prepared by a Source Selection Evaluation Board and transmitted to a final decision-maker. The court found that documents that were generated and used by the General Services Administration during the evaluative stage of its procurement process “are clearly intra-agency.” *Id.* at 8. It was stated that the documents were “not final decisions, but rather they were reports, analyses, and recommendations which were available to the final decision-maker.” *Id.* They were found to be predecisional and deliberative and exempt from disclosure. In *Mead Data Central v. Dept. of the Air Force*, 575 F.2d 932 (D.C. Cir. 1978), the requester sought disclosure of documents reflecting the agency's evaluation of a proposal of requester. The court upheld the claim of exemption, finding that “cost comparisons, feasibility opinions, and data relevant to how the personnel involved arrived at those comparisons and opinions,” *Id.* at 934, were deliberative documents. See also *SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force*, No. 88-481, 1989 WL 201031, at 1-2 (D.D.C. Mar. 31, 1989) (holding technical scores and technical rankings of competing contract bidders predecisional and deliberative); and *Prof'l Review Org., Inc. v. HHS*, 607 F. Supp. 423, 427 (D.D.C. 1985) (denying “requests for statistical information, panel members' point scores and evaluations, opinions and recommendations,” observing that scores used to rate procurement proposals may be “numerical expressions of opinion rather than ‘facts’”).

An internal memorandum or other document drafted by a subordinate employee which is ultimately routed through the chain-of-command to a senior official with decision-making authority is likely to be a part of an agency's deliberative process because it will probably “reflect his or her own subjective opinions and will clearly have no binding effect on the recipient.” *Access Reports v. Department of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991).

The records requested by Appellant clearly meet the requirements of the exemption. They are both predecisional, here prior to the decision to award the contract, and deliberative, here reflecting the thoughts, opinions, analyses, and recommendations of persons for the use of the ultimate decision-maker.

Appellant maintains that his company has requested and received similar records in a prior request. However, the provision of records in another situation does not compel a similar result in this situation. Unless otherwise prohibited by law, the release of records under DC FOIA as well as the federal FOIA is discretionary and can and should be made, notwithstanding the applicability of an exemption, if the public interest will not be harmed by its release. Indeed, Mayor's Memorandum 2011-01 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." In Freedom of Information Act Appeal 2011-19, we ordered the release of records for which withholding was justifiable on the basis of the deliberative process privilege, but which, due to age, would not impair the quality of agency decisions. We do not believe that the circumstances justify the same exercise of discretion in this instance and the release of such materials may, in fact, have an adverse impact on agency decision-making.

Conclusion

Therefore, we uphold the decision of OCFO. 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: Treva Saunders, Esq.
Charles Barbera, Esq.