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

Freedom of Information Act Appeal: 2011-51

August 17, 2011

Brendan O' Dell, Esq.

Dear Mr. O' Dell:

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 June 30, 2011 (the "Appeal"). You, on behalf of Aikido Shobukan Dojo, Inc. ("Appellant"), assert that the Office of the Chief Financial Officer ("EOM") improperly withheld records in response to your request for information under DC FOIA dated May 10, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought the following records for the years 2006 through 2010:

1. All documents issued by the Office of Tax and Revenue ("OTR") denying requests for, or revoking, real property tax exemptions for a school or educational institution under D.C. Official Code § 47-1002(10).

2. All documents of OTR with respect to new requests for, or previously granted, real property tax exemptions for a school or educational institution under D.C. Official Code § 47-1002(10).

3. All documents provided by or to OTR employees regarding the interpretation of D.C. Official Code § 47-1002(10) or related case law or authorities.

In response, by letter dated June 7, 2011, OCFO denied the FOIA Request "under the authority of D.C. Official Code 2-531(a)(3) and (4)." It indicated that D.C. Official Code § 2-531(a)(3) provides an exemption from disclosure for investigatory records compiled for law enforcement purposes and D.C. Official Code § 2-531(a)(4) provides an exemption from disclosure for privileges which could be asserted in litigation. It also noted that the Appellant is engaged in litigation contesting the revocation of its real property tax exemption and "the Freedom of Information Act is not to be used as a supplement to discovery or to obtain materials that would not be available through discovery. [citations omitted]."

On Appeal, Appellant challenges the denial of the FOIA Request. In general, Appellant contends that the conclusory assertion by OCFO of a blanket exemption for all records is insufficient to justify the withholding of the records under DC FOIA. In particular, with respect to the law enforcement exemption, Appellant asserts that the records requested have not been compiled for law enforcement purposes. With respect to the claim of OCFO that the records withheld are privileged, in addition to the failure of OCFO to relate such claim to the particular record withheld, Appellant asserts that these privileges do not apply to documents provided to or by third parties.

In its response, dated August 5, 2011, OCFO reaffirmed and amplified its prior position. First, it states that the information provided will be used in litigation contesting the revocation of the real property tax exemption of Appellant. Therefore, it asserts that "FOIA may not be used by a litigant to obtain information not available through discovery" in accordance with the decision in Freedom of Information Act Appeal 2009-51 holding that a "'pending litigation' exception" provided an exemption from disclosure. OCFO adds that the information sought would not be relevant to the litigation and that it would be inadmissible at trial. Second, OCFO asserts that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(4) pursuant to exemptions for deliberative process privilege, attorney-client privilege, and work product privilege. Third, OCFO contends that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(3) pursuant to an exemption for investigatory records compiled for law enforcement purposes with respect to two different, sufficient conditions, i.e., enumerated harms, thereunder. As to the first condition, it indicates generally that disclosure interferes with pending enforcement proceedings by prematurely revealing the government's case. As to the second condition, it maintains that disclosure of the records may reveal OTR investigative techniques and methods.

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).

The first contention of OCFO is that all of the records requested are exempt from disclosure because the Appellant is engaged in litigation relating to the FOIA Request and that a FOIA

request cannot be used to circumvent discovery. In addition to case law, in support of its position, OCFO cites the decision in Freedom of Information Act Appeal 2009-51 holding that a "'pending litigation' exception" provided an exemption from disclosure. Appellant contends that the blanket assertion of an exemption on this basis is improper. We agree with Appellant.

While the decision in Freedom of Information Act Appeal 2009-51 may have relied on the so-called "pending litigation" exemption, we have subsequently held that the existence of pending litigation is itself insufficient to justify the withholding of records. In Freedom of Information Act Appeal 2011-5, we stated:

> The Supreme Court has stated affirmatively that the only shelter from FOIA's disclosure requirements is the proper assertion of one of the specific and particular legislatively enacted exemptions under the Act:
>
> > Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. *But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.* (Emphasis added)
> >
> > *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 220-221 (U.S. 1978).[1]
>
> The Court went on to suggest that FOIA requesters rights are neither enhanced nor diminished by their status as litigants.[2]

Freedom of Information Act Appeal 2011-5 at 5.

OCFO has not provided any other authority which dictates a different result. While OCFO cites *NLRB v. Robbins Tire & Rubber Co*. for the proposition that FOIA was not intended to supplement discovery, it ignores the statement, noted above, that requesters' rights are neither enhanced nor diminished by their status as litigants.[3] The reliance of OCFO on Freedom of Information Act Appeal 2009-51 is muted by the fact that it argues for the applicability of the law enforcement exemption under D.C. Official Code § 2-531(a)(3), which argument was rejected in the same appeal.

"[1] At least one jurisdiction, California, has specifically adopted a pending litigation exemption in their FOIA law. *See*, Cal. Government Codes Section 6254 (b) (nothing in this chapter shall be construed to require disclosure of records that are . . . [r]ecords pertaining to pending litigation). The Council has not enacted such an exemption.
[2] *Id*. at 214, 242, n23; *See also EPA v. Mink*, 410 U.S. 73, 86 (1973)."

[3] The other cases which OCFO cites in support of its position are inapposite. *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), simply rejected the notion that FOIA could be used to obtain material "that is normally privileged," *Id.* at 801, but did not sanction a blanket withholding of documents. The quoted statement in *United States v. Agunbiade*, 1995 WL 351058 (E.D. N.Y. 1995), that FOIA could not be used as a means to enlarge a right to discovery was dicta in the context of a discussion on exhaustion of administrative remedies.

OCFO devotes considerable focus to the particular circumstances of Appellant and the utility of the records disclosed. However, 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); *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989). As indicated above, the withholding of records by OCFO will depend on the applicability of exemptions specified in DC FOIA.

The context in which the records requested were compiled is not clear on the administrative record. However, it appears to arise out of the requirement, pursuant to D.C. Official Code §§ 47-1002(20) and 47-1007, that tax-exempt organizations file annual reports to obtain and maintain a real property tax exemption. The responsive records are described in the response of OCFO as those "which generally pertain to OTR's review of exemption applications, and documents used to review exemptions under subsection (10)." OCFO response at 3.

With respect to the exemptions claimed by OCFO, we will first address the contention that the records are exempt from disclosure with under D.C. Official Code § 2-531(a)(3) pursuant to an exemption for investigatory records compiled for law enforcement purposes with respect to two different provisions thereunder. D.C. Official Code § 2-531(a)(3) provides, in pertinent part, for an exemption from disclosure for:

> Investigatory records compiled for law-enforcement purposes, including the records of Council investigations . . ., but only to the extent that the production of such records would:
>
> (A) Interfere with:
>
> (i) Enforcement proceedings; . . .
>
> (E) Disclose investigative techniques and procedures not generally known outside the government; . . .

For the purposes of DC FOIA, law enforcement agencies conduct investigations which focus on acts which could, if proved, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). The exemption "applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well." *Rugiero v. United States DOJ*, 257 F.3d 534, 550 (6th Cir. 2001). Citing *Barry v. Washington Post Co.*, 529 A.2d 319 (D.C. 1987), which, in turn, cited *Rural Housing Alliance v. United States Dep't of Agriculture, supra*, Appellant contends that the OCFO, acting through its Office of Tax and Revenue, was not engaged in law enforcement activity. However, it is clear that the OCFO/OTR, like the Internal Service, is a law enforcement agency. See, e.g., *Church of Scientology Int'l v. United States IRS*, 995 F.2d 916, 919 (9th Cir. 1993). Moreover, it has been held that the determination of tax-exempt status is a law enforcement function. *Id*. Nevertheless, that is only one requisite for the availability of the exemption.

D.C. Official Code § 2-531(a)(3) provides that the exempt records must be "[i]nvestigatory records." This provision was taken from the federal FOIA as it existed at the time of the District enactment. However, it should be noted that the corresponding federal provision was amended in 1986 to change the phrase "investigatory records" to "records or information." As explained by the Attorney General's Memorandum on the 1986 Amendments to the Freedom Of Information Act (1987), the courts often struggled with the application of the "investigatory" requirement and generally interpreted the term to require that the records result from specifically focused law enforcement inquiries as opposed to more routine monitoring or oversight. The legislative history states, under the law prior to amendment, that if the record contained otherwise exempt information, "but is not otherwise an investigatory record, it must be disclosed." Senator Hatch Statement, 132 Cong. Rec. S 14039 (September 27, 1986). See also Rep. Kindness Statement, 132 Cong. Rec. H 9466 (October 8, 1986), quoting Senate Judiciary Committee Report on S 774 (S. rept. 98-221) stating that the amended law would apply "regardless of whether they [the records] may be investigatory or noninvestigatory." Thus, only pre-amendment federal cases will apply to the application of the phrase "investigatory records" under DC FOIA.

The case which is cited most regarding the distinction between investigatory and noninvestigatory records is *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974). The court stated:

> There is no clear distinction between investigative reports and material that, despite occasionally alerting the administrator to violations of the law, is acquired essentially as a matter of routine. What is clear, however, is that where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way.

Id. at 373.

In *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980), the plaintiff sought agency interpretations of petroleum pricing and allocations regulations requested by auditors conducting audits pursuant to a compliance program established to assure compliance with the regulations. The court stated:

> Each regional office also employed auditors and other investigative personnel, whose job was auditing individual firms to assure compliance with the regulations. These audits were not "investigations;" at that point, no charge had been made nor was a violation necessarily suspected.

Id. at 858.

Thus, the court regarded these audits as routine administrative matters and not investigative in character.[4] If audits, which are normally considered to be investigative, are not considered to be

[4] It was not necessary for the court to rule as a matter of law on whether these were "investigatory records" as there were no pending enforcement proceedings.

investigative, the routine, annual review of exemption applications and reports has less claim to be an investigative matter. Therefore, we do not believe that the records requested are investigatory records. Accordingly, the law enforcement exemption does not apply in this matter.

Even if the records requested were determined to be investigatory records, we do think that enumerated harms under D.C. Official Code § 2-531(a)(3)(A) and (E) are implicated.

The first enumerated harm specified by OCFO is the interference with enforcement proceedings. Here the first two categories of records would be involved. A close analogue would be the disclosure of determination letters regarding the tax-exempt status of entities. However, the federal law in this area does not provide direct guidance as to the interpretation regarding this harm as section 6104 of the Internal Revenue Code of 1986 specifically provides for the disclosure of determination letters, applications for exemption, annual reports, and certain other materials. Nevertheless, as the types of materials sought by Appellant are made available as a matter of federal law seemingly without any adverse effect, it is dubious that the disclosure of the requested materials would have any effect in the case maintained by Appellant.

An "agency must make clear how disclosure would interfere with enforcement proceedings." *Lemaine v. IRS*, 1991 U.S. Dist. LEXIS 18651, 92-1 U.S. Tax Cas. (CCH) P50,040 (D. Mass. 1991). OCFO offers only the conclusory statement that disclosure of the records "could interfere with the proceedings." OCFO response at 4. It offers a general statement that disclosure of certain types of records could prematurely reveal the government's case, but makes no effort to relate it to the records identified, i.e., those "which generally pertain to OTR's review of exemption applications, and documents used to review exemptions under subsection (10)." This is insufficient to justify the applicability of the exemption. Indeed, the argument of OCFO that the records would be of limited utility to Appellant in its litigation indicates that it will not interfere with the enforcement proceedings.

OCFO also maintains that disclosure of the records should be exempt under D.C. Official Code § 2-531(a)(3)(E), which exempts the production of investigatory records which would "[d]isclose investigative techniques and procedures not generally known outside the government," as it "may reveal OTR enforcement methods and techniques . . ." Again this is a conclusory statement. It is difficult to see how the evaluation of tax-exempt status based on submissions by applicants would reveal investigative techniques and procedures.

The final contention of OCFO is that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(3) pursuant to exemptions for deliberative process privilege, attorney-client privilege, and work product privilege. We will address each of these privileges with respect to each category of records requested.

The first privilege that OCFO asserts is the attorney-client privilege.

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). However, "[n]ot all communications between attorney and client are privileged." *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). "[T]he privilege 'protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.' *Fisher v. United States*, 425 U.S. 391, 403 (1976)." *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 862-863 (D.C. Cir. 1980). "The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977)

One of the categories of records which Appellant seeks are documents provided by or to OTR employees regarding the interpretation of D.C. Official Code § 47-1002(10) or related case law or authorities. This request is similar to the request made by auditors in the *Coastal States Gas Corp.* case for legal interpretations of agency regulations. Such general advice was found not to be within the attorney-client privilege. "Rather than "counseling," intended to assist the agency in protecting its interests, the memoranda here seem to be neutral, objective analyses of agency regulations. They resemble, in fact, question and answer guidelines which might be found in an agency manual." *Id.* at 863. Citing *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977), the court stated that, in order for the attorney-client privilege to apply, the documents must be circulated only among persons who are authorized to speak or act for the agency. In the *Coastal States Gas Corp.* case, it found:

> The agency has admitted that it does not know who has had access to the documents, there is undisputed testimony that at least in some regions, copies of the memoranda were circulated to all area offices, filed and indexed for future use, relied on as precedent and used as training materials for new personnel.

Id. This essentially describes the nature of this category of request made in this case. The information sought is, as the *Coastal States Gas Corp.* characterized it, in the nature of a staff manual. It should be noted that D.C. Official Code § 2-536(a)(2) provides for the disclosure of "[a]dministrative staff manuals and instructions to staff that affect a member of the public." While the records requested may not fall within this provision, it is of the same nature. We also note that the Internal Revenue Service discloses similar materials in its "Electronic Reading Room" which is maintained pursuant to the federal FOIA. The *Coastal States Gas Corp.* states, although in the context of the deliberative process privilege, that agencies "will not be permitted to develop a body of "secret law," used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege . . ." *Id*. at 867. That principle certainly applies to the claim of attorney-client privilege with respect to this category of documents.

Another category of records which Appellant seeks are documents issued by the Office of Tax and Revenue denying requests for, or revoking, real property tax exemptions for a school or educational institution. This category of records clearly does not involve a communication between and an attorney and a client, much less one made for the purpose of securing legal advice or services. The attorney-client privilege does not exempt this category of documents from disclosure.

The last category of records which Appellant seeks are "documents . . . with respect to new requests for, or previously granted, real property tax exemptions for a school or educational institution." As stated earlier, OCFO describes the records as those "which generally pertain to OTR's review of exemption applications, and documents used to review exemptions under subsection (10)." In order to justify the withholding of a document an agency must provide a *Vaughn* index. However, there is no particular form which this must take. An agency may submit declarations which describe the documents, or groups of documents, withheld and identify the reasons why a particular exemption is applicable, sufficient to allow the decision-maker to evaluate the claim. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006). In this case, the description of OCFO is barely more than conclusory and it is difficult to know which, if any, documents were generated as a result of the attorney-client communications. Nevertheless, we cannot ignore the fact that the nature of the review of claims for real property tax exemptions is one which could be expected to generate some documents which are subject to the attorney-client privilege. In addition, the OCFO response may have been influenced by an expectation that its action would be upheld under a "pending litigation" exception as in Freedom of Information Act Appeal 2009-51. Thus, to the extent that OCFO maintains that there are records in this category, which records are subject to the attorney-client privilege in accordance with the principles set forth above, it shall provide to Appellant a detailed index identifying and describing each document and shall produce the remaining records not otherwise exempt in accordance with this decision.[5] Appellant may challenge the withholding of any document identified in such index.

The second privilege that OCFO asserts is 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).

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[5] Thus, for instance, the fact that a document was sent to or from an attorney does not, by itself, make it subject to the attorney-client privilege

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).

While internal communications consisting of advice, recommendations, and opinions do not pose particular problems of identification as exempt where the deliberative process is applicable, factual information or investigatory reports may present the need for additional scrutiny. The legal standard is that

> purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed in an FOIA suit. . [citing, by footnote, *Environmental Protection Agency v. Mink*, 410 U.S. 73, 91 (1973)]. . . . We have held that factual segments are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process, [citing, by footnote, *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974)] or if the facts are "inextricably intertwined" with the policy-making process. [citing, by footnote, *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971)]. The Supreme Court has substantially endorsed this standard. [citing, by footnote, *Environmental Protection Agency v. Mink*, 410 U.S. 73, 92 (1973)].

Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).

As we stated above, one of the categories of records which Appellant seeks are documents provided by or to OTR employees regarding the interpretation of D.C. Official Code § 47-1002(10) or related case law or authorities. As we also stated, this request is similar to the request made by auditors in the *Coastal States Gas Corp.* case for legal interpretations of agency regulations.

The court in that case stated:

> There is nothing subjective or personal about the memoranda; they are simply straightforward explanations of agency regulations in specific factual situations. They are more akin to a 'resource' opinion about the applicability of existing policy to a certain state of facts, like examples in a manual, to be contrasted to a factual or strategic advice giving opinion. Nor do they reflect 'agency give-and-take of the deliberative process by which the decision itself is made.' *Vaughn II*, 173 U.S.App.D.C. at 195, 523 F.2d at 1144.

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

In this case, the records sought in this category are interpretative records which are explanations of the law and a resource for the application of agency policy. As stated above, agencies "will

not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege . . ." *Id*. at 867. The deliberative process privilege does not apply to this category of records.

As stated above, another category of records which Appellant seeks are documents issued by the Office of Tax and Revenue denying requests for, or revoking, real property tax exemptions for a school or educational institution. This category of records clearly does not involve internal communications consisting of advice, recommendations, and opinions. The attorney-client privilege does not exempt this category of documents from disclosure.

The last category of records which Appellant seeks are "documents . . . with respect to new requests for, or previously granted, real property tax exemptions for a school or educational institution." As stated earlier, OCFO describes the records as those "which generally pertain to OTR's review of exemption applications, and documents used to review exemptions under subsection (10)." Our analysis with respect to the application of the attorney-client privilege applies here as well. The description of OCFO is barely more than conclusory and it is difficult to know which, if any, documents were generated as a result of the deliberative process. To paraphrase what we stated earlier, we cannot ignore the fact that the nature of the review of claims for real property tax exemptions is one which could be expected to generate some documents which are subject to the deliberative process privilege. Likewise, our order will be the same, with two modifications.

First, taxpayers seeking an exemption under D.C. Official Code § 47-1002(10) are required to file an annual report in April. D.C. Official Code § 47-1007, DCMR § 9-324. Under D.C. Official Code § 47-1007(a), taxpayers seeking an exemption under D.C. Official Code § 47-1002(10) may file an application for exemption and a statement of annual income and expenses in lieu of the report. Appellant seeks records for the years 2006 through 2010. In our decisions, we are mindful of Mayor's Memorandum 2011-01, which 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 considered a request for records, in pertinent part, relating to road and safety conditions on Canal Road from 2006 to 2008. Because of their age and the likelihood of changing conditions, we found that that they would not be material to a final agency decision and, given their lack of materiality, how they would reveal anything about the internal debate or impair the quality of agency decisions. Consequently, despite the fact that these older materials may have reflected internal assessments and observations which were a part of a prior deliberative process, we nevertheless ordered that these materials be released. In the current Appeal, with respect to the annual applications and reports filed, the materials with respect to older applications and reports, for which appeal deadlines have long passed, would seem to be similarly stale. Thus, we find that the deliberative process privilege should not be applied to exempt materials for the years 2006 through 2008.

Second, as noted above, the annual report required under D.C. Official Code § 47-1007(a) may be satisfied by filing an application for exemption and a statement of annual income and expenses. Under D.C. Official Code § 47-4406 and DCMR § 9-110.1, items relating to income

or value or its computation shall not be disclosed. Thus, with respect to a statement of annual income and expenses which are part of the responsive records, items of income and expenses shall be redacted.

Accordingly, to the extent that OCFO maintains that there records for the years 2009 and 2010 in this category, which records are subject to the deliberative process privilege in accordance with the principles set forth above, it shall provide to Appellant a detailed index identifying and describing each document and shall produce the remaining records not otherwise exempt in accordance with this decision.[6] As indicated above, with respect to a statement of annual income and expenses, items of income and expenses shall be redacted. Appellant may challenge the withholding of any document identified in such index.

The third privilege that OCFO asserts is the work-product privilege.

The work-product privilege has been developed in federal courts based on the decision in *Hickman v. Taylor*, 329 U.S. 495 (1947) and, simply stated, protects from disclosure materials prepared in anticipation of litigation or for trial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). "[I]t is firmly established that there is no privilege at all unless the document was initially prepared in contemplation of litigation, or in the course of preparing for trial. . . . at the very least some articulable claim, likely to lead to litigation, must have arisen." *Id*. at 865. The only litigation referred to by OCFO is that involving Appellant. Regardless of the existence of other pending litigation, there is no indication on the administrative record, nor do the circumstances suggest, that there was any prospect of litigation at the time that any records were created. Therefore, the work-product privilege will not exempt any records from disclosure.

Conclusion

Therefore, we REMAND this matter to OCFO for disposition in accordance with this decision. OCFO shall provide the requested records to Appellant, except as follows:

1. For the second category of records requested by Appellant, i.e., documents of OTR with respect to new requests for, or previously granted, real property tax exemptions for a school or educational institution under D.C. Official Code § 47-1002(10), OCFO shall re-examine its claims of exemption for the attorney-client privilege and, for the years 2009 and 2010, the deliberative process privilege with respect to the responsive records in accordance with the principles set forth above.

2. To the extent that OCFO maintains that there records in this category subject to the attorney-client privilege or deliberative process privilege, it shall provide to Appellant a detailed index identifying and describing each document withheld and shall produce the remaining records.

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[6] Thus, for instance, the documents must reflect the give-and-take of the consultative process and the privilege will not apply to the extent that the documents, or portions thereof, are factual in nature.

3. With respect to any statement of annual income and expenses, items of income and expenses shall be redacted.

This order shall be without prejudice to Appellant to assert any challenge to the records withheld as provided above.

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: Bazil Facchina, Esq.