

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

Freedom of Information Act Appeal: 2011-53

August 1, 2011

Edward P. Trivette, Esq.

Dear Mr. Trivette:

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 13, 2011 (the “Appeal”). You (“Appellant”) assert that the District Department of Transportation (“DDOT”) improperly withheld records in response to your request for information under DC FOIA dated May 16, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records related to an accident which occurred at the intersection of 4th and M Streets, N.W., on August 27, 2010.

In response, by letter dated June 7, 2011, DDOT provided 52 pages of responsive records to Appellant, but withheld six pages of the records related to the request for information regarding any other accidents, including any reports considering, proposing, or recommending alteration or changes to the intersection as a result of any accident, 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 contends that DDOT merely cited the deliberative process privilege without further explanation and did not articulate the reason for its withholding of documents under the applicable standard.

In its response, dated July 27, 2011, DDOT reaffirmed and amplified its prior position. It states that the records withheld consist of an email transmitting, for review, “draft documents that were never finalized or available to the public.” The draft documents were draft drawings of proposed changes to an intersection and draft letters to an Advisory Neighborhood Commission and the Council of the District of Columbia if the plans were approved for implementation. In addition, DDOT provided a privilege log and copies of the documents withheld for *in camera* review.

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 (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.

In this case, the records are clearly predecisional, submitted in contemplation of an agency policy to be adopted. It is as clearly deliberative as it reflects alternative proposals, with associated implementation letters, submitted for consideration by higher-level decision-makers. Disclosure of these types of records may inhibit the free-flowing exchange of written ideas and, as DDOT states, “discourage candid discussions with the agency about proposed safety measures that may

be taken at hazardous locations throughout the District.” DDOT is warranted in invoking the deliberative process privilege as a basis for the exemption.

Conclusion

Therefore, the decision of DDOT is upheld. The Appeal is hereby 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: Angela Addison Freeman, Esq.