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

Freedom of Information Act Appeal: 2012-05

November 22, 2011

Mark Borbeley, Esq.

Dear Mr. Borbeley:

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 October 20, 2011 (the "Appeal"). You, on behalf of a named client ("Appellant"), assert that the Department of Insurance, Securities, and Banking ("DISB") improperly withheld records in response to your request for information under DC FOIA dated August 31, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought documents relating to the foreclosure mediation process as follows:

1. All (blank) checklists or similar documents in use by DISB during June, July, and August 2011 to determine whether a Notice of Default on Residential Mortgage (Form FM-1) that DISB receives from the lender has been properly completed by the lender.

2. All (blank) check lists or similar documents in use by DISB during June, July, and August 2011 to determine whether a Mediation Election Form (Form FM-2) that DISB receives from a lender has been properly completed by the lender.

3. All documents pertaining to the planned foreclosure of 1650 Rosedale St., N.E. by Dunphy Properties, Inc.

4. All e-mails sent from Christopher Weaver to Monica Davis, dated June 1, 2011, through August 31, 2011.

5. All policy and procedure memos and e-mails dated May 1, 2011, to the date of the FOIA Request, issued by DISB to give guidance to staff regarding on the implementation and enforcement of the foreclosure mediation program

In response, by letter dated October 3, 2011, DISB denied the FOIA Request. It stated generally that it was withholding the records because "the requested information is confidential." As to the fourth request, it indicated that the records were exempt under "D.C. Official Code § 2-534 (Exemption (2)(b))." As to the fifth request, it indicated that the records were exempt under D.C. Official Code § 2-534 (Exemption 4)."

On Appeal, Appellant challenges the denial for the following reasons. First, DISB does not specify a statutory exemption and there is no exemption for "confidential" information. Second, as to the fourth request, Appellant states that he cannot find this exemption. Third, Appellant states that "Exemption 4" is the deliberative process privilege and applies to pre-decisional records. Appellant states that the requested records are not pre-decisional.

DISB responded "in part" by email dated November 2, 2011, and, when informed that a complete response was due, requested an extension on the same day. By email dated November 9, 2011, DISB supplemented/revised its response. In addition, by email dated November 14, 2011, in response to an invitation to supplement its response to clarify the manner in which the search was conducted and a description of withheld documents adequate to evaluate the claim of exemption, DISB further supplemented its response. It has revised its position, in part, representing that it will provide some documents to Appellant or that certain documents do not exist. However, it has affirmed its position as to withholding of other documents, but revised its position as to the reasons therefor. A summary of the response for the various numbered requests is as follows.

With respect to the first numbered item, DISB states that "[n]o such checklists or similar documents exist." (In its November 2 response, it stated that "[n]o such checklists or similar documents exist as the Foreclosure Mediation Administrator compares each Notice of Default on Residential Mortgage (Form FM-1) to the applicable Foreclosure statute and regulations to assure that each Form FM-1 received has been properly completed by the lender.") With respect to the second numbered item, DISB states that "no such checklists or similar documents exist." (In its November 2 response, it stated that "no such checklists or similar documents exist as the Foreclosure Mediation Administrator compares each Mediation Election Form (Form FM-2) to the applicable Foreclosure statute and regulations to assure that each Form FM-2 received has been properly completed by the lender.")

With respect to the third numbered item, DISB states that while it indicated initially that documents were withheld in response to the FOIA Request,

> on closer review, DISB has no documents "pertaining to the planned foreclosure of 1650 Rosedale, St., NE." The earliest document submitted to DISB is the Notice of Default filed in June 2011, which was also sent to the Borrower. DISB noted correctly that any document received pursuant to the mediation process would be protected from disclosure pursuant to D.C. Official Code §2-534[a](6) since 26 DCMR 2715 mandates confidentiality and shields from public inspection documents received in the mediation process.

With respect to the fourth numbered item, DISB states that while it indicated initially that all documents were being withheld in response to the FOIA Request, it will release some of the documents, but is withholding others pursuant to the deliberative process privilege or the attorney-client privilege under D.C. Official Code § 2-534(a)(4). DISB has furnished to this office copies of these documents, with redactions on the copies of the documents which it states that it is withholding. The *Vaughan* index submitted, and the redacted copies of the documents, indicate that a personal privacy exemption under D.C. Official Code § 2-534(a)(2) is also being asserted.

With respect to the fifth numbered item, DISB states:

> DISB does not believe that any such policy and procedure memos, or email messages have been issued by the Department to give guidance regarding the implementation and enforcement of the Foreclosure Mediation program, therefore, no Vaughn index or corresponding set of withheld documents can be compiled with respect to Request 5. However, in the spirit of cooperation, DISB will release the Foreclosure Mediation Training materials and will include such materials along with the documents for disclosure referenced above.

In its November 2, 2011 response, DISB notes that, subsequent to the filing of the Appeal, Appellant has filed an action in the Superior Court of the District of Columbia appealing the order of the Foreclosure Administration Mediator of DISB.

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).

DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

DISB states that there are no documents which exist with respect to the first and second numbered items. DISB states only that it does not "believe" that there are any documents which exist with respect to the fifth numbered item. It also states that there are no documents which exist with respect to the third numbered item, but, in the following sentence, identifies a document which falls within such category. Statements that an agency only "believes" that there are no documents or states that there are no documents which exist when it identifies one suggests that an adequate search has not been made or that the nature of the required disclosures is not understood. When invited to supplement the record to address the manner of the search that was made, DISB described only the search procedure for the fourth numbered item, which search was reasonable and adequate,[1] but did not address the other categories.

Accordingly, DISB shall make a new search with respect to the first, second, third, and fifth numbered items and shall provide, subject to any appropriate exemption, responsive records to Appellant. In order to make a reasonable and adequate search, DISB should make reasonable determinations as to the location of records requested and make, or caused to be made, searches for the records. Such determinations may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files which DISB maintains. Notwithstanding the foregoing, but for the inconsistencies noted in the prior paragraph, we may have been able to accept the explanations for the absence of the documents for the first and second numbered items which DISB stated in its November 2 response. We do not intend to require that DISB engage in an exercise that is certain to be futile. Therefore, if DISB can provide an affidavit from the administrator of the foreclosure mediation program, which affidavit establishes that such administrator is knowledgeable about all the procedures associated with the program, and all documentation generated for use therewith, and that the documents which are requested do not exist for the reasons which we have quoted above from the November 2 response, this will establish, to our satisfaction, that the documents for such numbered items do not exist.

DISB shall provide all records which it finds, whether or not it believes that Appellant already has such records, whether the information therein can be found in other records, or whether it believes that such records are useful. "FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information." *Stolt-Nielsen Transp. Group LTD. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008). The Notice of Default, identified by DISB as a document in its possession, is a record described by Appellant and must be produced along with any other records described in the FOIA Request. DISB contends that the Notice of Default—and presumably similar documents--is not permitted to be disclosed under 26 DCMR § 2715 (confidential information under foreclosure mediation rules). Accordingly, the contention of DISB is that disclosure is exempt under District of Columbia Official Code § 2-534(a)(6), which provides an exemption for information specifically exempt from disclosure by statute if the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular

[1] DISB described a search of the relevant electronic database identifying the appropriate parties and dates for search terms.

types of matters to be withheld. In this instance, DISB cites a rule under the District of Columbia Municipal Regulations for which there is no statutory counterpart. Accordingly, it is dubious that a rule alone can support an exemption which requires statutory authority. However, that is not the end of the inquiry. The rule cited by DISB is rooted in personal privacy considerations, which considerations are addressed by exemptions under DC FOIA. The relevant exemption would be D.C. Official Code § 2-534(a)(2), which, as discussed later, requires the identification of a sufficient privacy interest and the balancing of the public interest against that privacy interest to evaluate the availability of the exemption. However, a sufficient privacy interest, and the availability of the exemption, is not present when the requester, as here, seeks information about himself or herself. See, e.g., *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989).

As stated above, with respect to the fourth numbered item, DISB states it will release some of the documents located, but will withhold others pursuant to the deliberative process privilege or the attorney-client privilege under D.C. Official Code § 2-534(a)(4) or the personal privacy exemption under D.C. Official Code § 2-534(a)(2). We will evaluate the claims of exemption.

Under DC FOIA, as well as the federal FOIA, an agency has the burden of proof to justify its claim of exemption. In its initial responses, DISB merely asserted that that the records withheld were privileged and exempt under D.C. Official Code § 2-534(a)(4). DISB was given an opportunity to supplement the administrative record to provide a description of withheld documents adequate to evaluate the claim of exemption. DISB submitted a *Vaughan* index which identified, but did not describe, the documents (email messages), and copies of the documents withheld with substantially all of the body of the email messages redacted.

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, DISB has submitted essentially conclusory statements in support of its position. In Freedom of Information Act cases, "'conclusory and generalized allegations of exemptions' are unacceptable, *Found. Church of Scientology of Wash., D.C, Inc*. v. *Nat'l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 830 (D.C. Cir. 1979) (quoting *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820, 826 (1973))." *In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

We have examined the redacted documents to determine whether the claims of privilege may nevertheless justify the claim of exemption, but the unredacted portions do not support the claim.

The first privilege that DISB 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).

In this case, the emails, including persons on the email trail, are substantially all between Christopher Weaver and Monica Davis. Mr. Weaver identifies himself as Associate Commissioner for Banking and Ms. Davis identifies herself as Foreclosure Mediation Administrator. Accordingly, neither Mr. Weaver nor Ms. Davis are employed as attorneys. While both Mr. Weaver and Ms. Davis append the designation "Esq." after their names, it is not uncommon in District government for an employee who is not employed as an attorney to append such designation after his or her name to indicate that he or she is licensed in the District or another jurisdiction to practice law. However, the fact that an employee possesses a license to practice law does not bestow the attorney-client privilege on his or her communications. In one instance, there is a communication in an email trail from an individual employed as a DISB attorney. However, it is not apparent, especially in the light of the other claims of attorney-client privilege, that it is a privileged attorney-client communication. These records must be produced.[2]

The second privilege that DISB 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.

[2] The record with the communication from the DISB attorney is being ordered to be produced as a result of the determination that there is insufficient evidence that it an attorney-client communication. However, its production shall not constitute a waiver of the attorney-client privilege and Appellant shall accept the record only upon the condition that its production does not constitute such waiver.

"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 subject captions for certain of the email messages, relating to rulemaking, suggests that the such emails *could* be the subject of a deliberative process. However, under these circumstances, that is insufficient. Moreover, certain of the redactions for which this privilege is claimed are made for communications from third parties who are not part of the District government and whose communications would not be subject to the privilege. In addition. the brief nature of these messages does not suggest the "the give-and-take of the consultative process." These emails must be disclosed as well.

In addition to the claims for exemption under D.C. Official Code § 2-534(a)(4), DISB asserts the personal privacy exemption under D.C. Official Code § 2-534(a)(2) with respect to two documents (identified by DISB as Documents 16 and 30). An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). Here, the subject emails bear the captions "SBS Login and ID" and "Hold down the fort." Even without an agency description, these records indicate that they pertain to personal, secure access to an electronic database and to personal plans. There is a clear privacy interest in such types of records. The redacted portion in each email, including those that are part of the email trail, consist of no more than one line of text. There does not appear to a public interest in disclosure as it seems highly unlikely that such disclosure will contribute significantly to public understanding of the operations or activities of the government. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Accordingly, the claim of exemption for these records is upheld.

As stated above, DISB notes that, subsequent to the filing of the Appeal, Appellant has filed an action in the Superior Court of the District of Columbia appealing the order of the Foreclosure Administration Mediator of DISB. However, the litigation and the FOIA Requests are separate matters. The production of documents in a separate matter does not satisfy a proper request for records under DC FOIA. We have held that the existence of pending litigation is itself insufficient to justify the withholding of records. Freedom of Information Act Appeals 2011-5, 2011-51, and 2011-63. 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).

Conclusion

Therefore, the decision, as revised, of DISB is upheld in part and reversed and remanded in part for disposition in accordance with this decision, which disposition is summarized as follows:

1. DISB shall make a new search with respect to the first, second, third, and fifth numbered items and shall provide, subject to any appropriate exemption, responsive records to Appellant.

2. DISB shall provide all records located with respect fourth numbered item other than the two records for which it has claimed an exemption under D.C. Official Code § 2-534(a)(2) (identified by DISB as Documents 16 and 30).

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Mary E. Lofton-Manning
Thomas Glassic, Esq.