

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

Freedom of Information Act Appeal: 2012-15

December 23, 2011

Mr. Jordan Hultgren

Dear Mr. Hultgren:

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”), undated (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 November 7, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records regarding “any Open Zoning Violations or any Planned Road Projects (construction, widening, etc) that might require Right of Way Acquisition of” 818 Southern Avenue, S.E.

In response, by letter dated November 29, 2011, DDOT stated that it had located responsive records, but was withholding the records under D.C. Official Code § 2-531(a)(4) pursuant to an exemption for deliberative process privilege.

On Appeal, Appellant challenges the denial of the FOIA Request. Appellant states that he is conducting a zoning compliance/due diligence report and he must know if there are any planned or current road projects that may require DDOT or any other government agency to acquire an additional right of way or part of the property. In addition, Appellant states that he has previously received this information “for other addresses in the District of Columbia area.”

In its response, dated December 12, 2011, DDOT reaffirmed its prior position. It states that the records consist of “two (2) work and fee proposals that are currently being reviewed” by DDOT and DDOT “intends to use these documents to solicit consultants for future roadway improvement projects.” At the present time, “these documents remain draft proposals and have not yet been signed, finalized, or released to the public at-large. (See Exhibit 2). The proposals are opinions and recommendations of suggested modifications for future DDOT road improvement projects that have not yet been awarded.” Thus, DDOT asserts that “these

documents are both predecisional and deliberative and meet the legal standard applicable to the exemption for deliberative process privilege.” DDOT provided copies of the withheld records for confidential 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 (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 records in this case are proposals from an outside vendor for a contract to provide services to DDOT. They are not intra-agency assessments of the contract proposal nor do they reflect the assessment of an outside consultant retained to do so. While the records generated within DDOT evaluating the contract proposal and the project which the contract will support would be subject to exemption under the deliberative process privilege, we do not believe that the actual contract proposal submitted is a record which is covered by the deliberative process privilege.

Nevertheless, in *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340 (1979), Supreme Court recognized that there is a privilege under FOIA for documents or information which the government has received or generates before it completes the process of awarding a contract.

At the time that it was considering amendments to the federal equivalent of D.C. Official Code § 2-534(a)(4), the Supreme Court noted that concern was raised that “information relating to the purchase or sale of real estate, materials, or other property might not be protected . . .” *Id.* at 358. The Court pointed to the following portion of the legislative history as significant:

Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy (emphasis added). *Ibid.*

Id. at 359. It concluded:

In light of the complaints registered by the agencies about premature disclosure of information relating to Government contracts, we think it is reasonable to infer that the House Report, in referring to ‘information . . . generated [in] the process of awarding a contract,’ specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.

Id.

The Court contrasted the application of this privilege to the deliberative process privilege:

The purpose of the privilege for predecisional deliberations is to insure that a decisionmaker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to

which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency. The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

Id. at 359-360.

The records withheld in this case were received as part of the contracting process and, as DDOT clearly states, the proposed contract has not been awarded. Accordingly, such records are exempt from disclosure under D.C. Official Code § 2-534(a)(4) pursuant to the privilege identified by the Supreme Court for documents or information which the government has received or generates before it completes the process of awarding a contract.

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 contracting and decision-making.

Appellant states that he needs the documents because he is conducting a zoning compliance/due diligence report and he must know if there are any planned or current road projects that may require DDOT or any other government agency to acquire an additional right of way or part of the property. 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).

Conclusion

Therefore, we uphold the decision of DDOT. 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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Nana Bailey-Thomas, Esq.