

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

Freedom of Information Act Appeal: 2012-17

December 23, 2011

Mr. Joseph A. Davis, II

Dear Mr. Davis:

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 26, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the State Superintendent of Education (“OSSE”) improperly withheld records in response to your request for information under DC FOIA dated July 18, 2011 (the “FOIA Request”) by making improper redactions to records which it provided to Appellant pursuant to the FOIA Request.

Background

Appellant’s FOIA Request sought records from Ms. Vanessa Miranda regarding Youth Engaged for Success, Inc. for the period October 1, 2010 to July 5, 2010. By email dated October 25, 2011, OSSE provided a response to Appellant.

On Appeal, Appellant challenges the response to the FOIA Request as set forth above. In its response, by email dated December 22, 2011, OSSE reaffirmed its position. OSSE states that five redactions were made to records provided to Appellant and that the redactions were made pursuant to the attorney-client privilege under the exemption provided by D.C. Official Code § 2-534(a)(4). OSSE states further that

the information redacted was sent to Ms. Miranda from Richard Pohlman, an OSSE attorney, for the purpose of providing legal advice relating to litigation involving Mr. Davis’ company, ‘Youth Engaged for Success’. Not only is the redacted information non-responsive to Mr. Davis’ request for emails from Vanessa Miranda, but this communication is clearly protected from disclosure by the attorney-client privilege as all of the information redacted communicates information from an attorney to his client who sought advice/assistance relating to pending litigation.

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).

Appellant asserts that OSSE has made improper redactions to records which it provided to Appellant pursuant to the FOIA Request. In turn, OSSE asserts that the redactions were properly made pursuant to the attorney-client privilege.

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 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). OSSE clearly establishes that the redactions relate to communications made in the course of the attorney-client relationship. Accordingly, the portion of the records redacted are exempt from disclosure under D.C. Official Code § 2-534(a)(4).

Appellant also asserts that OSSE has violated DC FOIA by failing to respond timely to the FOIA Request. As Appellant knows well from his previous appeals to this office, as OSSE has responded to Appellant, there is no relief which we are authorized to provide under DC FOIA and this issue is moot.

Conclusion

Therefore, the decision of OSSE is upheld and the appeal is hereby dismissed.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under 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: Tracey Langley