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

Freedom of Information Act Appeal: 2012-18

January 11, 2012

Ms. Marisol Bello

Dear Ms. Bello:

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 December 7, 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 August 8, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought OSSE's "erasure analysis" for the 2011 District of Columbia Comprehensive Assessment System test results and all correspondence between OSSE and local education agencies regarding the erasure analysis. By letter dated November 25, 2011, OSSE withheld records relating to the data, but provided responsive emails with redactions.

On Appeal, Appellant challenges the response to the FOIA Request for following reasons:

> this is a matter of great importance to the public; the public, particularly those who are parents with children attending District schools, have a right to receive erasure information about the schools in a timely manner; OSSE has released this data before and Mayor Gray has made it a point to make transparency a hallmark of his administration.
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> . . . Because of the importance of the tests, as noted by the Superintendent's office, the public has a right to know what the erasure analysis shows and the erasure rates for each DC school.

In its response, by email dated December 22, 2011, OSSE reaffirmed its position. OSSE indicates that it intends to release the erasure analysis at some future time.

> However, the information requested is presently exempted from disclosure pursuant to D.C. Code § 2-534(a)(4) because the information at issue is included in the agency's deliberative process for analyzing data related to the administration of the DC CAS. OSSE has also implemented a data privacy policy which establishes parameters for data access and use of educational data collected by the agency. This policy provides guidance

> to the agency with regard to any analysis performed by the State Education Agency and its agents and/or contractors pursuant to federal or state law will be considered *embargoed* and will not be publicly disclosed pursuant to this policy unless the decision-making and/or investigatory processes for which the analysis is used has been fully completed and approved for publication. At this time, the analysis of the data related to the administration of the 2011 DC-CAS is still being performed and no decision has been made to release the information prior to the completion of the analysis.[1]

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).

OSSE explains that the District of Columbia Comprehensive Assessment System is a standardized test that assesses public school students on reading and math in grades 3 through 8 and 10, science in grades 5 and 8, biology in high school, and composition in grades 4, 7, and 10.[2] The records sought with respect to the District of Columbia Comprehensive Assessment System relate to two general categories: the erasure analysis and correspondence related to the erasure analysis. We will analyze each category in turn. As to the erasure analysis, OSSE

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[1] The filings of Appellant and OSSE referred to an "erasure analysis" and "DC-CAS." OSSE was invited to supplement the administrative record to clarify the meaning of these terms. Both OSSE and Appellant submitted clarifications on January 3, 2011. The supplements, including a restatement by Appellant of its argument, are reflected herein.

[2] As explained by OSSE on its website, cited by Appellant: "Test results are used to drive instructional planning. Teachers and administrators can better understand what your child needs academically through the reports generated from your child's scores." http://www.dc.gov/DCPS/In+the+Classroom/How+Students+Are+Assessed/Assessment+Archives/DC+Comprehensive+Assessment+System+(DC+CAS). Appellant adds that the test is also used to determine if federal mandates are being met.

asserts that the erasure analysis was properly withheld pursuant to the deliberative process privilege and Appellant contests that assertion based on the public need and prior practice.

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.

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).

For example, accident reports have been found to be exempt from disclosure, but not invariably so. *See Lloyd v. Marshall*, 526 F. Supp. 485 (M.D. Fla. 1981), where the report of an OSHA compliance officer was withheld. ("This privilege is primarily aimed at safeguarding the quality of agency decision-making, and its protection is strongest when the material to be disclosed relates to "communications received by the decision-maker on the subject of the decision prior to the time the decision is made." [citation omitted]. The opinions and conclusions reached by the compliance officer as the result of his investigation represent precisely this kind of predecisional communication, for the compliance officer's recommendations and opinions are used by the OSHA in deciding what agency action should follow. *Id*. at 486.) *Cf. Lacy v. United States Dep't of Navy*, 593 F. Supp. 71 (D. Md. 1984) ("The photographs attached to the investigative reports compiled by Navy investigators are factual in nature. They are not so intertwined with the deliberative portions of these reports that they could not have been segregated and produced. . . . In essence, the Navy is claiming that whenever photographs are attached to a report by an investigator they cannot be revealed because they would expose the deliberative processes of the investigator. Such a sweeping argument is rejected." *Id*. at 77-78.)

We have looked to Appellant and OSSE for an explanation of the phrase "erasure analysis" and, as their explanations are similar, we will set forth a blended description. Appellant states: "An erasure analysis is the examination of electronic bubble sheets on which students record their answers. The analysis looks at the rates that wrong answers were erased and filled in with right answers." OSSE states: "Analyzing erasures assists states in identifying patterns and determining if there is 'cheating'." Based on these descriptions, an erasure analysis would consist of two components. The first part of the analysis would be a compilation of data, that is, the determination of the number of times that wrong answers were changed to correct answers (and perhaps the converse as well) and a determination of the overall rate of change based on the aggregate number of answers. The second part of the analysis would be an evaluation of the data compiled.

The first part of the analysis, the compilation of the number of erasures and erasure rates, involves material which is factual in nature and not deliberative. The second part of the analysis, the evaluation of the data compiled, is deliberative in nature. This evaluation would involve the assessment of the significance of the erasure rates, presumably taking into account statistical measures such as confidence levels and sample sizes, a judgment as to the reliability of the tests results, and recommendations based on such assessments. Moreover, this evaluation would have an impact on the planning for which the test results are used. At this time, the evaluation is predecisional. Thus, we have a circumstance where, as in the words of the *Ryan* court above, there is "purely factual material which is severable from the policy advice contained in a document." Accordingly, OSSE shall provide Appellant with the first part of the erasure analysis, but shall redact the second part of the erasure analysis. This would be the same result as was reached in *Lahr v. NTSB*, 569 F.3d 964, 983 (9th Cir. 2009), with respect to an analysis of radar tracking of a commercial airplane flight, where the raw data used in the analysis was ordered to be disclosed, but the remainder of the document, including evaluation of that data, was withheld.

Appellant relies on the public interest in disclosure to overcome the assertion of the deliberative process privilege under the exemption. We believe that public interest here is in the redaction of the erasure analysis in accordance with the reasoning which we expressed in Freedom of Information Act Appeal 2011-42. In that decision, we stated:

> As the public interest is not a mandated requirement under the statutory text of DC FOIA or under case law, other than a privacy analysis, we view this as a rule of discretion rather than a statutory mandate. Nevertheless, to be sure, the public interest is not only a consideration under the rule cited by Appellant, but under Mayor's Memorandum 2011-01, Transparency and Open Government Policy. For instance, in Freedom of Information Act Appeal 2011-19, pursuant to the Memorandum, we ordered disclosure of certain records where the deliberative process privilege applied when the information therein had become stale. However, here, the public interest is in nondisclosure of the emails. The exemptions under DC FOIA are intended to achieve the correct balance between public access to information and, among other things, the efficient operation of government. The efficient operation of government dictates that a free exchange of ideas must be permitted in order to reach optimal decisions. Officials and employees need to be free to express unpopular opinions, make erroneous statements, or even look foolish on the road to making a decision without having such predecisional thoughts put under the microscope of public scrutiny. Without the comfort that this will not occur, such persons may feel comfort only in the oral conversations and this may eliminate important sources of communication. In the words of the *Coastal States* court, 'public disclosure is likely in the future to stifle honest and frank communication.'

The second category of records is correspondence related to the erasure analysis. Here the universe and nature of the responsive records is unclear. While OSSE has provided responsive emails, with redactions, its original response suggests that there may be other responsive records in this category which are withheld. Moreover, the context of the redactions in the records produced indicates that such redactions may have been made for exemptions other than the deliberative process privilege. On the other hand, Appellant has made a generalized challenge to the response of OSSE with respect to this category without reference to the records produced or an indication that it believes that other records exist. Therefore, to resolve this issue, consistent with the principles set forth above, OSSE shall:

1. Indicate whether it is withholding any records with respect to this category, state the exemption which is the basis for any such withholding, and state the reasons why any exemption is applicable.

2. State the exemption or exemptions for the redactions made to the responsive records which it has produced and the reasons why the exemptions are applicable.

This decision shall be without prejudice to challenge the response of OSSE when made.

Conclusion

Therefore, the decision of OSSE is upheld in part and reversed and remanded in part for disposition in accordance with this decision.

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Tracey Langley