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

Freedom of Information Act Appeal: 2012-24

February 3, 2012

Julie M. Skirvin, Esq.

Dear Ms. Skirvin:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) (the "DC FOIA"), dated January 12, 2012 (the "Appeal"). You, on behalf of Oregon Iron Works, Inc. ("Appellant"), assert that the District Department of Transportation ("DDOT") improperly withheld records in response to your request for information under DC FOIA dated December 22, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought from DDOT all responses, other that of United Streetcar, LLC, to a contract solicitation for streetcars. In response, by letter dated January 12, 2012, DDOT stated that it was withholding all of the responsive records because, as a result of protest filed in connection with the contract solicitation, the Contract Appeals Board had issued a protective order, dated December 21, 2011, which barred release of the records. DDOT indicated that when the protective order is lifted, it would process the records for release.

On Appeal, Appellant challenges the withholding because, as of the date of the Appeal, the docket of the case (P-0903) on the website of the Contract Appeals Board does not show that a protective order has been issued.

In its response, dated February 1, 2012, DDOT reaffirmed its prior decision, but revised the reasons for the decision. DDOT states that after the filing of the Appeal, it contacted Appellant and acknowledged that it had erroneously indicated that a protective order had been issued. It told Appellant that it would renew the processing of the FOIA Request. By letter dated January 31, DDOT notified Appellant that it had located responsive records, but it was withholding the records based upon the exemption under D.C. Official Code § 2-534(a)(2) and the exemption under D.C. Official Code § 2-534(a)(4) for documents or information which the government has received or generates before it completes the process of awarding a contract. DDOT states that it has processed the FOIA Request and the Appeal is moot, contending that Appellant needs to file a new appeal to contest its revised decision on January 31, 2011.

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 § 2-537(a). 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).

DDOT contends that the Appeal is moot because it has now "processed" the FOIA Request and maintains that Appellant needs to file a new appeal to contest its revised decision. We disagree. DDOT had conducted a search for, and located, responsive records at the time of its original response and has merely changed the rationale for its decision to withhold the records pursuant to the FOIA Request. In our view, the Appeal is ripe for decision.

As the factual situation established by the parties on the administrative record was unclear as to status of the contract, we consulted the pleadings of the contract appeal before the Contract Appeals Board, which posts such public records on its website. On January 18, 2012, in response to the uncontested motion of the District, the Contract Appeals Board dismissed the contract appeal "based upon the decision of the District to take corrective action in response to the present protest allegations." The District stated in the motion that it would take the following corrective action:

1. It will not proceed with the proposed contract award.

2. It will rescind the "Cost/Price Tradeoff Analysis" used to recommend the contract award.

3. It will determine whether to proceed with or cancel RFP No. DCKA-2011-R-0042.

4. If it decides to proceed with the RFP, it will amend the RFP and request, and evaluate, another round of best and final offers in accordance with the revised RFP.

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).

In *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340 (1979), the 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. The award of the proposed contract (to the extent that the award was actually made, which is not clear on the administrative record) has been rescinded and the contracting process is now ongoing. 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.

Conclusion

Therefore, the decision of DDOT, as revised, is upheld.

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: Nana Bailey-Thomas, Esq.