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

Freedom of Information Act Appeal: 2012-25

February 3, 2012

Mr. Nick Morales

Dear Mr. Morales:

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 January 11, 2012 (the "Appeal"). You, on behalf of the National Resources Defense Council ("Appellant"), assert that the District Department of the Environment ("DDOE") improperly withheld records in response to your request for information under DC FOIA dated November 14, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought

> all records since February 1, 2011 concerning communications with the U.S. Environmental Protection Agency regarding contamination at the Pepco electrical generation, distribution, transmission, and maintenance facility located at 3400 Benning Road, NE, Washington, DC, including communications regarding the District of Columbia v. Potomac Electric Power Company, No. 1:11-cv-00282 (D.D.C., filed Feb. 1, 2011) litigation and proposed consent decree.

In response, by letter dated December 2, 2012, DDOE denied the FOIA Request on the ground that the responsive records were exempt from disclosure based upon the work-product privilege under D.C. Official Code 2-531(a)(4). DDOE explained that beginning in the Fall of 2010, it was in "close contact" with the Environmental Protection Agency ("EPA") regarding the status of an investigation at the Pepco Benning Road facility and that regular updates to EPA staff were done by telephone calls. It stated that "most communications were not memorialized and those that were written consist of attorney-notes and emails."

On Appeal, Appellant challenges the denial of the FOIA Request. Appellant contends that "DDOE failed to sufficiently describe the records it withheld and provided only a cursory explanation of why they were protected by the exemption for inter- or intra-agency memoranda."

Appellant maintains that DDOE is required to identify "each withheld record and explain the basis for the withholding." It also contends that communications between DDOE and EPA are not "inter-agency" communications as EPA is not an "agency" as defined by DC FOIA. In addition, as EPA is not a party to the litigation or a representative or agent of DDOE, the work-product privilege does not apply to any documents drafted by EPA. Moreover, Appellant asserts that DDOE has waived the work-product privilege for any emails which it drafted and sent to EPA. Finally, Appellant asserts that the withheld records "likely contain non-privileged information" and, at the least, should be produced with redactions.

In its response, dated January 20, 2012, DDOE reaffirmed and amplified its position. By way of background, DDOE explains after receiving a letter stating that EPA was prepared to use its federal enforcement authorities at several locations along the Anacostia River if DDOE did not reach enforceable cleanup agreements by mid-December 2010, it issued a Notice of Intent to Sue and began negotiations with Pepco. In mid-December of 2010, these negotiations resulted in an agreement in principle on a consent decree. DDOE states further that, during the negotiations, through conference calls, EPA was regularly updated on the status of negotiations and the proposed substantive terms of a consent decree. During these conference calls, EPA "provided oral support for the substance and form of the Consent Decree. The only records of these conversations are lead counsel's attorney notes from that time." DDOE indicates that the consent decree was filed on February 1, 2011 (apparently, DDOE had commenced legal action). Although it was not required to do so, DDOE published the proposed consent decree for public comments. In response to the comments received from Appellant, DDOE renegotiated a portion of the consent decree. On April 26, 2011, Appellant filed a motion to intervene in the action, which intervention DDOE opposed. Unable to resolve its differences with the Appellant, "DDOE opted to move forward with the settlement. At this point, lead counsel for DDOE asked EPA to memorialize their oral approvals of the Consent Decree. Counsel sought this written opinion to demonstrate EPA's perspective on the Consent Decree and thus undermine NRDC's arguments." DDOE filed a Motion to Enter the Consent Decree on September 1, 2011, which motion was opposed by Appellant. In its reply, DDOE included the letter from EPA in response to its earlier request. A hearing on the motion was scheduled for November 22, 2011. On November 16, DDOE received the FOIA Request.

DDOE asserts that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(4). DDOE maintains that the handwritten notes of its lead counsel are exempt from disclosure pursuant to the work-product privilege as they were prepared in conjunction with the litigation with Pepco. Similarly, as part of the litigation process, DDOE sought "to memorialize EPA's previous endorsements of the Consent Decree" and "[t]hese emails were part of a direct effort of lead counsel to prepare for an inevitable conflict with NRDC." In addition, DDOE contends that the records are also exempt under the deliberative process privilege. Finally, DDOE asserts that its description of the records was adequate.

<u>Discussion</u>

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).

DDOE has identified two groups of responsive records with respect to the FOIA Request: the handwritten notes of its lead counsel made during conference calls and the email or emails to EPA by such counsel requesting a written opinion on the proposed consent decree.

As to the handwritten notes, the basic contention of Appellant is that DDOE has failed to identify each withheld record by Vaughan index and to justify the basis for the withholding of each such record. As a general matter, 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, we believe that DDOE has adequately identified a group of documents which is sufficiently similar in nature and the circumstances under which records were generated. Moreover, we believe that DDOE has adequately established the applicability of the exemption based upon work-product privilege.

The work-product privilege has been developed in federal courts based on the decision in *Hickman v. Taylor*, 329 U.S. 495 (1947) and, simply stated, protects from disclosure materials prepared in anticipation of litigation or for trial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). "[I]t is firmly established that there is no privilege at all unless the document was initially prepared in contemplation of litigation, or in the course of preparing for trial. . . . at the very least some articulable claim, likely to lead to litigation, must have arisen." *Id*. at 865. In this case, it is clear that the records were generated by counsel in connection with the Pepco litigation.

As to the email or emails to EPA by lead counsel requesting a written opinion on the proposed consent decree, Appellant maintains that DDOE has failed to identify each withheld record by Vaughan index and to justify the basis for the withholding of each such record. As we concluded with respect to the handwritten notes, we believe that DDOE has adequately described the records. However, Appellant adds two principal contentions. First, it contends, as stated, that communications between DDOE and EPA are not "inter-agency" communications as EPA is not

an "agency" as defined by DC FOIA. Second, it contends that as EPA is not a party to the litigation or a representative or agent of DDOE, the work-product privilege does not exist or DDOE has waived the work-product privilege for any emails exchanged with EPA.

D.C. Official Code 2-531(a)(4) establishes two conditions to exempt a record from disclosure: the record must be an inter-agency or intra-agency communication and it must satisfy the requirements of a privilege against discovery under judicial standards that would govern litigation. *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Appellant argues that neither condition is met.

Appellant gives a literal reading to the term "inter-agency," but this reading does not comport with the law. It is clear that communications with parties outside the government whose consultation has been requested by an agency can qualify as "inter-agency."

> Unquestionably, efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects. Congress apparently did not intend 'inter-agency' and 'intra-agency' to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process. . . . When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5. This common sense interpretation of 'intra-agency' to accommodate the realities of the typical agency deliberative process has been consistently followed by the courts. [footnote omitted].

Ryan v. Department of Justice, 617 F.2d 781, 789-790 (D.C. Cir. 1980). In accord, *McKinley v. Bd. of Governors of the Fed. Reserve Sys*., 647 F.3d 331, 339 (D.C. Cir. 2011); *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 44 (D.D.C. 2007).

". . . our Circuit precedent interprets "intra-agency" to include agency records containing comments solicited from non-governmental parties such as the lawyers whose counsel DoD sought . . ." *Nat'l Inst. of Military Justice v. United States DOD*, 512 F.3d 677, 680 (D.C. Cir. 2008).

While the Supreme Court has not ruled directly on this issue, it has determined that there is a limitation on which outside parties can qualify as consultants. In *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), it held the intra-agency condition excludes "communications to or from an interested party seeking a Government benefit at the expense of other applicants." *Id*. at 12.

Nevertheless, communications between federal and state agencies have been held to be inter-agency communications qualifying under FOIA. In *Mobil Oil Corp. v. Federal Trade Com.*, 406 F. Supp. 305, 315 (S.D.N.Y. 1976), the court considered two different records concerning

communications between a federal and state agency. The first was a record of a discussion of the relationship between separate investigations by the Federal Trade Commission ("FTC") and a state attorney general into pricing policies of major brand oil suppliers. The second was a summary of an interview between a staff member of the FTC and officials of a state agency written to instruct the FTC as to the jurisdiction and decision-making process of the state agency. The Court held that the exemption could be applied to both records.

> 'By including inter- agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency . . .' *Renegotiation Board v. Grumman Aircraft*, *supra*, 421 U.S. at 188, 95 S. Ct. at 1502.
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> *The rationale applies with equal force to advice received from state as well as federal agencies*. [emphasis added].

Id. at 315.

Similarly, *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Sec.*, 514 F. Supp. 2d 36 (D.D.C. 2007), found that meeting minutes involving federal employees and state emergency management officials from Mississippi and Louisiana to coordinate evacuation plans among the state and federal responders (which meeting also involved non-agency personnel acting in a consulting capacity) involved inter-agency communications.

Perhaps the closest analogous factual situation to the instant case was in *United States v. Allsteel, Inc.*, 1988 U.S. Dist. LEXIS 14570 (N.D. Ill. Dec. 21, 1988), which considered memoranda of meetings and conference calls among EPA personnel and personnel from the Illinois Environmental Protection Agency. Rejecting the argument that their communications could not be privileged because the agencies had separate views, the Court stated: "USEPA and IEPA are cooperating agencies with identical goals and overlapping jurisdiction. Their consultation in confidence is within the purposes of the deliberative process privilege." *Id*.

In the case of the Appeal, DDOE indicates that it was pursuing regulatory/legal action to forestall similar action by EPA. As a consequence, it regularly consulted EPA on the progress of its efforts in order to maintain its status as the enforcing agency. In the words of the *Allsteel* court, they are "cooperating agencies with identical goals and overlapping jurisdiction" and their communications are inter-agency under D.C. Official Code § 2-531(a)(4).

While the first condition is met, i.e., that these are inter-agency communications, such communications must still be privileged to be exempt. As stated, DDOE asserts that the email or emails are exempt from disclosure under the work-product privilege. DDOE explains that the email or emails requested a written opinion on the proposed consent decree. It is plain that DDOE sought the opinion as part of its evaluation and decision-making with respect to the filing of the consent decree with the court. Thus, they were sent as part of the litigation process and, under the principles described above, meet the requirements of the work-product privilege. While Appellant maintains that EPA is not a party and that there has been a waiver of the

privilege, for the reasons set forth above, EPA would be a consultant to DDOE and the materials exchanged with EPA are privileged.

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial.

United States v. Nobles, 422 U.S. 225, 238 (1975). See also *Williams & Connolly v. SEC*, 662 F.3d 1240 (D.C. Cir. 2011).[1]

According to these principles, the written opinion generated by EPA would also be covered by the work-product privilege. However, as DDOE has stated, this opinion was publically disclosed by attaching it to DDOE's reply to the opposition of Appellant to the Motion to Enter the Consent Decree. Accordingly, such disclosure would waive the work-product privilege as to this document.[2] Although it is not clear, it is fair to infer that Appellant may regard this disclosure as a waiver of the privilege as to all documents. However, the work-product privilege is waived only on a document-by-document basis.

> 'The purposes of the work product privilege . . . are not inconsistent with selective disclosure — even in some circumstances to an adversary.' *In re Sealed Case*, 676 F.2d at 818; see also *Pittman v. Frazer*, 129 F.3d 983, 988-89 (8th Cir. 1997). Thus, 'disclosure of some documents does not necessarily destroy work-product protection for other documents of the same character.' 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024, at 530 (3d ed. 2010).

Williams & Connolly v. SEC, 662 F.3d 1240 (D.C. Cir. 2011).

DDOE also raises the deliberative process privilege as a basis for withholding the responsive records identified. We note that several of the cases which were analyzed above with respect to the issue of inter-agency communications found that the records were exempt from disclosure under the deliberative process privilege. See, e.g., *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Sec.*, 514 F. Supp. 2d 36 (D.D.C. 2007); *United States v. Allsteel, Inc.*,

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[1] "The work-product doctrine protects from disclosure materials 'prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).' Fed. R. Civ. P. 26(b)(3)(A); see also *Upjohn Co. v. United States*, 449 U.S. 383, 398, 101 S. Ct. 677, 66 L. Ed. 2d 584 & n.7 (1981); *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 341 (D.C. Cir. 2011)." *Id.*

[2] As a technical matter, this record should have been provided to Appellant pursuant to the FOIA Request. However, as Appellant is already is in possession of this document and has not referred to it in the Appeal, it would not seem to be necessary to order its production.

1988 U.S. Dist. LEXIS 14570 (N.D. Ill. Dec. 21, 1988). However, as we have found that the work-product privilege applies, it is not necessary to analyze the applicability of the deliberative process privilege.

Finally, as stated above, Appellant asserts that the withheld records "likely contain non-privileged information" and, at the least, should be produced with redactions. While this principle has been applied, for example, in the case of the deliberative process privilege with respect to factual material which is not inextricably intertwined with the deliberative portions of a record, it does not apply in the case of the work-product privilege. In *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, (D.C. Cir. 2005), the Court considered this issue and held that redaction is not required.

> The circuit's case law is clear that 'the work-product doctrine simply does not distinguish between factual and deliberative material.' *Martin v. Office of Special Counsel*, 260 U.S. App. D.C. 382, 819 F.2d 1181, 1187 (D.C. Cir. 1987). In *Tax Analysts*, we explained that 'any part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5.' 117 F.3d at 620. In other words, factual material is itself privileged when it appears within documents that are attorney work product. If a document is fully protected as work product, then segregability is not required.

Id. at 371.

Conclusion

Therefore, the decision of DDOE is upheld.

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: Ibrahim Bullo
Kimberly Katzenberger, Esq.