GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal 2012-41

May 14, 2012

MaraVerheyden-Hilliard, Esq.

Dear Ms. Verheyden-Hilliard:

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 April 13, 2012 (the "Appeal"). You, on behalf of the Partnership for Civil Justice Fund ("Appellant"), assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated November 17, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records reflecting communications involving MPD, other state or municipal representatives, and/or private consultants regarding the Occupy Wall Street movement and Occupy encampments in cities around the country.

MPD responded by letter dated December 21, 2011, as follows:

1. It indicated that it searched the emails of MPD officials "substantially involved with the Occupy activities," but withheld emails, as indicated on an attached privilege log, because disclosure of the records "would interfere with the agency's investigation and any pending enforcement proceedings" and is exempt under D.C. Official Code § 2-534(a)(3)(A).

2. It stated that it did not retain recordings of telephone conferences.

3. It stated that records related to the U.S. Conference of the Mayors should be directed to the Executive Office of the Mayor.

On Appeal, Appellant challenges the response to the FOIA Request. First, Appellant contends that MPD failed to perform a search reasonably calculated to yield responsive records. It asserts that the referral of Appellant to the Executive Office of the Mayor indicates that a particularized and incomplete search was conducted. In addition, based on published reports that government employees have used personal email accounts to transact government business, Appellant asserts that staff personal email accounts should have been searched. Second, Appellant contends that

MPD improperly asserted the exemption for investigatory records under D.C. Official Code § 2-534(a)(3)(A). It asserts that records regarding a "cross-jurisdictional coordination of law enforcement response to protest does not amount to 'investigatory records' under D.C. FOIA," and, under *Barry v. Washington Post Co.*, 529 A.2d 319 (D.C. 1987), such records must be compiled for investigations which focus directly on specifically alleged illegal acts of particular identified persons. In addition, Appellant states that "MPD has not represented that there is a pending law enforcement proceeding, much less one that would be interfered with by release of the requested materials."

In its response, MPD modified its position. With respect to the contention of Appellant that it has not conducted a reasonable and adequate search, by email dated April 27, 2012, MPD stated that, after reviewing the Appeal and pursuant to the request of Appellant, it would conduct another search for responsive documents. With respect to the claim of exemption for investigatory records, pursuant to an invitation to supplement the record, MPD, by email dated May 10, 2012, stated that upon further review of the withheld records, such records should be withheld, but that the basis for withholding the records should be the deliberative process privilege under D.C. Official Code § 2-534(a)(4) rather than the exemption for investigatory records compiled for law enforcement purposes under D.C. Official Code § 2-534(a)(3). In support of its contention, MPD further stated:

> The withheld documents consist of discussions between high ranking officials of the District government (such as representatives from the Mayor's office and the Chief of Police), federal agencies (such as the U.S. Department of the Interior and U.S. Park Police), and outside organizations concerning the appropriate policy and actions in response to demonstrations and activities relating to the Occupy encampments. These discussions consist of deliberations concerning the laws and policies to be enforced in the encampment areas related to public health, camping, cooking, public safety, child protective services, maintenance services and communications with stakeholders. These discussions also concerned possible responses to potential civil disobedience, high volume arrests, traffic closures and the sharing of resources.

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).

Under the Appeal, the Appellant has set forth two challenges. First, Appellant contends that MPD has failed to perform a search reasonably calculated to yield responsive records. Second, Appellant contends that MPD improperly asserted the exemption for investigatory records under D.C. Official Code § 2-534(a)(3)(A).

With respect to the first challenge, as MPD has stated that it will conduct an additional search, we will consider such challenge to be moot. However, Appellant may challenge, by separate appeal, the results of the additional search when made.

With respect to the second challenge, in the Appeal, MPD has chosen not to assert its claim of exemption for the withheld records under the exemption for investigatory records compiled for law enforcement purposes under D.C. Official Code § 2-534(a)(3), but contends that such records should be withheld under the deliberative process privilege under D.C. Official Code § 2-534(a)(4).

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).

An internal memorandum or other document drafted by a subordinate employee which is ultimately routed through the chain-of-command to a senior official with decision-making authority is likely to be a part of an agency's deliberative process because it will probably "reflect his or her own subjective opinions and will clearly have no binding effect on the recipient." *Access Reports v. Department of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991).

It should be noted that policy in the context of the deliberative process privilege is not restricted to overarching, major determinations as to the mission of an agency and the manner in which it is to be achieved. The deliberative process privilege concerns the expression of thoughts and considerations in arriving at a decision. *See Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). *See also Quarles v. Department of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990).

> To fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*. . . . To the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5 [the federal equivalent of D.C. Official Code § 2-534(a)(4)]. Conversely, when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.

Petroleum Info. Corp. v. United States Dep't of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992).

Moreover, an agency deliberative process may involve a series of related decisions about a particular matter. In *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 46 (D.D.C. 2007), the court addressed the claim that "the withheld materials concerned deliberations regarding the ongoing response to Hurricane Katrina." *Id*. at 45. The court found that there were a number of decisions, including personnel, which, according to the agency affidavit, "'arose in the context of larger policy deliberations about how to most effectively respond to the extraordinarily difficult challenges that arose in the wake of Hurricane Katrina,' . . . [and] were thus part of the overall deliberations on how to effectively respond to Hurricane Katrina and other catastrophic events." *Id*. As the court stated, "gauging the appropriate response to a specific type of problem is clearly part of the ongoing, deliberative process about how to respond to a natural disaster." *Id*. at 45-46. As to briefings and reports which

> consist of reports regarding various problems relating to the *ongoing* response to Katrina and *suggesting* solutions and approaches and *draft* situation reports . . . FEMA thus properly withheld those briefings and reports as communications regarding the analysis of the ongoing policy of the Government's response to Katrina. *Reno*, 2001 U.S. Dist. LEXIS 25318, 2001 WL 1902811 at *3; see *Hornbostel v. United States DOI*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003) (finding 'emails exchanging thoughts and opinions about various legal and policy decisions' and briefings and reports exempt from FOIA disclosure as 'part of the group thinking and preliminary actions encompassed by the policy making process in an agency'); *Judicial Watch, Inc. v. Reno*, 2001 U.S. Dist. LEXIS 25318, 2001 WL 1902811, *4 (D.D.C. Mar. 30, 2001) (where documents contain facts bearing on formulation or exercise of agency policy-oriented judgment, deliberative). [footnote omitted].

Id. at 46.

In this case, the subject of the FOIA Request was, as Appellant described it, "the growing social and economic justice movement organizing in cities and towns across the country under the umbrella called Occupy." In addition to the District of Columbia, Appellant identifies eleven cities across the United States which have had Occupy encampments, including some cities where law enforcement action was taken. While Occupy may not be a natural, catastrophic event, it is clearly a highly unusual situation and is not merely a case of applying established policy or so-called "working law."[1] Indeed, given the list of high-profile cases in which Appellant has been involved and which it recites to show the nature of its activities, it does not seem likely that this matter would draw its interest if it was merely a garden-variety situation. In its supplemental response, MPD specifies a range of meaningful issues surrounding the Occupy encampments in the District of Columbia. Given the nature of the movement and its activities, government action had, and continues to have, a substantial potential to be inflammatory, with a reaction which would have an adverse impact on the District of Columbia, including an impact on public safety. In this environment, a careful consideration of government action regarding the areas specified by MPD was warranted. Given the controversial nature of the Occupy activities, "the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). For this reason, while we are mindful of Mayor's Memorandum 2011-01, which 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," we feel that disclosure in this case has significant potential to have a chilling effect on agency deliberations. *Cf.* Freedom of Information Act Appeal 2011-19. Accordingly, we find that MPD is warranted in invoking the deliberative process privilege as a basis for the exemption.[2]

As we have stated in past decisions, under DC FOIA, as well as the federal FOIA, an agency has the burden of proof to justify its claim of exemption. As we have also indicated in past decisions, an administrative appeal under DC FOIA is a summary process and we have not insisted on the same rigor in establishing the adequacy of a search or the claim of exemption as would be expected in a judicial proceeding. Here, we find that MPD has set forth a sufficient justification for its assertion of the exemption. Nevertheless, given the pivot from the original exemption claimed to the exemption for the deliberative process privilege, and the number of records which were withheld, it is possible that, upon its subsequent review, MPD may have overlooked certain documents which were post-decisional in nature, that is, communicated a

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[1] *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

[2] We note that one of the withheld records was received by an employee of the National Park Service, a federal agency. This does not change our conclusion. Communications between federal and state agencies have been held to be inter-agency communications qualifying under FOIA. *See Mobil Oil Corp. v. Federal Trade Com.*, 406 F. Supp. 305, 315 (S.D.N.Y. 1976); *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Sec.*, 514 F. Supp. 2d 36 (D.D.C. 2007); Freedom of Information Act Appeal 2012-25.

final policy decision. Accordingly, as MPD will be conducting an additional search for records as indicated above, MPD should review the withheld records to determine whether any of the documents were post-decisional in nature. If so, it shall provide the records to Appellant when it provides its response to Appellant as a result of the additional search. If it does not find any post-decisional documents, it shall so state at that time.

In addition, it is likewise possible that the withheld records may contain purely factual material. 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).

At the time of its review of the withheld records for post-decisional communications, MPD shall review the records for purely factual material, which, as indicated above, involve a routine compilation of facts without the exercise of judgment or informed observation in its collection. If it finds that any record or any portion of a record is factual material which does not involve the deliberative process, it shall provide the records to Appellant when it provides its response to Appellant as a result of the additional search. If it does not find any post-decisional documents, it shall so state at that time.

Conclusion

Therefore, the decision of MPD is moot in part, upheld in part, and reversed and remanded in part as set forth above.

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: Ronald B. Harris, Esq.