GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal 2012-43

May 30, 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 4, 2012 (the "Appeal"). You, on behalf of the Partnership for Civil Justice Fund ("Appellant"), assert that the Executive Office of the Mayor ("EOM") 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 EOM, other state or municipal representatives, mayors, and/or private consultants regarding the Occupy Wall Street movement, the Occupy encampments, and the law enforcement or government response to the movement or encampments.

EOM responded by letter dated December 20, 2011, producing records, with redactions on some of the records based on the exemption for a clearly unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2). In addition, it withheld other records based upon the exemption for the deliberative process privilege under D.C. Official Code § 2-534(a)(4) and the exemption for investigatory records compiled for law enforcement purposes under D.C. Official Code § 2-534(a)(3)(E) and (F).

On Appeal, Appellant challenges the response to the FOIA Request, as follows:

1. Appellant contends that EOM failed to perform a proper search of all relevant email accounts as the emails produced appear to have been that received, but not sent, from one official in EOM although Appellant states that the emails produced suggest that there are other responsive emails. "By way of example," Appellant states that eleven records produced that reference other responsive records that were not produced (and which should be produced). 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.

2. Appellant challenges the redaction of the names of the sender or recipient of five emails on the basis of privacy, contending that these persons have identified themselves to the

District government and, therefore, releasing the names would not constitute a clearly unwarranted invasion of personal privacy.

3. Appellant asserts that the claim of exemption based on the deliberative process privilege is improper and that EOM has failed to support its claim of exemption. First, Appellant contends that EOM is not formulating new policy with respect to the Occupy movement and encampments, but simply applying established policy or "working law" to these activities. In this connection, Appellant notes that the activities occurred on land under federal, not District, jurisdiction. Second, "[t]o the extent that the documents reflect 'special' considerations applied to the Occupy Movement," under case law which it cites, the deliberative process privilege can be overcome by a showing of need, especially where there is reason to believe that the records may shed light on government misconduct. Here, "there is reason to believe that such documents may shed light on government misconduct, particularly in light of police crackdowns on First Amendment protected activity around the country . . ." Third, Appellant suggests that certain of the records reflect post-decisional communications which fall outside the deliberative process privilege. Fourth, Appellant asserts that to the extent that the District was responding to concerns raised, or requests made, by third parties or was consulting with third parties, the deliberative process privilege would not apply. Fifth, certain emails reflecting public relations strategy are not exempt under the deliberative process privilege.

4. Appellant contends that EOM improperly asserted the exemption for investigatory records under D .C. Official Code § 2-534(a)(3)(E) and (F). First, Appellant maintains that, under *Barry v. Washington Post Co.*, 529 A.2d 319 (D.C. 1987), investigatory records must be compiled for investigations which focus directly on specifically alleged illegal acts of particular identified persons and records regarding a coordination of law enforcement response to a protest do not qualify as investigatory records. Second, to the extent that EOM may assert that there are investigations for which there are responsive records, Appellant contends that it is unclear how records regarding activities in other jurisdictions constitute investigatory records under DC FOIA. Third, Appellant contends that a record cannot be, as is claimed for one record, subject to both the deliberative process privilege and the investigatory records exemption. Fourth, Appellant contends that there is no support for the contention that the conditions of subparagraphs (E) and (F) have been met.

5. Appellant contends that various discrepancies indicate that portions of withheld records are segregable and should be disclosed.

In its response, EOM reconsidered or modified its previous response with respect to certain records and claims, but otherwise reaffirmed its position.

With respect to the contention of Appellant that EOM failed to perform a proper search of all relevant email accounts, EOM maintains that it conducted a search reasonably calculated to produce the relevant records and that the search was reasonable and adequate. It indicated that it caused several offices under the purview of the EOM to search for responsive records. By supplement dated May 17, 2012, EOM stated that it identified the offices most likely to have responsive records, which offices were the Office of Policy and Legislative Affairs, the Deputy

Mayor for Public Safety and Justice, the Office of Community Affairs, and the Office of Communications, and requested that these offices search for responsive records. Moreover, EOM disputes the contention that the only email account searched was that of the Deputy Mayor for Public Safety and Justice and cites a record produced in support.

As to the eleven records produced that Appellant states reference other responsive records that were not produced (and which should be produced), EOM states that it is not able to locate any additional documents with respect to five of the records, that it has located and will produce two additional documents with respect to two of the records, that three records which Appellant indicates appear to be incomplete are in fact complete, and that the deficiency alleged by Appellant is unclear for one record.

As to the failure to search staff personal email accounts, EOM states that Appellant has not provided any basis, supported by factual evidence, to indicate that, in this case, a search of those email accounts would be likely to produce responsive records.

With respect to the challenge of the redaction of the names of the sender or recipient of five emails on the basis of privacy, EOM reaffirms its position. "No interest would be served by releasing a private citizen's communication with the government. Such exposure may cause a chilling effect and lessen public input for fear that those communications would be exposed to public exposure. [citation omitted]."

With respect to the challenge to the claim of the exemption for investigatory records under D .C. Official Code § 2-534(a)(3)(E) and (F), EOM has reconsidered its claim on the basis of this exemption, but maintains that the exemption for deliberative process privilege would apply to these records.

With respect to the challenge to the claim of the claim of exemption based on the deliberative process privilege, EOM has reconsidered its position regarding, and will release, the record which it identifies as "Bates range 000006," but otherwise reaffirms its position. EOM indicates that the records involve

> coordinated agency consultation . . . regarding issues surrounding an ongoing movement that poses a unique set of public health and safety concerns that require interagency candor to arrive at appropriate policy determination. Furthermore, sharing portions of documents selected internally as relevant, in spite of their factual nature, would reveal the internal decision making process used by an agency in formulating a policy.

As to the assertion of Appellant that certain emails reflecting public relations strategy are not exempt under the deliberative process privilege, Appellant maintains that subordinate employees "prepare and compile materials contained in draft press briefing materials and releases . . . for submission to the executive for deliberation prior to final determination and issuance."

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 several challenges. Although we have summarized them in five paragraphs above, the challenges can be grouped into two main categories. First, Appellant challenges the adequacy of the search, namely, it contends that EOM has failed to perform a proper search of all relevant email accounts. Second, Appellant challenges the claim of exemptions for withheld records and certain redactions on records provided to Appellant by EOM.

As stated above, Appellant challenges the adequacy of the search. The first part of its challenge in the first grouping is that EOM has failed to perform a proper search of all relevant email accounts.

An agency is not required to conduct a search which is unreasonably burdensome. *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990).

DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

> 'the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.' [*Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a 'reasonableness test to determine the 'adequacy'

> of a search methodology, *Weisberg v. United States Dep't of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

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, including Freedom of Information Act Appeal 2012-41, in which Appellant was the appellant, 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.

In this case, as set forth above, EOM indicates that it identified the offices most likely to have responsive records, which offices were the Office of Policy and Legislative Affairs, the Office of the Deputy Mayor for Public Safety and Justice, the Office of Community Affairs, and the Office of Communications, and requested that these offices search for responsive records. Thus, its FOIA officer, presumptively based on her knowledge of EOM and the manner in which the records are maintained, made determinations as to the location of records requested and made, or caused to be made, searches for the records. This is the appropriate method in devising and executing a reasonable and adequate search.

Appellant makes several suggestions or assertions indicating that the search for the relevant emails was not adequate. Appellant asserts that it "is not sufficient to simply ask staff to search their own e-mail communication, since this production indicates that such results will be incomplete. Instead, the EOM must run a complete search on its server." EOM has chosen not to respond directly to this assertion.[1] However, the nature of an electronic search is not mandated as a matter of law. In *Rein v. United States PTO*, 553 F.3d 353 (4th Cir. 2009), the court found that searches were reasonable and adequate where the search was sent to the offices "'likely to have any responsive documents'" and employees therein were requested to conduct electronic and paper-based searches. *Id*. at 359. According to EOM, this was essentially the search request sent to the constituent EOM offices.[2] Therefore, it is not dispositive that a complete search of an agency server was not made.

Appellant also lists several documents and refers to others as suggesting that the search was inadequate. Appellant briefly describes the documents and the alleged deficiencies, but does not make the documents part of the administrative record. EOM responds to the deficiencies, but only makes a few of the documents part of the administrative record. As set forth above, it states

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[1] EOM maintain that as Appellant asserts this "as a general matter" and not by the citation of any law, judicial or otherwise, it need not be addressed. This is nonresponsive as the assertion of Appellant goes to the adequacy of the search. Nevertheless, we must resolve the issue based on the present administrative record.

[2] In *Rein*, the court indicated the nature of the instructions given to each office regarding the search. As indicated previously, because of the summary nature of the appeal process, we have not required this level of detail for appeals.

that it is not able to locate any additional documents with respect to five of the records, that it has located and will produce two additional documents with respect to two of the records, that three records which Appellant indicates appear to be incomplete are in fact complete, and that the deficiency alleged by Appellant is unclear for one record. The response of EOM indicates that it has re-examined, as appropriate, the records produced or its search results. In eight instances, it represents that the documents provided were complete or there are no additional documents. We note that, in two of these eight instances, Appellant bases its suggestion on the expectation that there would be a response where one was requested, but this appears simply to be a case of an unrealized expectation. Nonetheless, EOM has indicated that there are additional documents which will be provided in two other instances. However, the omissions appear to stem from processing errors, such as failure to include an attachment to an email, rather than providing an indication of an insufficient search. As noted above, the test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. The fact that some records were not included in the records produced is not determinative in the absence of other indications of inadequacy. "[T]he FOIA does not require a perfect search, only a reasonable one. *See Meeropol v. Meese*, 252 U.S. App. D.C. 381, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.")." *Rein v. United States PTO*, 553 F.3d 353, 362 (4th Cir. 2009). While Appellant points to other records referenced in certain of the emails produced, the failure of a search to uncover these records does not itself warrant a conclusion that the search was not adequate. In *Rein*, the court stated:

> We also do not find persuasive R&HW's argument that the Agencies' searches were inadequate because responsive documents refer to other documents that were not produced. . . . The Agencies' failure to produce certain specific documents does not, of itself, yield the conclusion that the search was inadequate.

Id. at 363-364.

In the Appeal, Appellant also contends that the only email account searched was that of the Deputy Mayor for Public Safety and Justice. However, EOM disputes this contention and cites a record produced in support of its position. Although the document was not made part of the administrative record, we have no reason to question this representation.

As we stated previously, the FOIA officer of EOM, presumptively based on her knowledge of EOM and the manner in which the records are maintained, made determinations as to the location of records requested and made, or caused to be made, searches for the records. Ordinarily, this would be sufficient for us to find that the search was reasonable and adequate and, as a general matter, we so find. However, in the Vaughan index prepared by Appellant in connection with its claim of exemption, EOM identifies records in which either the Chief of Staff or the Mayor is a sender or recipient. As these are not insignificant officials, it would appear that the relevant email records of the Office of the Chief of Staff (or at least the Chief of Staff if he is the only individual in the office for whom there is likely to be responsive records) and the Mayor should have been included in the places where responsive records were likely to be located.

Accordingly, EOM shall make a supplemental search of the relevant email records of the Office of the Chief of Staff (or at least the Chief of Staff if he is the only individual in the office for whom there is likely to be responsive records) and the Mayor.

The second part of its challenge in the first grouping is that staff personal email accounts should have been, but were not, searched.

As set forth above, DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate.

As also set forth above, 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. In order to make a reasonable and adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. Such determinations may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files which the agency maintains. *See*, e.g., Freedom of Information Act Appeal 2012-05; Freedom of Information Act Appeal 2012-04, Freedom of Information Act Appeal 2012-26, Freedom of Information Act Appeal 2012-28, Freedom of Information Act Appeal 2012-30, and Freedom of Information Act Appeal 2012-35. A search of staff personal email accounts would be an extraordinary measure. In order to trigger a request by a FOIA officer to an employee to search his or her personal email account for responsive records, the FOIA officer would need to know that an official or employee was using his or her personal email account to transact official business. There is no evidence on the administrative record that the EOM FOIA officer had reason to believe that an EOM official or employee was using his or her personal email account to transact official business. Indeed, in its response, EOM FOIA officer disputes that there is any such evidence. Appellant has produced, as part of the administrative record, news reports and blog entries that there have been isolated instances of officials using personal email accounts to transact official business. However, it is a fundamental flaw in logic to conclude that because a few officials or employees engage in such practice, most or all officials or employees do so. Moreover, there are no instances reported of any current official or employee of EOM or a subordinate agency under the Mayor doing so. Indeed, the only current officials reported to be using private emails to transact public business are a member of the Council of the District of Columbia, the Chief Financial Officer, and the Chief of Staff of the Chief Financial Officer.[3] The use of private email accounts by others is mere speculation. On the basis of the administrative record, a search of staff personal email accounts was not required.

The second main grouping of the challenges of Appellant is to the claim of exemptions for withheld records and certain redactions on records provided to Appellant by EOM.

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[3] The other persons who are reported to have used personal email accounts to transact official business are former Mayor Adrian Fenty and former Councilmember Harry Thomas.

The first challenge under this grouping is for redactions made on the basis of personal privacy. As set forth above, Appellant challenges the redaction of the names of the sender or recipient of five emails on the basis of privacy, contending that these persons have identified themselves to the District government and, therefore, releasing the names would not constitute a clearly unwarranted invasion of personal privacy.

The claim of exemption with respect to the redactions for the responsive records is based on privacy. Two provisions of DC FOIA provide exemptions for relating to personal privacy. D.C. Official Code § 2-534(a)(3)(C) ("Exemption (3)(C)") provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy." It should be noted that the privacy language in this exemption is broader than in the comparable exemption in the other provision, D.C. Official Code § 2-534(a)(2) ("Exemption (2)"), which applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." While Exemption (2) requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption (2). See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). In this case, as EOM does not claim that any of the records are investigatory records, Exemption (2) applies.

An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether there is a sufficient privacy interest present.

A privacy interest is cognizable under DC FOIA if it is substantial, that is, anything greater than de minimis. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

The case law with respect to the confidentiality of the identity of individuals writing to the government has not been uniform in its results. While some courts have declined to find a privacy interest in the identities of individuals who voluntarily provide their names to the government, *see*, e.g., *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284 (D.D.C. 2007), the majority view is that there is a sufficient privacy interest. *See*, e.g., *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122 (7th Cir. Ill. 2003)(concluding that disclosure of FTC complainants would not further the core purpose of FOIA), *Strout v. United States Parole Comm'n*, 40 F.3d 136 (6th Cir. 1994). Accordingly, based on the majority view, we find that there is a sufficient privacy interest.

As stated above, the second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the purpose of FOIA, which is

> 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773 (1989).

According to EOM, the records reflect communications from private citizens to voice concerns or offer views to government officials regarding the Occupy movement in the District of Columbia. EOM has already disclosed the substance of communications to Appellant. It does not seem that the disclosure of the names of the individuals alone will contribute materially, if at all, to public understanding of the operations or activities of the government or the performance of EOM. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Accordingly, the public interest in disclosure here does not outweigh the individual privacy interest.

The second and third challenge regarding the claims of exemption are the arguments of Appellant that EOM improperly asserted the exemption for investigatory records under D.C. Official Code § 2-534(a)(3)(A) and the exemption based on the deliberative process privilege under D.C. Official Code § 2-534(a)(4). As EOM has reconsidered its claim on the basis of exemption for investigatory records, but instead maintains the applicability of the deliberative process privilege for those records, we will consider only the applicability of the deliberative process privilege.

As Appellant is aware, we addressed the applicability of the deliberative process privilege in substantially similar circumstances regarding the Occupy movement in Freedom of Information Act Appeal 2012-41. We believe that the same basic conclusion applies in this matter. We will re-state substantial portions of that decision here.

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, as Appellant contends, merely a case of applying established policy or so-called "working law."[4] 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, similar to the range of meaningful issues surrounding the Occupy encampments in the District of Columbia that MPD specified in Freedom of Information Act Appeal 2012-41, EOM indicates that records reflect deliberations "regarding an ongoing movement that poses a unique set of public health and safety concerns," which deliberations took into account "national considerations that pose considerations locally." Given the nature of the movement and its activities, government action had 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 EOM 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

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

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, with exceptions we will set forth below, we find that EOM is warranted in invoking the deliberative process privilege as a basis for the exemption for records which it withheld.

Appellant asserts several additional arguments, not addressed in our analysis above but summarized previously, as to the inapplicability of the deliberative process privilege, but these arguments do not alter our conclusion.

First, Appellant states that, "[t]o the extent that the documents reflect 'special' considerations applied to the Occupy Movement," under case law which it cites, the deliberative process privilege can be overcome by a showing of need, especially where there is reason to believe that the records may shed light on government misconduct. Here, it maintains, "there is reason to believe that such documents may shed light on government misconduct, particularly in light of police crackdowns on First Amendment protected activity around the country . . ." This argument is without merit. Although certain privileges may be overcome in the context of litigation, this is irrelevant for the purposes of FOIA.

> The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance. *NLRB v. Sears, Roebuck & Co.* 421 U.S., at 148-149.
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> . . . [The fact that a privilege is qualified] is irrelevant in the FOIA context. It makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to 'routine' disclosure.

FTC v. Grolier, Inc., 462 U.S. 19, 26-27 (1983). The general rule under FOIA is that disclosure is not evaluated based on the identity of the requester or the use for which the information is intended. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004); *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989). There is no difference in the case of the assertion of privileges under D.C. Official Code § 2-534(a)(4).

> The Supreme Court has read Exemption 5 to protect from disclosure any documents that "fall within the ambit of a privilege" such that they would not be "'routinely' or 'normally'" disclosed in civil discovery upon a showing of relevance. *Klamath*, 532 U.S. at 7-8; *Grolier*, 462 U.S. at 26-27. These principles create a divide between the rules of FOIA and civil discovery. There will be many cases in which a document should be withheld under Exemption 5 of FOIA because it falls 'within the ambit" of a privilege, but the document nonetheless would be discoverable in certain circumstances in civil litigation.

Lardner v. United States DOJ, 2005 U.S. Dist. LEXIS 5465 (D.D.C. 2005).

Second, Appellant asserts that to the extent that the District was responding to concerns raised, or requests made, by third parties or was consulting with third parties, the deliberative process privilege would not apply. However, we are unaware of any rule indicating that the source of information which gives rise to the deliberative process has any bearing on the applicability of the privilege. Moreover, the Vaughan index does not indicate that the withheld records involved communications with third parties.[5]

Third, Appellant asserts that emails reflecting public relations strategy are not exempt under the deliberative process privilege. However, the formulation of a communications strategy and development of materials associated with that strategy, including talking points, briefing books, and press releases, are encompassed within policy decisions subject to the deliberative process privilege. *See*, e.g., *Thompson v. Department of Navy*, 1997 WL 527344, 5 (D.D.C. 1997)("the process by which the Navy formulates its policy concerning statements to and interactions with the press" subject to deliberative process privilege); *Judicial Watch, Inc. v. United States Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004)("talking points and recommendations for how to answer questions" properly withheld.); *Williams v. United States Dep't of Justice*, 556 F. Supp. 63, 65 (D.D.C. 1982)("briefing papers prepared for the Attorney General prior to an appearance before a congressional committee in executive session [are] clearly deliberative.").

We indicated above that there are certain exceptions to our conclusion that EOM is warranted in invoking the deliberative process privilege as a basis for the exemption for records which it withheld. In reviewing the Vaughan index, we note that the second and third entries indicate that the email is, in part, "providing a policy decision." As we stated above, and as Appellant argues, the deliberative process privilege only applies to records which are predecisional. The communication of a decision which has been made does not, therefore, fall within the ambit of the privilege. The records corresponding to these entries shall be provided, with redactions for any predecisional matter. In addition, we note that there is an entry for November 14, 2011, designated as "Meeting Request." As a request for a meeting would not contain any deliberative matter, it shall be provided to the Appellant.

Finally, as stated above, Appellant contends that various discrepancies which it noted indicate that portions of withheld records are segregable and should be disclosed. We have examined the alleged discrepancies previously and do not find that there is any reason to order additional disclosures based thereon.

Conclusion

[5] As Appellant acknowledges, the deliberative process privilege extends to third parties who are consultants to the government.

Therefore, the decision of EOM is upheld in part, is moot in part,[6] and is reversed in part. As set forth in this decision, EOM shall:

1. Make a supplemental search of the relevant email records of the Office of the Chief of Staff (or at least the Chief of Staff if he is the only individual in the office for whom there is likely to be responsive records) and the Mayor and provide any responsive records to Appellant.

2. Provide to Appellant, with redactions for the portions which constitute deliberative material, the emails referenced in the second and third entries of the Vaughan index.

3. Provide to Appellant, the record, dated November 14, 2011, in the Vaughan index designated as "Meeting Request."

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the response of EOM pursuant to this order.

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: Mikelle Devillier

[6] As indicated in the decision, EOM has stated that it will provide certain records which either withheld or omitted from its prior disclosures.