GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2012-47

June 5, 2012

Ms. Abigail Padou

Dear Ms. Padou:

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 May 14, 2012 (the "Appeal"). You ("Appellant") assert that the Department of Health ("DOH") improperly withheld records in response to your request for information under DC FOIA, dated April 4, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought

> all documents, records and reports related to the medical marijuana panel's evaluation of applications for cultivation center registrations. This request applies to all cultivation center applications, not just applications eligible for registration or those that scored above 150 points.
>
> This request includes but is not limited to records associated with the evaluation of each panel member as well as the evaluation of the panel as a whole. This request includes the scores awarded by each panel member as well as the scores awarded by the panel as a whole.
>
> This request includes all documents relied upon by the panel or individual members of the panel.
>
> There is no need to produce copies of the cultivation center applications in response to this request.

In response, by email dated May 6, 2012,[1] DOH stated as follows:

[1] By email dated April 26, 2012, DOH sent Appellant a partial response, but the final response incorporated and superseded the partial response.

1. The FOIA Request was not stated with sufficient particularity. "Where a FOIA request seeks every document or a FOIA request requires a search of all files, the request can be found unduly burdensome."

2. With respect to the request for each panel member's scoring sheets and the panel's scoring sheets, DOH claimed an exemption from disclosure under D.C. Official Code § 2-534(a)(1) for trade secrets or commercial or financial information obtained from outside the District government and for the deliberative process privilege under D.C. Official Code § 2-534(a)(4). While DOH stated that redaction would be required under the first exemption, it stated that these records were exempt in whole under the deliberative process privilege as they "evidenc[ed] pre-decisional deliberations to facilitate free and frank discussions among government officials that predate the announcement of an official action." DOH noted that "[t]he scoring sheets are being provided to denied applicants only after entry of a protective order and even then with redactions."

3. With respect to the request for documents relied upon by the panel or individual members of the panel, DOH stated that it "relied upon the authorizing legislation and the applicable regulations both of which are available at www.hrla.doh.dc.aov/mmo as well as the applications and a security plan assessment conducted by the Protective Services Division of the Department of General Services formerly the Department of Real Estate Services." DOH withheld the security plan assessments under the exemptions set forth in paragraph 2 above. (It noted that the applications were specifically excluded from the documents requested.)

On Appeal, Appellant challenges the denial of the FOIA Request. First, Appellant contests the claim of exemption of the deliberative process privilege, as follows:

1. DOH has claimed the exemption in a conclusory manner, not sufficiently explaining its reasons for doing so.

2. The withheld records "are clearly post-decisional, i.e. after the adoption of an agency policy." Appellant maintains that

> the requested records pertain to the *implementation* of a policy: i.e. the evaluation of cultivation center applications pursuant to existing regulations. . . The requested records did not pertain to the *creation* of a policy, i.e. the creation of laws or regulations governing medical marijuana.

3. Even if records relate to the development of a policy, the record must now be provided "because the policy has been finalized and implemented: the District's evaluation of applications for medical marijuana cultivation centers is now complete. . . Once a policy is decided upon, the public has a right to the information used in the development of the policy."

4. DOH has waived the deliberative process privilege by releasing the scoring sheets to individuals outside the government.

Second, Appellant maintains that DOH cannot justify its claim of exemption for under D.C. Official Code § 2-534(a)(1) for trade secrets or commercial or financial information obtained from outside the District government. Appellant argues that in order to suffer competitive harm, a business must be operating. In the case of the rejected applicants, Appellant states that they have no operating business, cultivation centers or otherwise. As to the winning applicants, Appellant maintains DOH has offered no evidence demonstrating that their competitive positions would be harmed by the release of the documents.

Third, Appellant contests the assertion of DOH that the FOIA Request was not expressed with particularity. Appellant argues that locating the records should not be difficult or burdensome as there were only 29 applications, there were only a handful of members on the panel, and the evaluations were made during over a short period of time.

In its response, dated May 24, 2012, DOH reaffirmed its prior position.

First, with respect to the assertion of the deliberative process privilege, DOH provides, for in camera review, a sample scoring sheet and a sample security plan assessment, both with redactions for exempt material. It also provides an explanation of the scoring sheets and the scoring process, which materials and process are executed in accordance with rules codified in the District of Columbia Municipal Regulations. It notes that the scoring sheets reflect the criteria set forth in the rules. As part of its explanation, DOH states:

> The individual score sheet reflect the deliberations of each panel member as he/she participated in the scoring as well as the group discussions during the scoring. Notes made by the panelists were essential as each of the applications could be as long as approximately 600 pages.
>
> Key in the foregoing scoring process is the following facts: (1) The final decisions are made by the Director of the Department of Health; and, (2) The six-member panel conducts pre-decisional and deliberative scoring to make a recommendation to the Director of the Department of Health. The scoring sheets evidence pre-decisional deliberation prior to the final decision by the Director of the Department of Health.

DOH also states that the panel did not create a panel composite scoring sheet, but calculated the composite scoring by the method set forth in the rules.

DOH explains that, in accordance with the rules, each applicant must submit a written security plan that is scored in the initial scoring. Thereafter, there is a security plan assessment made for each applicant which achieved a minimum prescribed overall score in the initial scoring. The security plan assessment, which includes "detailed comments," is used by the panel to score the security plan.

DOH disputes the contention of Appellant that withheld records pertain to the implementation of policy. "The deliberative process privilege covers all pre-decisional deliberations at any stage of the process of the government decision-making process." Accordingly, it argues that the

evaluation materials, including the scoring sheets and the security plan assessment, are exempt from disclosure as "the actions prior to the final decision of the Director of the Department of Health are covered by the deliberative process privilege . . ." DOH analogizes the approval of cultivation center applications to a contract award or other agency policy.

Second, with respect to the substantial harm to the competitive position of an applicant, DOH maintains that the exemption under D.C. Official Code § 2-534(a)(1), by its terms, does not require that there be an operating business. Furthermore, it argues that they are operational to the extent that they have been formed. Moreover, it argues that applicants would suffer competitive harm if the public knew their weaknesses.

Third, as to the contention of Appellant that DOH has waived the deliberative process privilege by releasing the scoring sheets to individuals outside the government, DOH states that the records are only provided to litigants in the Superior Court of the District of Columbia pursuant to a protective order and, even under the protective order, there will be redactions to the records provided to the litigations. It notes that disclosure in the context of litigation is different from disclosure in the context of DC FOIA.

Fourth, with respect to the contention of Appellant that the FOIA Request was expressed with sufficient particularity, DOH reaffirms its prior position. DOH states that "the documents are not always well-organized" and that, without particularity specifying the nature of each class of documents, "DOH is reduced to being Ms. Padou's investigator."

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).

There are two main issues in this Appeal. The first issue is the withholding of records in whole pursuant to the claim of exemption pursuant to the deliberative process privilege. The claim of partial exemption for trade secrets or commercial or financial information obtained from outside

the District government will be in issue if that claim is not upheld. The second issue is the alleged failure of Appellant to state the FOIA Request with particularity.

As stated, the first issue is the withholding of records in whole pursuant to the claim of exemption pursuant to the deliberative process privilege. 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). 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.

"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).

The deliberative process privilege applies to predecisional records created as part of the licensing process. In *Weigel Broad. Co. v. FCC*, 2012 U.S. Dist. LEXIS 37065 (N.D. Ill. Feb. 17, 2012), the court considered the request of plaintiff for records regarding applications filed with the Federal Communications Commission to assign the licenses for low-power television stations as part of a proposed sale of the station. The Court stated:

> It is clear from the descriptions and dates of these documents that they reflect internal agency discussions about what action, if any, to take on plaintiff's applications that occurred before the applications were withdrawn in September 2009. Thus, they are subject to the deliberative process privilege.

Id.

In *Porter County Chapter of Izaak Walton League, Inc. v. United States Atomic Energy Com.*, 380 F. Supp. 630 (N.D. Ind. 1974), the requester sought agency records from an Atomic Energy Commission licensing proceeding involving an application of the Northern Indiana Public Service Company for a permit authorizing construction of a nuclear plant in Porter County, Indiana. Although the agency made many records available on a discretionary basis, it withheld certain records, or portions of records, including advisory reports and recommendations. In upholding the claim of exemption based on the deliberative process privilege, the Court stated:

> The documents and portions of documents here in issue -- lawyers' advice, opinions and recommendations of individual staff members, opinions of ACRS members, summaries of the internal deliberations of the Committee, etc. -- are clearly an integral part of the Government's deliberative processes.

Id. at 637.

Similarly, this case involves the evaluation of applications for licenses for marijuana cultivation centers. Here we note as significant, as DOH explains, that the final decisions on the issuance of the licenses are made by the Director of the Department of Health and the evaluations made by the six-member panel are for the purpose of making a recommendation to the Director of the Department of Health in aid of such decision. Intra-agency memoranda or similar communications from subordinate to superior on an agency ladder are more likely to be deliberative than those flowing in the opposite direction. *Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983). Thus, except as explained below, we find that DOH has properly withheld the records based on the deliberative process privilege. Accordingly, it is not necessary to consider redactions to those records based on the exemption from disclosure under D.C. Official Code § 2-534(a)(1) for trade secrets or commercial or financial information obtained from outside the District government.

As we stated in the past, while internal communications consisting of advice, recommendations, and opinions which are part of the deliberative process are exempt from disclosure, "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 . . ." *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980). Thus, non-deliberative material must be disclosed where it is not inextricably intertwined with the deliberative portions of a document. In *Professional Review Organization, Inc. v. United States Dep't of Health & Human Services*, 607 F. Supp. 423, 428 (D.D.C. 1985), in considering a request for records for relating to the evaluation of proposals submitted in response to a competitive procurement, while the Court held that completed computer-generated score sheets were exempt from disclosure under the deliberative process privilege, it ordered that a blank score sheet indicating the rating categories utilized in the evaluation of proposals be disclosed. In this case, DOH submitted, for in camera review, a sample panel member's score sheet, which indicates the evaluation factors used, but which is redacted for the evaluation of the panel member. As the *Professional Review Organization* court found, we believe that the evaluation factors, which reflect the standards set forth by rule, are not deliberative. Accordingly, DOH shall disclose the redacted sample panel member's score sheet or, in the alternative, a blank score sheet.

Appellant argues that licensing of cultivation centers is merely the implementation of policy, not the making of a policy decision. As we noted in Freedom of Information Act Appeal 2012-41 and Freedom of Information Act Appeal 2012-43, 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.

As we found above, DOH has correctly identified the process prior to the decision of the Director of the Department of Health as deliberative.

The second issue is the alleged failure of Appellant to state the FOIA Request with particularity. Subsection 1-402.4 of the District of Columbia Municipal Regulations provides: "A request shall reasonably describe the desired record(s)." A requester must frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome and to enable the agency to determine precisely what records are being requested. *Assassination Archives & Research Center, Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989). "The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters. Therefore, agencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems." *Id*.

On this issue, we agree with the Appellant. While it is true, as DOH argues, that the first part of the FOIA Request was framed as a request for "all documents, records and reports," the latter part limits the request to "the medical marijuana panel's evaluation of applications for cultivation center registrations." The latter portion considerably narrows the nature of the request. The evaluation was a short-lived process and it is reasonable to infer that the records which comprise the request were housed in a single location rather than multiple, scattered locations. As DOH indicates that it has compiled the records in connection with litigation surrounding the award of the licenses, and has done so apparently without the need for a protective order, it is difficult to understand why the search would be unduly burdensome.[2]

In contrast, in *Brophy v. U.S. Dep't. of Defense*, 2006 U.S. Dist. Lexis 11620 (D.D.C. 2006), the Court held that a request was unduly burdensome because it would have required the Department of Defense to search two Human Resources Command Centers containing over 3,700 personnel for any e-mails relating to the requester without limitation. In Freedom of Information Act Appeal 2011-09, a request to search all of the email accounts of the University of the District of Columbia, which would have a search of over 7,000 email accounts, plus archived accounts, was found to be an unreasonably burdensome request. On the other hand, in Freedom of Information Act Appeal 2011-41, although a request, on its face, required a search of all email accounts of a particular office without naming the employees, in actuality, the request required a search of the accounts of approximately 12 employees for a 4 ½-month period. Here, like Freedom of Information Act Appeal 2011-41, we do not find the FOIA Request was unduly burdensome.

It is not clear to us that there are any additional records other than those that have been identified. However, given that DOH has raised an objection, we must presume that additional

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[2] DOH states that "the documents are not always well-organized." It is unclear what the nature of the organization is or whether it would have any significant impact on the search.

records exist. DOH shall perform a complete search for the records in accordance with the FOIA Request and provide any records, subject to the assertion of any applicable exemption, to Appellant.

Conclusion

Therefore, the decision of DOH is upheld in part and reversed and remanded in part. As set forth in this decision, DOH shall:

1. Disclose the redacted sample panel member's score sheet or, in the alternative, a blank score sheet.

2. Perform a complete search for the records in accordance with the FOIA Request and provide any records, subject to the assertion of any applicable exemption, to Appellant.

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

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: Phillip L. Husband, Esq.