GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2012-49

June 13, 2012

Ms. Delcianna Winders

Dear Ms. Winders:

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 24, 2012 (the "Appeal"). You, on behalf of the People for the Ethical Treatment of Animals Foundation ("Appellant") assert that the Department of Health ("DOH") improperly withheld records in response to your requests for information under DC FOIA, dated March 15, 2012 (the "First FOIA Request" and March 19, 2012 (the "Second FOIA Request") (together. the "FOIA Request").

Background

Appellant states the predicate for the FOIA Request as follows:

> During the week of March 11, 2012, DOH employees and/or representatives observed the elephants' walk from the circus train to the Verizon Center, in Washington D.C. and observed and inspected the animals and circus operations at the Verizon Center.

Appellant's First FOIA Request sought

> (1) All records obtained concerning any and all inspections or observations of the elephants brought into the District of Columbia by Ringling Brothers and Barnum & Bailey Circus under the permit issued by the Department of Health dated March 12, 2012. This request includes all investigative reports, notes of interviews or other conversations, data obtained, photographs and videos in such inspection or observations.
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> (2) All notices provided to Ringling Brothers and Barnum & Bailey Circus by the Department of Health, the Washington Humane Society or other law enforcement agency that Ringling may not use Elephant Siam in performances in the District of Columbia since March 12, 2012.

Appellant's Second FOIA Request sought "all records pertaining to Feld Entertainment, Inc., dba Ringling Bros. and Barnum & Bailey Circus, from February 1, 2012 through the date this request is processed."

In response to the First FOIA Request, on April 4, 2012, DOH provided records to Appellant, which records consisted of photographs and a cellphone video. However, by email dated April 6, 2012, DOH stated that, based upon the deliberative process privilege, it withheld "notes of observations were taken by at least one Department of Health representative. . . . [which] were not distilled into an official and final report."

In response to the Second FOIA Request, by email, on April 9, 19, and 23, 2012, DOH provided additional records, including photographs and a video, to Appellant. The April 9 email indicated that the following records were being withheld:

> (1) an unsigned draft of the permit for which you are receiving a signed copy of the permit with this email; (2) a draft of an Animal Inspection Report at the circus; and, (3) a draft of a photographs in Power Point format that include draft captions.

The April 23 email summarized the withholdings as falling into "two fundamental categories," the exemptions for deliberative process privilege and for attorney-client privilege.

On Appeal, Appellant challenges, in part, the withholding of records under FOIA Request with respect to the deliberative process privilege. The withholding would include at least one additional record, a draft veterinarian's report, which is referenced in an email from the Washington Humane Society. Appellant does not challenge, as a whole, the claim of exemption under the deliberative process privilege. Rather, Appellant bases its challenge on the failure of DOH to segregate the deliberative materials from non-deliberative material and provide it with redacted records.

> The sole basis upon which DOH relies for withholding the notes of DOH employees / representatives created during the observations/inspections of the animals with Ringling and the draft PowerPoint presentation is the deliberative process exemption. This exemption, however, does not override the legal obligation to segregate and provide all factual information contained in such records unless the factual material is inextricably intertwined with deliberative material. . . .
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> Notes of observations that, for example, an elephant is limping, do not reveal deliberations. No amount of agency deliberations can alter whether the elephant was limping or not. The appearance of an elephant, or the manner in which she moves, which may have been recorded by a DOH Program Specialist or by the veterinarian representing DOH cannot be altered by agency deliberations. The factual material in photographs that are included in the draft PowerPoint presentation also do not reflect any agency deliberations.

In its response, dated June 5, 2012, DOH reaffirmed its prior position. DOH identifies, as the records which Appellant places in contention, the notes of the observations made by a DOH employee, the draft animal inspection report, and a draft PowerPoint presentation containing photographs and captions. DOH states that these records constituted draft materials for which

final documents were neither approved nor issued and were and remain predecisional and deliberative. Accordingly, these records are exempt from disclosure pursuant to the deliberative process privilege under D.C. Official Code § 2-534(a)(4). With respect to the notes of the observations made by a DOH employee, citing case law, DOH argues that the notes are personal records, not agency records, and are not subject to disclosure under DC FOIA. With respect to draft PowerPoint presentation and the issue of segregability, DOH states that it has already provided to Appellant the photographs used in such record, except that the photographs provided are larger and afford better detail. As part of its response, DOH has included, for in camera review, the draft animal inspection report and a Vaughan index setting forth the captions in the draft PowerPoint presentation.

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).

Generally, in an appeal of this nature, an appellant would argue that there is no basis for the assertion of the deliberative process privilege, which 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). Here Appellant makes a more nuanced argument. Appellant asserts that there is factual, non-deliberative material which can be segregated from the deliberative portion of the records and that the records can be provided in redacted form.

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).

For example, accident reports have been found to be exempt from disclosure, but not invariably so. *See Lloyd v. Marshall*, 526 F. Supp. 485 (M.D. Fla. 1981), where the report of an OSHA compliance officer was withheld. ("This privilege is primarily aimed at safeguarding the quality of agency decision-making, and its protection is strongest when the material to be disclosed relates to "communications received by the decision-maker on the subject of the decision prior to the time the decision is made." [citation omitted]. The opinions and conclusions reached by the compliance officer as the result of his investigation represent precisely this kind of predecisional communication, for the compliance officer's recommendations and opinions are used by the OSHA in deciding what agency action should follow. *Id*. at 486.) *Cf. Lacy v. United States Dep't of Navy*, 593 F. Supp. 71 (D. Md. 1984) ("The photographs attached to the investigative reports compiled by Navy investigators are factual in nature. They are not so intertwined with the deliberative portions of these reports that they could not have been segregated and produced. . . . In essence, the Navy is claiming that whenever photographs are attached to a report by an investigator they cannot be revealed because they would expose the deliberative processes of the investigator. Such a sweeping argument is rejected." *Id*. at 77-78.)

The courts have cautioned against applying a "reflexive fact/opinion characterization," *Petroleum Info. Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), and, as the *Ryan* case quoted above indicates, the selection or presentation of facts may be protected as part of the deliberative process. See, e.g., *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (A staff member's summary of volminous evidence presented at a hearing held exempt; "separating the pertinent from the impertinent is a judgmental process . . ." *Id*. at 68.)

In *Envtl. Prot. Servs. v. United States EPA*, 364 F. Supp. 2d 575, 585 (N.D. W. Va. 2005), the requester sought, among other records, the handwritten notes of an investigator made in the course of a subsequently closed investigation of another company. The activities of the investigator included "'interviewing, assessing the information, reviewing documentations, requesting documentation,' . . . [and he] was sufficiently briefed regarding the nature of the investigation prior to and during the course of his involvement to make his questioning a selective recording of information particularly pertinent to the EPA's investigation." Under such circumstances, the Court found that the notes were properly withheld under the deliberative process privilege.

In this matter, the administrative record indicates that DOH began activities in pursuance of a possible decision to undertake regulatory action. An agency employee observed activities of the circus and, as a consequence, generated the records in question, namely, the notes regarding her observation, the draft inspection report, and the draft PowerPoint presentation. There is no dispute that these activities were part of a deliberative process.[1] The only question is whether the materials identified contained factual or other non-deliberative material. Appellant would characterize the recording of the observations of the DOH employee as merely the reporting and recording of the factual circumstances that she observed. However, we do not agree. Like the investigator in *Envtl. Prot. Servs. v. United States EP*, the DOH employee was involved in an exercise of judgment in both selecting and characterizing conditions which she observed as the circus carried out its operations. Like such interviewer, she exercised judgment in interviewing and recording her interpretation of the answers of circus staff as they performed their functions. Rather than the simple recordation of objective, unequivocal facts, these observations were perceptions, informed, presumably, by experience, and undertaken in a changing, not a static environment. As opposed to an unmistakable description of the route of a circus parade, the "factual" material in the three records identified above represent an exercise of judgment in selecting and characterizing facts. In Freedom of Information Act Appeal 2011-19, we found that the thoughts and observations about conditions on Canal Road as part of a determination of appropriate agency action were deliberative. We find that the same conclusion is justified here.

Nevertheless, as DOH recognizes, the photographs used in the draft PowerPoint presentation constitute non-deliberative material. However, DOH states that these photographs have been given separately to Appellant. Therefore, it would be pointless to require DOH to provide the same records simply in a different format.

Appellant also references a veterinarian's report. DOH does not address this record in its response or provide it for in camera review. However, in an email to Appellant prior to the filing of the Appeal, DOH indicated that this was a draft report. While we have not examined the report, such reports would be based on observations, although informed by experience, which involves professional judgment and the interpretation of those observations. Accordingly, we believe that the "factual" material in the report would be deliberative as well.

As set forth above, with respect to the notes of the observations made by a DOH employee, citing case law, DOH argues that the notes are personal records, not agency records, and are not subject to disclosure under DC FOIA. In light of our conclusion above, it is not necessary to consider this argument.

Conclusion

Therefore, the decision of DOH is upheld. The Appeal is dismissed.

[1] The fact that it did not result in any regulatory action is not relevant, as is implicitly acknowledged by both parties.

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.