**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**EXECUTIVE OFFICE OF THE MAYOR**
**OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**
**Freedom of Information Act Appeal: 2012-50**

June 29, 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 31, 2012 (the "Appeal"). You ("Appellant") assert that the Department of Parks and Recreation ("DPR") improperly withheld records in response to your request for information under DC FOIA dated August 5, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records related to section 2(b)(2)(i) and (iii) of the Fiscal Year 2008 Supplemental Appropriations Temporary Act of 2008, which provided funding to the Department of Parks and Recreation for the following projects: "(i) An amount of $500,000 to fund youth outreach in neighborhoods, including Langston Terrace; and . . . (iii) An amount of $500,000 to fund a Ward 5 gang-intervention initiative." The FOIA Request was the subject of Freedom of Information Act Appeal 2012-50, in which we found that four records were not exempt from disclosure under the exemption for "investigatory records" under D.C. Official Code § 2-531(a)(3)(A)(i) and (B). As a result of discussions between Appellant and DPR in the course of complying with the decision, it was discovered that a search had not been made for emails. Consequently, DPR conducted a supplemental search for emails responsive to the FOIA Request. DPR provided responsive records to Appellant, but withheld other responsive records based upon the deliberative process privilege and the attorney-client privilege under D.C. Official Code § 2-534(a)(4).

On Appeal, Appellant challenges the withholding of the records pursuant to the supplement search. As to the assertion of the deliberative process privilege, Appellant makes several arguments. First, Appellant states that DPR has not adequately explained or justified its claim of exemption for the deliberative process privilege, including the failure to provide sufficient identifying details of the emails which would allow Appellant to assess the claim of exemption. Second, Appellant contends that the deliberative process privilege is not applicable as the records relate to the "implementation," not the "creation" of a policy. In any event, "the emails must now be disclosed because the policy has been finalized and implemented: the grants have long since been disbursed and the initiatives have long since been completed." Third, Appellant contends that DPR has not considered the possibility of redaction of exempt portions of the emails. As to the assertion of the attorney-client privilege, Appellant similarly challenges the failure of DPR provide sufficient identifying details of the emails which would allow Appellant to assess the claim of exemption. In this regard, Appellant submits that "not all communications

between a government attorney and a government employee are exempt from disclosure," which communications would include general interpretations of agency law.

In its response, dated June 15, 2012, DPR reconsidered and revised its position in part by providing to Appellant additional records, some of which are redacted based on the deliberative process privilege and the attorney-client privilege, but reaffirms its position as to most of the records withheld. As part of its response, DPR has submitted for the administrative record a revised Vaughan index, copies of the records withheld, and copies of the additional records provided to Appellant on June 15, 2012.[1] DPR states that, with respect to the deliberative process privilege, as the index indicates, the emails "include discussions about proposed actions, financial decisions, recommendations, concerns, suggestions and, in some cases, draft documents for review and comment." With respect to the attorney-client process privilege, DPR indicates that each "communication involves secure or private legal communication, requests for advice, or legal opinions." DPR states that it has considered the segregability of portions of the records, as is reflected in the revised index.

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).

While the Appeal arises out of the same FOIA request as in Freedom of Information Act Appeal 2012-50, the Appeal involves a separate set of records. While Freedom of Information Act Appeal 2012-50 involved the applicability of an exemption for investigatory records under D.C. Official Code § 2-531(a)(3)(A)(i) and (B), the Appeal involves the applicability of exemptions deliberative process privilege and the attorney-client privilege under D.C. Official Code § 2-534(a)(4).

[1] DPR supplemented its response to provide records which had been inadvertently omitted from the copies of the records withheld.

The administrative record in the Appeal is substantial. In addition to the records provided to Appellant in their June 15, 2012 response, DPR has provided to this office approximately 120 records which are grouped in 42 categories on its Vaughan index. We have examined each of the withheld records. Because of the volume of records, we will not analyze each category and record separately, but set forth our conclusions with respect to the claim of exemption for each privilege. The legal principles are familiar to both Appellant and DPR and will be summarized prior to our findings.

The attorney-client privilege applies to confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 78-79 (D.D.C. 2008); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980). However, "[n]ot all communications between attorney and client are privileged." *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). "[T]he privilege 'protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.' *Fisher v. United States*, 425 U.S. 391, 403 (1976)." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980). "The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977).

Based on our examination, we find that the majority of the emails for which the attorney-client privilege is claimed were sent or received for the purpose of securing legal advice or services. All of these involved DPR counsel. The following document groupings, as numbered on the Vaughan index provided by DPR, are exempt in whole: 2, 24, 31, 36, 38, and 42. The following document groupings shall be provided to Appellant with redactions as indicated in parentheses: 13 (10/29/08 (1:48 PM) email from John Stokes to Marie-Claire Brown and 10/29/08 (3:33 PM) reply from Marie-Claire Brown); 23 (1/28/09 (1:22 PM) email from Marie-Claire Brown and 3/2/09 emails (10:33 AM and 10:57 AM) between Marie-Claire Brown and Melissa McKnight); 26 (last 2 emails in thread); and 32 (emails to and from Marie-Claire Brown).[2] However, matters which "will be brought to the attention of" legal counsel (8) and emails which are written by an attorney with whom there is not an attorney-client relationship or were not made for the purpose of securing or providing legal advice (23, 32) do not qualify under the attorney-client privilege.

As we stated in Freedom of Information Act Appeal 2012-46 and Freedom of Information Act Appeal 2012-47, appeals in which Appellant was the appellant, 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

[2] No. 22 has already been produced with a redaction which qualifies under the attorney-client privilege.

> 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).

As we also stated in Freedom of Information Act Appeal 2012-46 and Freedom of Information Act Appeal 2012-47, 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. Moreover, it is not the case that, as a bright-line rule, once a policy is decided, the information used in the development of the policy must be disclosed. If the document is predecisional at the time it is prepared, it can lose that status if it is adopted as the agency position on an issue or is used by the agency in its dealings with the public. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

In our decisions, 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." In Freedom of Information Act Appeal 2011-19, we considered a request for records, in pertinent part, relating to road and safety conditions on Canal Road from 2006 to 2008. Because of their age and the likelihood of changing conditions, we found that that they would not be material to a final agency decision and, given their lack of materiality, how they would reveal anything about the internal debate or impair the quality of agency decisions. Consequently, despite the fact that these older materials may have reflected internal assessments and observations which were a part of a prior deliberative process, we nevertheless ordered that these materials be released. In Freedom of Information Act Appeal 2011-51, with respect to the annual applications and reports filed for real property exemptions for which there were subsequent annual applications and reports, the materials with respect to older applications and reports, for which appeal deadlines had long passed, were found to be similarly stale.

In this case, there is a substantial portion of emails which we find to be non-deliberative. Some of these are predecisional, but they do not reflect the give-and-take which is the hallmark of the deliberative process. For example, some of the emails (or portions thereof) merely state the nature of a decision to be made, summarize action taken (e.g., summary of action of a Council committee or of legislation which was passed), request or relay information, or are negotiations

between different parties or agencies. Some emails communicate a decision which has been made. These do not meet the requirements for the deliberative process privilege.

The balance of the emails (or portions thereof) arguably qualify for exemption from disclosure under the deliberative process privilege. However, as a matter of discretion, under the guidance of Mayor's Memorandum 2011-01, we believe that these emails should be disclosed. The emails reflect the administration of routine business of the agency and are benign in tone. The exchanges fall far short of the vigorous interchange of ideas and personal opinions which the deliberative process privilege is designed to protect at its apex. A portion of the emails simply solicit comments (to which there is often little or no response) or offer straightforward, noncontroversial proposals for comment. We do not believe that the release of these emails would have any chilling effect on future frank and candid discussions within DPR or any other agency.

Accordingly, the emails for which deliberative process has been claimed, subject to redactions for the attorney, shall be provided to Appellant.[3]

Notwithstanding our conclusions which are set forth above, we believe that DPR has made its claim of exemption in good faith and to protect what it believes is the efficient operation of the agency by withholding or redacting communications which it deems necessary to preserve candor. For the reasons we have set forth, we do not believe that disclosure will have an adverse effect on agency operations or the public interest.

Conclusion

Therefore, the decision of DPR, as revised, is upheld in part and is reversed and remanded. DPR shall produce the withheld records other than those exempt, in whole or in part, under the attorney-client privilege or privacy (footnote 3) as set forth above.

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,

[3] Prior to releasing the document grouping numbered 8, we recommend that redactions be made with respect to the personal matters of one of the participants.

Donald S. Kaufman
Deputy General Counsel

cc: Jamarj Johnson, Esq.