GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR

Freedom of information Act of Appeal: 2012-52

June 26, 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 District Department of Transportation ("DDOT") improperly withheld records in response to your requests for information under DC FOIA, dated April 6, 2012 (collectively, the "FOIA Request").

Background

Appellant's FOIA Request, in two separate emails on the same date, sought records regarding all documents and records related to the planned Rhode Island Avenue pedestrian bridge, such as task orders, budget documents, cost estimates, bid documents, schedules, plans, letters, drawings, and reports, as well as emails beginning October 1, 2011.

In response, by two emails dated May 14, 2012, DDOT stated that it had located responsive records, but was withholding the records. It explained that the FOIA Request related to a contract which had been cancelled and was to be re-bid. DDOT stated that since the contract award process was not complete, the records were exempt in their entirety from disclosure under D.C. Official Code § 2-534(a)(4) based upon executive privilege. In addition, DDOT stated that many of the records were exempt from disclosure based upon exemptions for trade secrets or commercial or financial information obtained from outside the District government and the deliberative process privilege under D.C. Official Code § 2-534(a)(1) and (4).

On Appeal, Appellant challenges the denial of the FOIA Request. First, Appellant states that DDOT has not adequately explained or justified its claim of exemption for the deliberative process privilege, such as by providing a sufficient Vaughn Index, and has asserted the exemption in a conclusory manner. Second, the deliberative process privilege is not applicable here as the records "do not pertain to the development of an agency policy: they pertain to a routine bidding process. In addition, DDOT has failed to demonstrate that every single record makes recommendations on legal or policy matters." Third, to the extent that any responsive records include trade secrets or commercial or financial information, DDOT has failed to demonstrate, as required by the statutory exemption, that "disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained."

In its response, dated June 18, 2012, DDOT reaffirmed its prior position. First, it states under the executive privilege recognized by the Supreme Court, there is an exemption for documents or information which the government has received or generates before it completes the process of awarding a contract. DDOT states that the requested records relate to a contract which was canceled before award and which will be re-bid. DDOT also states that the records will be used during the rebidding process. "If the government releases this information, it could put the government as well as the contractor at a competitive disadvantage when the proposal goes out for bidding." Second, DDOT states that "[t]he documents requested include details of blueprints, measurements, engineering plans, designs and materials . . ." DDOT maintains that the exemption for trade secrets or commercial or financial information applies because "[i]f a competitor knows the design, material, price and engineering plan of the contractor, they could mimic the design or adjust their costs and materials in order to become more competitive. This would put contractors whose information was disclosed at a severe disadvantage." Third, DDOT contends that the deliberative process privilege applies because it applies to inter-agency discussions regarding plans, proposals, and recommendations on the project and the award of the contract.

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).

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."

In *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340 (1979), the Supreme Court recognized that there is a privilege under FOIA for documents or information which the government has received or generates before it completes the process of awarding a contract.

At the time that Congress was considering amendments to the federal equivalent of D.C. Official Code § 2-534(a)(4), the Supreme Court noted that concern was raised that "information relating to the purchase or sale of real estate, materials, or other property might not be protected . . ." *Id*. at 358. The Court pointed to the following portion of the legislative history as significant:

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy (emphasis added). Ibid.

Id. at 359. It concluded:

> In light of the complaints registered by the agencies about premature disclosure of information relating to Government contracts, we think it is reasonable to infer that the House Report, in referring to 'information . . . generated [in] the process of awarding a contract,' specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.

Id.

The Court contrasted the application of this privilege to the deliberative process privilege:

> The purpose of the privilege for predecisional deliberations is to insure that a decisionmaker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency. The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

Id. at 359-360.

DDOT indicates that the records withheld in this case were either received as part of the contracting process or were created within DDOT in consideration of the objectives of the project and the award of a contract to build the project. In addition, as DDOT clearly states, the proposed contract has not been awarded. Accordingly, such records are exempt from disclosure

under D.C. Official Code § 2-534(a)(4) pursuant to the privilege identified by the Supreme Court for documents or information which the government has received or generates before it completes the process of awarding a contract. This conclusion is consistent with our decisions in Freedom of Information Act Appeal 2012-15 and Freedom of Information Act Appeal 2012-24.[1]

Based on this conclusion, at this time, it is not necessary to consider the applicability of the exemptions for trade secrets or commercial or financial information obtained from outside the District government and the deliberative process privilege. However, while the executive privilege will expire after the contract award has become final, those exemptions may still apply with respect to certain of the records.

Conclusion

Therefore, we uphold the decision of DDOT. The Appeal is dismissed.

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: Nana Bailey-Thomas, Esq.

[1] The Supreme Court suggested in dicta in *Merrill* that the executive privilege may be "confined to information generated by the Federal Government itself." *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979). However, it concluded that the privilege applied "at least to the extent that this information is generated by the Government itself . . . " *Id*. Based upon the legislative history in the House report, which stated that an exemption would apply to information or documents "received or generated" by the government as part of the contracting process, we believe that the privilege also extends to information submitted by contractors and their agents as part of the contracting process. Even if this was not the case, we believe that such records would be exempt from disclosure in whole because the disclosure of contract submissions in pursuance of an award and prior to such award becoming final would result in competitive harm in the rebidding process.