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

Freedom of Information Act Appeal: 2012-53

June 20, 2012

Jason Klein, Esq.

Dear Mr. Klein:

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 30, 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 27, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought "[t]he entirety of the administrative record" for two categories of records, "all applications for dispensary registrations" and "all applications for cultivation center registrations," related to a six-member medical marijuana panel's evaluation of such applications pursuant to recently enacted law and implementing rules permitting the cultivation and sale of marijuana for medical purposes. Each category had eight identical subparts.

In response, by email dated May 10, 2012, DOH provided some of the requested records and referenced rules posted on the Internet with respect to one subpart, but withheld most of the records requested. The response of DOH is summarized more particularly as follows (corresponding to the subparts of the FOIA Request):

1. With respect to the general statement of the FOIA Request prior to the specification of subparts, 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 subpart requesting scoring determinations from each panel member, 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 the detailed criteria and scoring measures used to make the scoring determinations, DOH provided a hyperlink to rules codified in the District of Columbia Municipal Regulations setting forth the criteria and scoring measures.

4. With respect to the request for the names and titles of all panel members, DOH provided responsive records.

5. With respect to the calculation of the provisional score for each application, DOH 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."

6. With respect to the request for correspondence with District or federal agency or entities as the correspondence relates to the scoring determinations, DOH responded in two parts. First, it stated that there was no correspondence with respect to any federal agency or entity. Second, with respect to correspondence with District agencies or entities, DOH withheld records sent to or from the Office of the Attorney General based on the attorney-client privilege, withheld records sent within DOH based on the deliberative process privilege, and withheld records sent to or from the Protective Services Division of the Department of General Services based on the deliberative process privilege and the exemption for trade secrets or commercial or financial information obtained from outside the District government.

7. With respect to the request for the "notice of denial letters provided to each applicant that explains the basis and reasons for agency action," 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 as release of such information would likely result in harm to applicants who have appealed or entities who are likely to file in a new round of applications.

8. With respect to the request for the documentation for findings in the "notice of denial letters," DOH withheld the 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 and for the deliberative process privilege under D.C. Official Code § 2-534(a)(4). Among other reasons, DOH notes that a new application period is still open as a result of new legislation.

9. With respect to the request for any other documents that relate to scoring determinations, DOH stated its position regarding the failure of Appellant to make the FOIA Request with particularity and that, even if the FOIA Request was proper, that the records were

exempt from disclosure based on the exemptions set forth above for trade secrets or commercial or financial information obtained from outside the District government and for the deliberative process privilege.

On Appeal, Appellant challenges the denial of the FOIA Request. First, Appellant contests the assertion of DOH that the FOIA Request was not stated with particularity as DOH was able to locate the requested records. Appellant maintains that the size of the records does not correlate to the specificity of the request.

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 information in the "documents in question are not trade secrets, commercial or trade information." Appellant also argues that "much of the information within these responsive documents submitted by applicants clearly would not cause them any competitive harm." As to the latter argument, Appellant contends that "knowledge of an applicant's proposed security or facility plan would not prevent or assist an applicant in obtaining a license;" that "the medical marijuana industry is highly regulated and there are only a few dispensaries and cultivation centers, essentially creating a monopoly among registered holders;" the applications "are merely plans," but do not fix the manner of operation; and information on matters such as lighting can be obtained by merely walking into a facility. 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 claim of exemption for the deliberative process privilege because the scores constitute a final decision. Moreover, the scoring determinations "were purely mathematical and fixed by regulation. There was no discretionary or deliberative element in the scoring."

Fourth, Appellant contests the claim of exemption for the attorney-client privilege because DOH has not demonstrated confidentiality and because these documents "discuss established policies and decisions."

Fifth, with respect to the request for the detailed criteria and scoring measures used to make the scoring determinations, Appellant asserts that reference to the rules codified in the District of Columbia Municipal Regulations is inadequate because they are vague and not detailed.

Sixth, Appellant contends that even if there is exempt material in the records, many of the records can be provided with redactions.

Seventh, Appellant contests the denial by DOH of his request for a fee waiver based upon the public interest. Although Appellant acknowledges that he represents clients on medical marijuana issues in his law practice, he contends that "he is also a concerned citizen."

In its response, dated May 24, 2012, DOH reaffirmed and amplified its prior position, which is summarized as follows.

First, with respect to the assertion of the deliberative process privilege, DOH references our decision in Freedom of Information Act Appeal 2012-47 and "suggests that a decision in this matter start with the issue of deliberative process." The response of DOH re-states portions of its response in Freedom of Information Act Appeal 2012-47 and states, based on the decision, that "all materials prior to the decision of the Director of the Department of Health are covered by 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.

Second, with respect to the assertion of the exemption under D.C. Official Code § 2-534(a)(1), DOH states that under Freedom of Information Act Appeal 2012-47, the issue is moot to the extent that the deliberative process privilege applies as all materials would be exempt. However, to the extent that the deliberative process privilege does not apply, DOH maintains that the trade secrets exemption would apply. As an initial matter, DOH states that, as conceded by Appellant, disclosure of pricing information is exempt from disclosure. In the main, applying the test of *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), DOH states that commercial information is "confidential" and need not be disclosed if it would impair the ability of the government to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom it was obtained. Although DOH notes that *National Parks and Conservation Association v. Morton* applies a federal standard and DC FOIA "does not expressly consider" the impairment of the ability of the government to obtain necessary information in the future, it states that

> the link between competitive harm and impairment to the government's ability of to obtain necessary information in the future is fairly obvious: If applicant's trade secrets, commercial information, or financial information will be disclosed to the public, the applicant will be harmed.

DOH provides examples of trade secrets and commercial information which applicants have submitted. Therefore, it contends that the exemption applies.

Third, with respect to the assertion of the attorney-client privilege, DOH states that the relevant records were sent by an agency official seeking legal advice from the Office of the Attorney General or from an attorney in the Office of the Attorney General providing such advice.

Fourth, DOH reiterates that the FOIA Request was not made with particularity. It states, among other things, that the FOIA Request was made in an "any or all" format and that it would yield a "voluminous page count of approximately 29,500 pages of potentially responsive documents."

Fifth, DOH notes that the licensing process is still ongoing. Furthermore, certain of the rejected applicants, including clients of the Appellant, are engaged in litigation in the Superior Court of the District of Columbia with respect to their applications. In such litigation, the records are only provided to litigants pursuant to a protective order and, even under the protective order, there will be redactions to the records provided to the litigants.

Sixth, DOH states that it considered redactions, but concluded that all records were exempt under the deliberative privilege process and all of the records were exempt in accordance with Freedom of Information Act Appeal 2012-47.

Seventh, DOH contends that Appellant "made his FOIA Request to benefit his litigation clients by obtaining information outside of the litigation parameters. This is not an appropriate use of FOIA." Accordingly, citing *Borton, Inc. v. OSHA*, 566 F. Supp. 1420 (E.D. La. 1983), DOH states that a decision-maker "must uphold a FOIA denial when the requested documents are sought solely to benefit the requester's private litigation."

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).

The issues in this Appeal arise out of the applications to the Department of Health for licenses to operate marijuana cultivation centers and marijuana dispensaries and the evaluations of the applications by a six-member panel. These are the same circumstances as those considered in our recent decision in Freedom of Information Act Appeal 2012-47 and some of the issues are the same. The issues in that appeal were decided, in large part, based upon the exemption pursuant to the deliberative process privilege and the disposition on the common issues will apply here. As that decision has not been published yet, we will re-state that analysis as it applies here.

As in Freedom of Information Act Appeal 2012-47, DOH withheld 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 and for marijuana dispensaries. 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. Thus, the scores were not final decisions as Appellant maintains. 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). Appellant characterizes the scores "themselves as just facts." However, the scores are merely the quantification of judgments made by the panel members and, while expressed in fixed terms, retain their deliberative quality. There are three subparts of the FOIA Request which seek records which fall squarely within the ambit of the exemption for the deliberative process privilege: scoring determinations from each panel member; the calculation of the provisional score for each application; and documentation for findings in the "notice of denial letters." Thus, we find that DOH has properly withheld, in whole, the records in these categories 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. With respect to the request for correspondence with District or federal agency or entities as the correspondence relates to the scoring determinations, the portions of the correspondence which simply transmit records or refer to matters such as scheduling would not be deliberative, but administrative or clerical. Accordingly, those records, redacted for all deliberative material, shall be provided to Appellant.[1]

However, with respect to the challenge by Appellant to the withholding of correspondence sent by an agency official seeking legal advice from the Office of the Attorney General or from an attorney in the Office of the Attorney General providing such advice, we find that DOH was justified in withholding such records. 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). The attorney-client privilege would not apply to general advice widely distributed within the agency providing, for instance, a legal interpretation of agency regulations. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980). However, despite the suggestion of Appellant to the contrary, the communications here were not generalized, but narrow and directed. Accordingly, these records are exempt from disclosure on the basis of the attorney-client privilege.

We will address the challenges for the additional contested subparts of the FOIA Request. As set forth above, in response to the request for the detailed criteria and scoring measures used to make the scoring determinations, DOH provided a hyperlink to rules codified in the District of Columbia Municipal Regulations. Based on the administrative record, there is no reason to believe that the response of DOH was insufficient.

As set forth above, Appellant also challenges the withholding of the "notice of denial letters provided to each applicant that explains the basis and reasons for agency action." As also set forth above, 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.

[1] In Freedom of Information Act Appeal 2012-47, notwithstanding our general conclusion regarding the deliberative process privilege, we ordered DOH to disclose the redacted sample panel member's score sheet or, in the alternative, a blank score sheet. However, in its response, DOH stated that it would provide the same to Appellant. Thus, the issue is moot here.

DOH states that, under the case cited above, commercial information is "confidential" and need not be disclosed if it would impair the ability of the government to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom it was obtained. DOH notes that DC FOIA "does not expressly consider" the impairment of the ability of the government to obtain necessary information in the future, but argues essentially that meeting the first test, i.e., impairment of the ability of the government to obtain necessary information in the future, satisfies the second test, i.e., the finding of substantial harm to the competitive position of the submitting entity. DOH argues for a *per se* rule: If information is disclosed, the applicant will be harmed.

The relevant provision of the federal FOIA law provides an exemption from disclosure for "trade secrets and commercial or financial information obtained from a person and privileged or confidential…" 5 U.S.C. § 552(b)(4). By contrast, D.C. Official Code § 2-534(a)(1) exempts "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained." Thus, as the District of Columbia Court of Appeals has stated, the DC FOIA "differs from the corresponding provision in the federal FOIA." *Washington Post Co. v. Minority Business Opportunity Com'n*, 560 A.2d 517, 522 (D.C. 1989). The case cited by DOH, *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), interprets the federal FOIA provision. However, the District test, as set forth by the District of Columbia Court of Appeals, is that "the party seeking to invoke this exemption must show (1) that the party from whom the information was obtained faces actual competition, and (2) that disclosure will cause substantial competitive injury. [citation omitted]." *Washington Post Co. v. Minority Business Opportunity Com'n*, 560 A.2d 517, 522 (D.C. 1989). Thus, unlike the federal provision, "[t]he District of Columbia statute, however, explicitly focuses on the question of harm to the competitive position of the person providing the information." *Id*. As stated, DOH not only asserts that the test under DC FOIA is the same as the federal test despite the different, more limited provision, but would apply it as a *per se* rule. We do not agree. The applicable test is as stated by the District of Columbia Court of Appeals and does not consider impairment of the ability of the government to obtain necessary information in the future.

DOH states that the denial letters "contain or reference trade secrets, commercial information, and financial information submitted by applicants . . ." We have not examined the text of the denial letters. However, the nature of such letters is to provide notice of an action taken and would be likely, at most, to contain a brief summary. It seems likely here that the denial letters contained mostly references to trade secrets, commercial information, and financial information submitted by applicants. It seems unlikely that such letters would provide the type of detail regarding such information, even if the full detail was exempt from disclosure, that would cause the harm to competitive position required to satisfy the exemption. Accordingly, we find that the "notice of denial letters" must be disclosed.

The last subpart of records are any "other documents not exempt that relate to scoring determinations for each application." Although the FOIA Request did not specify the applications submitted for each license as being included in the FOIA Request and Appellant did

not specifically discuss them, DOH does refer to the information in the applications submitted and the applications seem to be fairly with the scope of the FOIA Request. The issue, then, is whether some or all of the completed applications are exempt from disclosure under 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.

Appellant suggests that there is no competition in this case, and disclosures would not cause a loss of business, as "the medical marijuana industry is highly regulated and there are only a few dispensaries and cultivation centers, essentially creating a monopoly among registered holders." The suggestion of Appellant is correct to the extent that there is limited competition, but there is some competition nonetheless. There are or will be six licenses issued for marijuana cultivation centers (ten licenses can be issued) and four licenses for marijuana dispensaries (five licenses can be issued). Thus, there will be an oligopoly. However, at this point, we should consider the number of competitors to be larger. While the licenses have been approved, because there is ongoing litigation regarding the issuance of licenses, it would appear that the determination of the identity of the competitors has not been decided with finality and, until that time, prudence suggests that we consider all applicants as possible competitors. While this potentially increased number of competitors does not significantly change the competitive landscape, we believe that there is competition nonetheless.

Appellant argues that information in the "documents in question are not trade secrets, commercial or trade information." In general, at least some of the information provided to DOH are valuable plans or processes which applicants seek to protect and, whether or not they qualify as a matter of law as trade secrets, are within the zone of commercial or financial information which may be the subject of the exemption under D.C. Official Code § 2-534(a)(1). As DOH has made the documents posted on the DOH website part of the administrative record by reference to the website, we will examine the categories of information required in each application to determine whether disclosure would cause competitive harm to the applicants.

Some of the information required to be submitted as part of the application would not be likely to cause competitive harm. Thus, examples would include information such as the legal name of the business and the names and addresses of each of the principal officers, directors, or owners; the proposed physical address of the facility; evidence of compliance with the zoning requirements; or whether any of the applicants are licensed physicians.[2] On the other hand, we believe that there is required information whose disclosure would result in substantial harm to the competitive position of the applicant. We will set forth the categories of information which we believe meets the required standard of competitive harm and which will, therefore, be exempt from disclosure.

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[2] Regarding an item of a similar nature, we note that the District of Columbia Court of Appeals stated that "we are not persuaded that disclosure of the race, per se, of the principals of an enterprise would lead to competitive injury . . ." *Washington Post Co. v. Minority Business Opportunity Com'n*, 560 A.2d 517, 523 (D.C. 1989).

The following information in the application for marijuana cultivation centers will be exempt:

1. Proposed Staffing Plan. The legally sanctioned cultivation and sale of medical marijuana is a nascent industry and, as such, established business models and particular industry standards would not exist. The design of an optimal organizational structure and the ability to identify and hire qualified employees are meaningful competitive elements and can reasonably be expected to affect the operating results of the enterprise.[3]

2. Security Plan. There is a substantial illegal market existing for marijuana and the existence of this market will make the cultivation centers an attractive target for theft. The strength of the design and implementation of a security plan may be significant factor in the viability of the enterprise.

3. Cultivation Plan. DOH argues that the cultivation, harvesting, and processing of medical marijuana may entail a specialized process similar to the employment of horticultural techniques for the growth of other agricultural products such as roses. We agree. The processes and techniques employed by each licensee have a significant potential for differentiation of the quality of the end product, with a concomitant effect on market share. The absence of established, legally sanctioned operations with seasoned cultivation techniques buttresses this conclusion.

4. Business Plan and Services to be Offered. It seems apparent that the manner in which the licensee plans to operate can have a significant impact on the results of a business. In the case of a business in a new industry, this would seem to apply with greater force. As to this category, we note that the District of Columbia Court of Appeals stated that "entrepreneurs should not be put in the position of having their marketing techniques made a part of the public record and available as a windfall to their competitors." *Washington Post Co. v. Minority Business Opportunity Com'n*, 560 A.2d 517, 523 (D.C. 1989).

5. Environmental Plan. The environmental plan appears to be an adjunct to the cultivation plan. Again, we note the absence of established, legally sanctioned operations as models.

6. Source of funds used to acquire or develop the business for the cultivation center. This is a part of the requirement under the business plan. The access to financing provides an obstacle to entry into the marketplace for most businesses and the absence of successful business models regarding medical marijuana operations would appear to create additional difficulty.

The following information in the application for marijuana dispensaries will be exempt:

1. Proposed Staffing Plan. See discussion above.

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[3] This would not include demonstration of the knowledge of the applicant of medical marijuana laws.

2. Security Plan. See discussion above.

3. Inventory Plan. The inventory plan of a dispensary would seem to have an impact both on the security plan and the business plan of an enterprise.

4. Business Plan and Services to be Offered. See discussion above.

5. Source of funds used to acquire or develop the business for the cultivation center. See discussion above.

It should be clearly noted that, as stated above, the legally sanctioned cultivation and sale of medical marijuana is a nascent industry and, as such, established business models and particular industry standards would not exist. Therefore, our analysis of competition and harm is based on unique circumstances and our forecast of the likely business conditions. Accordingly, our analysis should be confined to such unique facts and circumstances.

DOH alleges, both with respect to the general request and the subpart asking for any "other documents not exempt that relate to scoring determinations for each application," that Appellant failed 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*.

In Freedom of Information Act Appeal 2012-47, DOH made the same argument and we ruled in favor of the appellant. Here, we agree with the Appellant as well. We will re-state the analysis here for the benefit of the Appellant. While it is true, as DOH argues, that the part of the FOIA Request was framed as a request for the "entirety of the administrative record" or "any and all other documents not exempt that relate to scoring determinations for each application," the balance of the part limits the subject matter of the request to applications for the 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. Thus, we find that the FOIA Request was stated with particularity.

In this Appeal, DOH stresses the number of pages of "potentially responsive records" and, based on the number of pages, computes a review time per page. This suggests an argument based on the burden of production rather than the lack of particularity in the statement of the request. However, we are unconvinced. First, the computation treats each page as being unique. However, in this case, the many of the records consist of the same type of documents, varying as to applicants, but for which judgments as to production or exemption therefrom can be made for

such documents as a whole. Second, as DOH indicated in Freedom of Information Act Appeal 2012-47 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. Third, DOH stated in its response that it has, in fact, reviewed all of the records and has "even consulted with its civil litigators and FOIA lawyers."

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.

As DOH stated in its response that it has, in fact, reviewed all of the records, it would appear that there are not any additional records other than those that have been identified. On the other hand, given that DOH has raised an objection based on particularity and continues to do so on appeal, we could infer that additional records exist. If DOH has in fact located and reviewed all responsive records pursuant to the FOIA Request, ordering a new search would not be productive. Accordingly, if it is the case, DOH shall state in writing to Appellant that it has made a complete search in accordance with the FOIA Request. If it is not the case, DOH shall make an additional search in order to complete the search for the records in accordance with the FOIA Request and provide any records, subject to the assertion of any applicable exemption, to Appellant.

As set forth above, DOH also contends that Appellant "made his FOIA Request to benefit his litigation clients by obtaining information outside of the litigation parameters. This is not an appropriate use of FOIA." Accordingly, citing *Borton, Inc. v. OSHA*, 566 F. Supp. 1420 (E.D. La. 1983), DOH states that a decision-maker "must uphold a FOIA denial when the requested documents are sought solely to benefit the requester's private litigation."

While certain appeals decisions may have relied on the so-called "pending litigation" exemption, we have subsequently held that the existence of pending litigation is itself insufficient to justify the withholding of records. In Freedom of Information Act Appeal 2011-5, we stated:

> The Supreme Court has stated affirmatively that the only shelter from FOIA's disclosure requirements is the proper assertion of one of the specific and particular legislatively enacted exemptions under the Act:

> Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. *But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.* (Emphasis added)
>
> *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 220-221 (U.S. 1978).[4]

The Court went on to suggest that FOIA requesters rights are neither enhanced nor diminished by their status as litigants.[5]

Freedom of Information Act Appeal 2011-5 at 5. See also Freedom of Information Act Appeal 2011-51.

Borton, Inc. v. OSHA, 566 F. Supp. 1420 (E.D. La. 1983), does not support the proposition advanced by DOH that a decision-maker "must uphold a FOIA denial when the requested documents are sought solely to benefit the requester's private litigation." It simply states that "[t]he purpose of the Freedom of Information Act is to insure an informed citizenry, not to function as a private discovery tool," *Id*. at 1422, and that an agency was under no obligation to seek a waiver of confidentiality from a witness. Thus, rather than a FOIA limitation when a requester is also a litigant, this case supports the principle 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).

Appellant also appeals the denial by DOH of his request for a fee waiver based upon the public interest. However, we read our jurisdiction under D.C. Official Code § 2-537(a) to be limited to adjudicating whether or not a record may be withheld and not encompassing fee disputes. This is in accord with prior decisions under D.C. Official Code § 2-537(a). See MCU 406151, 51 DCR 4213 (2004); Matter No. 390592, 51 DCR 1527 (2004); OSEC 102301, 49 DCR 8641 (2002). See also Freedom of Information Act Appeal 2012-21; Freedom of Information Act Appeal 2012-26. There is no indication on the administrative record that the amount of the fees which will be due will operate as a bar to access by Appellant to the requested records. Thus, we will not consider this issue.

Conclusion

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

"[4] At least one jurisdiction, California, has specifically adopted a pending litigation exemption in their FOIA law. *See*, Cal. Government Codes Section 6254 (b) (nothing in this chapter shall be construed to require disclosure of records that are . . . [r]ecords pertaining to pending litigation). The Council has not enacted such an exemption.
[5] *Id*. at 214, 242, n23; *See also EPA v. Mink*, 410 U.S. 73, 86 (1973)."

1. Provide the "notice of denial letters" requested by Appellant.

2. Provide, with respect to the request for correspondence with District or federal agency or entities as the correspondence relates to the scoring determinations, the portions of the correspondence which simply transmit records or refer to matters such as scheduling, redacted for all deliberative material.

3. Provide the applications for marijuana cultivation centers and marijuana dispensaries, with redactions for trade secrets, confidential information, or financial information as indicated above.

4. If it is the case, state in writing to Appellant that it has made a complete search in accordance with the FOIA Request. If it is not the case, DOH shall make an additional search in order to complete the 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.