

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

Freedom of Information Act Appeal: 2012-57

August 2, 2012

Fritz Mulhauser, Esq.

Dear Mr. Mulhauser:

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 June 18, 2012 (the “Appeal”). You, on behalf of Viola Briggs (“Appellant”), assert that the Office of Police Complaints (“OPC”) improperly withheld records in response to your request for information under DC FOIA dated May 11, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records of the OPC investigation with respect to her complaint about a search which Metropolitan Police Department (“MPD”) officers conducted of her apartment. OPC completed the investigation and dismissed the complaint.

In response, by letter dated June 4, 2012, OPC provided records to the Appellant, but redacted portions of certain documents pursuant to exemptions for privacy interests under D.C. Official Code § 2-534(a)(2) and (3)(C) and withheld other documents pursuant to exemptions for investigatory records under D.C. Official Code § 2-534(a)(3)(D) and (E) and for the deliberative process privilege and attorney work product under D.C. Official Code § 2-534(a)(4). As to the exemption for investigatory records under D.C. Official Code § 2-534(a)(3)(E), OPC stated that “the disclosure of this information would reveal investigative techniques used by OPC that are confidential and not otherwise known to the public.” In addition, OPC stated that disclosure “would reveal confidential information provided by a confidential source.” As to the exemption for the deliberative process privilege, OPC stated that “these records would reveal information about the agency’s internal deliberative process before it was completed and a final decision was reached. Making this information available to the public would inhibit frank and honest discussion of matters being considered by OPC and would disseminate records that suggest reasons or rationales for actions that were not in fact the ultimate or actual reasons for the agency’s actions.” As to the exemption for attorney work product, OPC stated that its Executive Director is required to be an attorney and the Executive Director employs investigators as agents.

On Appeal, Appellant challenges the denial, in part, of the FOIA Request with respect to the withholding of the records.¹ In general, Appellant states that OPC has not adequately explained or justified its claims of exemption.

As to the exemption for investigatory records which would reveal investigative techniques not generally known outside the government, Appellant states that OPC has not given any particularized explanation of how the exemption applies in this case. Appellant further contends, citing authority, that the exemption does not apply to “routine techniques and procedures,” but only to “‘obscure or secret techniques.’” Here the “techniques and procedures . . . are the most routine imaginable—talking to people and looking at records.” Appellant also argues that “the only ‘lawbreakers’ that could be deterred by keeping OPC methods secret are police officers—as they are the only targets of the work of OPC. Yet officers already know all law enforcement methods as part of their training and experience.”

As to the exemption for investigatory records which “would reveal confidential information provided by a confidential source,” Appellant first states that D.C. Official Code § 2-534(a)(3)(D) “in full protects only the identity of a confidential source,” but confidential information is exempt only if “compiled by a law-enforcement authority in the course of a criminal investigation” and only if it emanates from the confidential source. While Appellant would not contest the redaction of the name of the confidential source, Appellant states that OPC does not substantiate its claim for the withholding of an entire record or records and, without such substantiation, its claim cannot be assessed.

As to the exemption for the deliberative process privilege, Appellant sets forth several arguments. First, most of the records here, witness interviews and copies of other records, are not the types of “memorandums and letters” to which the deliberative process privilege applies. Second, while the records may be predecisional, they likely do not reflect the give and take of the deliberative process. Third, the deliberative process privilege does not apply to records that “lack subjective opinion or merely explain *preestablished* policy.” Fourth, an agency must distinguish between deliberative, policy matters and purely factual matters, the latter of which must be disclosed. Appellant notes that the FOIA Request was clear that it was “seek[ing] records only showing factual investigation together with agency findings and conclusions.”

As to the exemption for attorney work product, Appellant contends that OPC investigations, and the work of its Executive Director, are not conducted in anticipation of litigation. Even assuming that OPC investigations are conducted in anticipation of litigation, OPC would not be a party to such litigation and entitled to the protection of the privilege.

In its response, dated July 13, 2012, OPC reaffirmed its position. In addition to the reasons which it provided in its response as summarized above, OPC adds or emphasizes the following. First, OPC notes that Appellant made the FOIA Request “in order to ‘learn more from the investigative file about what OPC found in its investigation and the reason her complaint was apparently

¹ Appellant does not challenge the redactions based on privacy.

dismissed at an early stage.” OPC also notes that if a complaint is dismissed by OPC, the complainant “is entitled, under D.C. Official Code § 5-1107(h), to a ‘brief statement of the reasons for dismissal.’” Therefore, OPC asserts that “the underlying FOIA request is an attempt to seek more information than is required to be disclosed by law.” Second, OPC reiterates and emphasizes its contention that exemptions regarding investigative techniques and deliberative process apply to “OPC’s investigation and our analysis.”

It is OPC’s position that virtually our entire investigative file is covered by both as the nature of an investigation requires techniques that are used to gather information that engenders deliberation. Even where individual documents do not, at first glance, seem to reveal techniques or deliberations, taken together they paint a clear picture of what steps we take in an investigation and how we assess facts in a case.

Third, in addition to its assertion that the exemption for attorney work product applies because its Executive Director is required to be an attorney, OPC asserts that the attorney-client privilege also applies on this basis. As to the assertion by Appellant that the records of OPC are not created in anticipation of litigation, OPC argues that “[e]ach investigation has the potential, if the office determines that official misconduct occurred, to result in an administrative hearing which is adversarial in nature.” As to the argument of Appellant that, in any event, that OPC is not a party, OPC argues that “the whole complaint was pursued under OPC’s auspices and OPC’s interests are clearly at stake. And to the degree that the complainant has the burden of proof in these hearings, OPC’s investigative file forms the basis of their ability to meet this burden.”

Fourth, with respect to the record identified as the MPD Affidavit in Support of an Application for Search Warrant, OPC states, by way of background, that the “warrant was based on information from a confidential informant” who was employed by MPD.

Even though the informant is identified only by number, the information attributable to the informant could allow someone to discern the informant’s identity. . . . The rest of the document was withheld under ‘investigative techniques.’ We note that MPD does not publicly disclose its general order regulating the application for search warrants, and so these techniques are not known outside the government. Disclosure of the rest of the warrant application would allow these techniques to be gleaned by inference.

Appellant has also provided a Vaughan Index and a copy of the records which it withheld. As indicated on the Vaughan index and in its response, it has released one record which it determined to be withheld in error. It has also provided a copy of a 2010 decision of this office.²

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

² OPC also addresses exemptions which it claims based on an invasion of privacy. However, Appellant does not contest the applicability of such exemptions in this matter.

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 may be examined to construe the local law.

OPC advances several contentions that apply to multiple records which were withheld pursuant to its claims of exemptions.

First, OPC asserts that “the underlying FOIA request is an attempt to seek more information than is required to be disclosed by law” because Appellant, as a complainant whose complaint has been dismissed “is entitled, under D.C. Official Code § 5-1107(h), to a ‘brief statement of the reasons for dismissal.’” We disagree. D.C. Official Code § 5-1107(h) provides a minimum notice requirement upon an early dismissal of a complaint, but does not clearly exempt other information from disclosure as required under D.C. Official Code § 2-534(a)(6)³ or otherwise set forth a limitation on the obligations of OPC which precludes disclosure under DC FOIA. Moreover, while OPC notes that Appellant made the FOIA Request “in order to ‘learn more from the investigative file about what OPC found in its investigation and the reason her complaint was apparently dismissed at an early stage,’” disclosure is not evaluated based on 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).

Second, OPC asserts that that because its Executive Director is required to be an attorney and the Executive Director employs investigators as agents, both the attorney-client privilege and the attorney work privilege exempt the withheld records from disclosure pursuant to D.C. Official Code § 2-534(a)(4).

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*

³ D.C. Official Code § 2-534(a)(6) exempts “(6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.”

Energy, 617 F.2d 854, 862-863 (D.C. Cir. 1980). The work product privilege is a qualified immunity from discovery for the "work product of the lawyer" recognized in *Hickman v. Taylor*, 329 U.S. 495(1947). *FTC v. Grolier, Inc.*, 462 U.S. 19, 24 (1983). "[I]t is firmly established that there is no privilege at all unless the document was initially prepared in contemplation of litigation, or in the course of preparing for trial. [citation omitted]." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980). In the case of both privileges, an attorney-client relationship must exist. Here, there is none. Pursuant to its statutory authority, the functions of OPC are investigation, conciliation, mediation, and adjudication. See D.C. Official Code § 5-1101 *et seq.* The Executive Director administers the work of the agency and supervises its employees and agents. See D.C. Official Code §§ 5-1106 and 5-1107. OPC does not provide legal services or representation to complainants or police officers.⁴ While D.C. Official Code §§ 5-1106(a) provides that the "Executive Director shall be an attorney who is an active member in good standing of the District of Columbia Bar," this is a qualification for the position, but does not prescribe the function of the position. The function of the Executive Director does not include the provision of legal advice to employees of the agency. In Freedom of Information Act Appeal 2012-05, where the Associate Commissioner for Banking and the Foreclosure Mediation Administrator of the Department of Insurance, Securities, and Banking were licensed attorneys and appended the designation "Esq." after their names, we found that "the fact that an employee possesses a license to practice law does not bestow the attorney-client privilege on his or her communications." In this case as well as Freedom of Information Act Appeal 2012-05, the functions of the employees are administrative, not legal.⁵ Therefore, neither the attorney-client privilege nor the attorney work product privilege applies.⁶

Third, OPC contends that "virtually" its entire investigative file is exempt under D.C. Official Code § 2-534(a)(3)(E) as it would reveal "techniques that are used to gather information." D.C. Official Code § 2-534(a)(3) provides, in pertinent part, an exemption from disclosure for:

(3) Investigatory records compiled for law-enforcement purposes, including . . . investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would:

...

(E) Disclose investigative techniques and procedures not generally known outside the government; . . .

OPC has withheld five records pursuant to this claim of exemption, but has offered little more than a conclusory argument to justify its claim. We have examined the records which were withheld. Based upon such examination, we have been able to discern that the investigative

⁴ Note that the administrative rules governing OPC provide for representation of the parties by other attorneys at the various stages of the administrative process. See DCMR § 6A-2100 *et seq.*

⁵ While OPC does employ staff attorneys, none were involved in this matter.

⁶ In light of this conclusion, it is not necessary to consider the argument of OPC that the records were prepared in anticipation of litigation.

technique which OPC has employed in this case is to contact the complainant and witnesses to obtain their statement of facts, to record those statements in handwritten notes or on forms, and to prepare a summary of the facts based on those activities. This appears to us to be the most basic of investigative techniques. The argument that this involves investigative techniques and procedures not generally known outside the government is without merit.

Fourth, OPC contends as well that “virtually” its entire investigative file is exempt based upon the deliberative process privilege under D.C. Official Code § 2-534(a)(4).

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.

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).

In addition, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, 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).

OPC has withheld seven records pursuant to this claim of exemption, but, as in its assertion regarding investigative services, has offered little more than a conclusory argument to justify its claim (as to one record, it stated that it “reflect[ed] the observations and thoughts of the investigator regarding the interview”). As with that claim, we have examined the records which were withheld. The documents were:

1. “Handwritten OPC Investigator Notes for Interview of Viola Briggs.”
2. “Memorandum of Interview of Complainant Viola P. Briggs.”
3. “IAPro printouts—overview of essential data relating to case.”
4. “Non-finalized dismissal” form from OPC staff to board member recommending dismissal of case.
5. “Memorandum of Investigative Activity.”
6. “Chronology and Review Form—used by investigator to and managers to log tasks and assignments.”
7. “Dismissal Memo.” [Final.]

As explained above, factual material generally does not fall under the deliberative process privilege. The records numbered 1, 2, 3, and 6 consist of factual material. While factual material may be deliberative where the selection of material involves the judgments, observations, and/or expertise of the individual, *see*, e.g., Freedom of Information Act Appeal 2011-19 and Freedom of Information Act Appeal 2012-49, here the material involves the straightforward recording of statements and conditions and of ministerial administrative acts. These documents must be provided.

Under D.C. Official Code § 5-1117, if the Executive Director refers a complaint for investigation, he or she shall assign an investigator to investigate the complaint and the investigator must summarize the results of the investigation in an investigative report. *See* D.C. Official Code § 5-1117(a), (e). After receiving the investigative report and the investigative file, the Executive Director may, among other actions, dismiss the complaint with the concurrence of one of the OPC board members. *See* D.C. Official Code § 5-1117(e).

The records numbered 5, 4, and 7 are the Investigative Report, the Dismissal form with the exception of the signed concurrence of an OPC board member, and the completed Dismissal form, that is, with the signed concurrence of an OPC board member. The Investigative Report

sets forth a summary of relevant facts in support of its requested findings in the matter. It is both predecisional and reflective of the view of the writer, which view is proposed to be adopted. It would arguably fall within the deliberative process privilege.⁷ However, the next two records are essentially the same document at different states. The document is not predecisional or deliberative—it is a form whose purpose is to announce the decision. The form states that “[t]he complaint form and the documents supporting the dismissal are attached.” There are no attachments provided by OPC, but we must presume that both the complaint form and the Investigative Report are two of the attached documents. Thus, as the Investigative Report, together with the “Non-finalized dismissal” form, have been adopted or incorporated in the final decision, the Dismissal, which embodies the final decision, these records are not subject to the deliberative process privilege.⁸ These records shall also be provided to Appellant.

While we are ordering that all of the first eight withheld records, as identified in the Vaughan index to be withheld, should be provided to Appellant, the names and personal information of all witnesses and all investigators and other employees of OPC, other than the Executive Director and the OPC board member, shall be redacted to prevent an unwarranted invasion of privacy under D.C. Official Code § 2-534(a)(3)(C). In addition, the records contain the names or other identifying information of other individuals, which information should be redacted as well, as follows:

1. The names on page 4 of the Handwritten OPC Investigator Notes for Interview of Viola Briggs.

2. The names in paragraph 2 on page 2 of the Statement of Complainant Viola Briggs.

3. The name and apartment number in paragraph 3 of the Memorandum of Interview of Complainant Viola P. Briggs.

The final record which OPC has withheld is the MPD Affidavit in Support of an Application for Search Warrant. In the Vaughan index which it has submitted in its response, OPC claims the record is exempt in its entirety based on D.C. Official Code § 2-534(a)(3)(D)(exempting the disclosure of the identity of a confidential source and the information supplied by the source) and (E)(exempting disclosures which would reveal investigative techniques not generally known outside the government).

First, as to the claim of the exemption from disclosure of the identity of a confidential source and the information supplied by the source, OPC states that the “warrant was based on information received from a confidential informant in the employ of MPD. Even though the informant is

⁷ In this regard, we note that in Freedom of Information Act Appeal 2011-11, MPD released, with redactions, a similar Investigative Report.

⁸ D.C. Official Code § 5-1117 provides that the Executive Director may dismiss the complaint with the concurrence of one OPC board member. It may be argued that the decision, as reflected in the “Non-finalized dismissal” form by the Executive Director, though not final, is not deliberative. It is not necessary to decide this for the purposes of this decision.

identified only by number, the information attributable to the informant could allow someone to discern the informant's identity.”

As was the case with the other records which were withheld, we have examined the Affidavit. It identifies an unnamed person who MPD employed to make a drug purchase. We believe that, based upon statements made on page 3 of the Affidavit in the section with the heading “INVESTIGATION,” it is reasonable to conclude that the individual could be identified from such statements. Accordingly, this portion of the Affidavit shall be redacted. However, the Affidavit does not state that its underlying source of the information was an informant or that the individual employed to make the drug purchase was an informant. This appears to be speculation by OPC. Indeed, to the extent that there is a source of information, it appears that the affiant is the source of the information. Therefore, the entire Affidavit cannot be withheld on this basis.

Second, OPC asserts that the exemption for disclosures which would reveal investigative techniques not generally known outside the government would apply to the balance of the record. “We note that MPD does not publicly disclose its general order regulating the application for search warrants, and so these techniques are not generally known outside the government. Disclosure of the rest of the warrant application would allow these techniques to be gleaned by inference.” Thus, OPC rests its argument on the investigative techniques which would be contained in the applicable general order of the Metropolitan Police Department (“MPD”). However, MPD General Order 702.3 has now been made public as a consequence of an order by the Superior Court of the District of Columbia and is now publicly available. Accordingly, disclosure will not result in the harm claimed by OPC. Nevertheless, we have examined the Affidavit and we find that the affiant does reveal investigative techniques which MPD has employed successfully in the past and which are likely to be successful in the future. Thus, we find that this portion of the Affidavit should be redacted to prevent the disclosure of such techniques. In particular, the third paragraph on page one, including the following two subparagraphs, and all of page two shall be redacted in whole. In addition, the name, title, and service time of the affiant and the name of the reviewing Assistant United States Attorney shall be redacted to prevent an unwarranted invasion of privacy under D.C. Official Code § 2-534(a)(3)(C).⁹ The Affidavit, with these redactions in addition to those set forth in the previous paragraph, shall be provided to the Appellant.

Conclusion

Therefore, the decision, as revised, of OPC is upheld in part and reversed and remanded in part. As set forth above, OPC shall provide the withheld records to Appellant; provided, that:

⁹ Both parties submitted prior decisions of this office. The decision in Freedom of Information Act Appeal 2010-83 was based on the fact that there was a pending law enforcement proceeding. As this is not the case in this matter, that decision is not apposite. Appellant has submitted a decision dated January 8, 2010. As that decision was based on privacy exemptions under DC FOIA and Appellant does not contest the assertion of privacy exemptions by OPC, that decision is inapposite as well.

1. The names and personal information of all witnesses and all investigators and other employees of OPC, other than the Executive Director and the OPC board member, shall be redacted on the first eight records identified in the Vaughan index.

2. The following names or other identifying information shall be redacted:

A. The names on page 4 of the Handwritten OPC Investigator Notes for Interview of Viola Briggs.

B. The names in paragraph 2 on page 2 of the Statement of Complainant Viola Briggs.

C. The name and apartment number in paragraph 3 of the Memorandum of Interview of Complainant Viola P. Briggs.

3. The following portions of the Affidavit shall be redacted:

A. The third paragraph on page one, including the following two subparagraphs, and all of page two.

B. The section with the heading "INVESTIGATION," on page 2, which section consists of two paragraphs of text.

C. The name, title, and service time of the affiant and the name of the reviewing Assistant United States Attorney.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under 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: Nykisha Cleveland, Esq.
Christian J. Klossner