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

Freedom of Information Act Appeal: 2012-58

July 13, 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 11, 2012 (the "Appeal"). You ("Appellant") assert that the Department of Consumer and Regulatory Affairs ("DCRA") improperly withheld records in response to your request for information under DC FOIA, dated April 5, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought records (other than emails) as follows:

> 1. The report or findings issued by the Office of the Zoning Administrator (OZA) that conclude medical marijuana cultivation centers are equivalent to "light manufacturing" or "manufacturing" uses.
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> 2. All documents related to the analysis conducted by the OZA regarding the OZA's determination that medical marijuana cultivation centers are equivalent to "light manufacturing" or "manufacturing" uses.
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> 3. All documents and records relied upon by the OZA in making the determination that medical marijuana cultivation centers are equivalent to "light manufacturing" or "manufacturing" uses.
>
> 4. All documents related to water or electricity usage of medical marijuana cultivation centers.

In response, by email dated April 27, 2012, as supplemented May 11, 2012, DCRA stated that it did not have responsive records for the first, third, and fourth categories other than specified items which were publicly available at the DCRA Permit Center Records Room. With respect to the second category, DCRA identified one record—"handwritten notes from a pre-decisional meeting concerning the appropriate zoning designation for medical marijuana cultivation

centers"--but stated that it was withholding the records pursuant to the deliberative process privilege under D.C. Official Code § 2-534(a)(4).

On Appeal, Appellant challenges the withholding of the handwritten notes. First, while Appellant agreed that "the notes are internal agency memoranda . . . the notes pertained to the implementation of a policy: making zoning determinations, which is a routine function. The notes did not pertain to the creation of a policy, i.e. the creation of zoning laws or regulations governing medical marijuana." Second, even assuming that the notes pertained to the making of policy, "the notes must now be disclosed because the policy has been finalized and implemented: the OZA has made its final zoning determinations for medical marijuana license applications and has issued its official zoning determination letters." Third, Appellant states that DCRA has not adequately explained or justified its claim of exemption for the deliberative process privilege, including the failure to provide the date of the notes which would allow Appellant to assess whether the notes were predecisional. Fourth, Appellant contends that DPR has not considered the possibility of redaction of exempt portions of the emails.

In response to the Appeal, by email dated July 11, 2012, DCRA generally reaffirms its position as to the assertion of the deliberative process privilege. First, it states that the record is predecisional as

> the document at issue concerns policies which are at this time not finalized – policies which will govern the review of applications for Certificates of Occupancy ("C/O") for Medical Marijuana Cultivation Centers and Medical Marijuana Distribution Centers ("Medical Marijuana facilities"), potential issuance of these C/Os, and enforcement procedures and rules for C/Os issued to Medical Marijuana facilities . . .

Moreover, in addition to its statement that a final decision has not been made on these policies, DCRA represents that it has not received an application for a certificate of occupancy. With respect to the allegation of Appellant that "zoning determination letters" have been issued, DCRA states that

> the letters merely respond to preliminary inquiries submitted by potential licensees, submissions required as part of the Department of Health licensing process, and solely indicate whether the location contemplated by the potential applicant may be one for which a C/O could be issued, should one be applied for. The letters do not issue a C/O, or even definitively confirm that a C/O will be issued.

Second, it states that the record is deliberative as

> [t]he document at issue contains items documenting contradictory suggestions for future policy, one potential legislative change (not yet officially proposed, much less adopted), and one request/proposal for possible inter-agency coordination concerning C/O enforcement for these facilities.

Notwithstanding the foregoing, DCRA has revised its position in part by agreeing to provide to Appellant the record with redactions, although such redactions appear to constitute the substantial portion of the record.

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).

This case involves matters involving the licensing with respect to medical marijuana cultivation centers. The arguments which Appellant has set forth with respect to the inapplicability of the deliberative process privilege because this was an "implementation" rather than a "creation" of policy and the requirement to disclose the records "because the policy has been finalized and implemented" were considered and rejected in in Freedom of Information Act Appeal 2012-46, Freedom of Information Act Appeal 2012-47, and/or Freedom of Information Act Appeal 2012-50. As Appellant was the appellant in those appeals, there is no need to repeat the analyses in this decision. Thus, we need only consider whether the record in question here—the handwritten notes—qualify for exemption from disclosure under the deliberative process privilege.

The basic legal principles involved are familiar to the parties and need only be briefly summarized. 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*.

In upholding the assertion of the deliberative process privilege with respect to handwritten

meeting notes made in developing a course of action for the agency, our local federal court stated: "Internal notes to oneself can be just as much part of the deliberative process as discussions, memos and emails with others." *Sierra Club v. U.S. Dept. of Interior*, 384 F. Supp. 2d 1, 24 (D.D.C. 2004). Here, the handwritten meeting notes were made in pursuance of determinations related to the review and issuance of certificates of occupancy (as well as post-issuance enforcement) regarding a first-time establishment of a facility, medical marijuana cultivation centers (and, although it was not part of the FOIA Request, medical marijuana distribution centers). As described by DCRA, the discussion in the meeting reflects the give-and-take which the deliberative process privilege is designed to protect. Moreover, DCRA states that a determination as to its policy has not been made. We find that, as they encompass part of the deliberative process in making such determination, the notes are exempt from disclosure.

Conclusion

Therefore, we uphold the decision, as revised, of DCRA. 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: Hamilton Kuralt