

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

**Freedom of Information Act Appeal: 2012-63**

August 2, 2012

Ms. Leigh A. Slaughter

Dear Ms. Slaughter:

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 July 15, 2012 (the “Appeal”). You, on behalf of the Green House, LLC (“Appellant”), assert that the Department of Health (“DOH”) improperly withheld records in response to your requests for information under DC FOIA, dated April 16, 2012 and renewed on June 14, 2012 (collectively, the “FOIA Request”).

Background

Appellant’s FOIA Request sought the following records:

1. Any and all documents, in whatever form or format, pertaining or related to the provisional score and/or rank of all applications scored for the medical marijuana dispensary registrations pursuant to 22 DCMR C § 540.2, including but not limited to, the “consensus comments” and any other ranking factors used by the review panel that are not required by or reflected in the regulations applicable to the process;
2. Any and all documents, in whatever form or format, that include only the provisional score and/or provisional rank of all applications scored for the medical marijuana cultivation center and dispensary registrations pursuant to 22 DCMR C § 540.2, including but not limited to, the “consensus comments” and any other ranking factors used by the review panel that are not required by or reflected in the regulations applicable to the process.
3. Any and all documents, in whatever form or format, pertaining or relate to the provisional score or rank of all applications scored for the medical marijuana dispensary registrations that were (1) shared with, received from, or scored by, the “representative of the general public (or patient advocate)” member of the six (6) person review panel convened pursuant to, and in accordance with, 22DCMR C § 5402 et seq. or (2) received from, or shared with, any person or entity not considered an agency for purposes of

FOIA, or otherwise considered by the review panel as part of its decision-making process.

4. A copy of each and every document, including all Notice(s) otherwise to amend, alter, or correct, including all “Notice(s) of Opportunity to Correct” in whatever form or format, and as “Notice” is defined or construed pursuant to 22 DCMR C § 5402.2, provided by the Director to applicants that were not provisionally selected for ANC review in the medical marijuana registration application process pursuant to 22 DCMR C § 5402.2.<sup>1</sup>

In response, by email dated May 7, 2012, DOH provided hyperlinks to the location on its website with respect to the fourth category of requested records, but withheld the responsive records with respect to the first three categories of requested records based upon 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). On June 14, 2012, Appellant states that “because the medical marijuana dispensary deliberation process had been completed and successful applicants had been notified,” Appellant renewed the FOIA Request, to which DOH responded as a new request. In response, by email dated July 3, 2012, DOH referenced its prior response with respect to the fourth category of requested records. With respect to the first three categories of requested records, DOH again withheld the responsive records, but this time relied upon the deliberative process privilege in accordance with the decisions of this office in two DC FOIA appeals which considered the same issues.

On Appeal, Appellant challenges the denial of the FOIA Request. First, Appellant contends that “the deliberative process privilege only applies to documents which reveals the deliberative process. . . . Documents which reveal the results of the deliberative process, such as a score and/or rank with no indications of how those scores and ranks were determined, would not fall under the deliberative process privilege, as the privilege is designed to protect the process, not the (provisional) results or decisions of the agency.” Second, Appellant contends that privilege does not apply to documents received from or shared with individuals outside the government and, as a member of the review panel is a member of the public, the privilege does not apply.

In its response, dated July 27, 2012, DOH reaffirmed its position, relying on Freedom of Information Act Appeal 2012-47 and Freedom of Information Act Appeal 2012-53 with respect to the first three categories of requested records and its prior response with respect to the fourth category of requested records.<sup>2</sup>

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<sup>1</sup> Appellant made a fifth request, but the request was one for information, not records, and is not a subject of the Appeal.

<sup>2</sup> Although it discusses other alternative exemptions, it states that these are moot based on Freedom of Information Act Appeal 2012-47 and Freedom of Information Act Appeal 2012-53.

## 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).

As DOH asserts correctly, the issues with respect to the first three categories of requested records were considered and decided in Freedom of Information Act Appeal 2012-47 and Freedom of Information Act Appeal 2012-53 and we adopt the results and reasoning of those decisions for the purpose of this decision. As these decisions were published in the District of Columbia Register on July 27, 2012, and are available on the website of the Office of the Secretary of the District of Columbia, there is no need to re-state our analysis in those decisions here. Appellant should note as significant, as we did there, that, as DOH explained, 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.

Appellant contends that the deliberative process privilege does not apply because such privilege to documents received from or shared with individuals outside the government and a member of the review panel is a member of the public. As a general matter, it is clear that communications with parties outside the government whose consultation has been requested by an agency can qualify as “inter-agency.”

Unquestionably, efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects. Congress apparently did not intend ‘inter-agency’ and ‘intra-agency’ to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process. . . . When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an ‘intra-agency’ memorandum for purposes of determining the applicability of Exemption 5. This common sense interpretation of ‘intra-agency’ to

accommodate the realities of the typical agency deliberative process has been consistently followed by the courts. [footnote omitted].

*Ryan v. Department of Justice*, 617 F.2d 781, 789-790 (D.C. Cir. 1980). In accord, *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011); *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 44 (D.D.C. 2007).

However, in this case, as DOH correctly asserts in its original response, the public member is a member of a government panel officially constituted to conduct government business and the application of the deliberative process privilege is not precluded.

Although it is unclear whether or not Appellant is challenging the response of DOH with respect to the fourth category of requested records, we will address the same. It has been held that an agency was not obligated under FOIA to produce records when the information is publically accessible via its website or the Federal Register. *Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). See also *Crews v. Commissioner*, 85 A.F.T.R.2d 2169, 2000 U.S. Dist. LEXIS 21077 (C.D. Cal. 2000)(production satisfied for documents that are publicly available either in the agency's reading room or on the Internet); Freedom of Information Act Appeal 2011-31. Here, DOH has posted the responsive records online and provided the information necessary to allow Appellant to access such records. Thus, DOH has complied with its obligation under DC FOIA.

In Freedom of Information Act Appeal 2012-47, we ordered DOH to provide to the appellant a redacted sample panel member's score sheet or, in the alternative, a blank score sheet. DOH has attached a redacted sample panel member's score sheet as an exhibit to its response to the Appeal. We presume that DOH will provide this document to Appellant if it has not already done so and without an order.

### Conclusion

Therefore, the decision of DOH is upheld. 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: Phillip L. Husband, Esq.