

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

Freedom of Information Act Appeal: 2012-68

August 8, 2012

Christina L. Anderson, Esq.

Dear Ms. Anderson:

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 20, 2012 (the “Appeal”). You, on behalf of DMS Pharmaceutical Group, Inc. (“Appellant”), assert that the Office of the Chief Financial Officer (“OCFO”) improperly withheld records in response to your request for information under DC FOIA dated June 22, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the following records:

“1. The list of vendors that appeared on the accounts payable list for United Medical Center/Not-For-Profit Hospital at the time of the foreclosure dated July 9, 2010.

2. The list of vendors from the July 12, 2010, testimony of Natwar M. Gandhi, Chief Financial Officer, who stated that ‘it has proven necessary to pay a portion of the \$7 to \$9 million of outstanding accounts payable to certain vendors who continue to provide critical medical supplies and services to the Hospital’, and which appeared in the Public Hearing document on the Not-For-Profit Hospital Corporation before the Committee on Health, dated January 20, 2011 (please attached document for reference).”

In response, by email dated July 16, 2012, OCFO stated that it was withholding all of the responsive records on the basis of the attorney-client privilege and the deliberative process privilege.

On Appeal, Appellant challenges the denial of the FOIA Request. First, Appellant states that it is not requesting any attorney-client communications, but “is requesting documents pursuant to a public hearing be released.” Second, Appellant asserts that the deliberative process privilege does not apply because it “applies to pre-decisional communications. Once the decision has been made and action taken, it becomes a historic matter.”

In response, dated August 6, 2012, OCFO affirmed and amplified its position. First, it states that Dr. Gandhi did not submit a list of vendors with his testimony before the Committee on Health nor did he otherwise submit a list to the Council.

Second, OCFO asserts not only the attorney-client privilege and the deliberative process privilege, but also sets forth circumstances that sound in the attorney client product privilege. In conjunction with the submission of the withheld records for *in camera* review and as a predicate for its legal argument, OCFO explains that the records were created, and continued to be used, by the Office of the Attorney General (“OAG”) to identify all alleged creditors of the former owners of the hospital; to analyze the legal claims of such creditors; to weigh litigation risks related to the denial of claims; to determine the effect of a denial of such claims on availability of critical services or supplies for the hospital operated by the Not-For-Profit Hospital Corporation (“NFPHC”); and to develop settlement strategies or payment plans for creditors whose services or supplies are deemed critically necessary for continuing hospital operations. Consequently, OCFO asserts that the records are exempt from disclosure for the following reasons:

1. The records were “[c]ommunications between OAG and/or NFPCHC lawyers with NPHC or District government employees” which “involve legal opinions and/or preparation for, or defense of litigation by, OAG and NFPCHC lawyers.”

2. “The communications among and between OAG and/or NFPCHC lawyers with NPHC or District government employees relating to these documents are antecedent to adoption of an agency policy and deliberative with respect to the alleged creditors of the UMC. The documents are thus an integral part of a continuing deliberative process . . .”

3. Because of current or threatened litigation, disclosure to potential litigants and waiver of the attorney-client privilege and the deliberative process privilege would be detrimental to such litigation and would not be in the public interest.

In order to clarify the record, OCFO was invited to supplement the response to clarify or address the following: (1) Whether the financial records of NFPHC are agency records of the Office of the Chief Financial Officer under the District of Columbia Freedom of Information Act; and (2) Whether or not it would be difficult to extract the records requested in paragraph 1 of the June 22, 2012 FOIA Request of Appellant from an electronic database of the financial records of NFPHC. As to the first question, OCFO states that “[t]he financial records of the NFPHC are the records of the OCFO.” However, in response to the second question, the OCFO clarified that the data in question was drawn from the records of the former owner of the hospital and not from the records of NFPHC. OCFO states as follows:

The financial records delivered in connection with the FOIA appeal response are the financial records of the former owner of the hospital that is now owned by the District and operated by the NFPHC. After the foreclosure sale on July 9, 2010, the OCFO extracted from the financial records of the former owner, which records were left in the offices of the hospital, data to create the financial records delivered in connection with

the response to the FOIA appeal. The former owner did not leave all of its financial records in the offices of the hospital.

Please note that when the District, as successful bidder at the foreclosure sale, acquired the ownership of the assets of the debtors subject to the lien of the deed of trust, the District did not assume the liabilities of the debtors. Thus, the purpose for creating the financial records that list the alleged payables to vendors of the former owners was not to determine the District's responsibility for payment of the vendors, because no such responsibility exists (DC Superior Court has previously ruled in the District's favor on this issue). The purpose was to identify which vendors provided services and/or goods that were absolutely critically necessary for the continued operation of the hospital. If it was not possible to find alternative vendors for such critically necessary services, OAG would contact these vendors and negotiate financial terms for these vendors to continue providing critically necessary goods and or services for the hospital.

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 FOIA Request had two categories. The second category referred to a list of vendors as identified in testimony presented by Dr. Gandhi to the Council. As set forth above, OCFO states that Dr. Gandhi did not submit a list of vendors with his testimony before the Committee on Health nor did he otherwise submit a list to the Council. Thus, as there is no separate list which was submitted to the Council, that is, to paraphrase Appellant, there are no "documents pursuant to a public hearing," the two categories of the FOIA Request both describe the withheld records.

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 attorney-client privilege and the work product privilege. As set forth above, in its response, OCFO asserts not only the attorney-client privilege and the deliberative process privilege, but also sets forth circumstances that sound in the work product privilege.

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 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).

The circumstances giving rise to the FOIA Request arise out of the acquisition, pursuant to foreclosure, by NFPHC, a District of Columbia instrumentality, of the hospital formerly owned and operated by United Medical Center. OCFO, which, pursuant to section 424 of the District of Columbia Home Rule Act, is responsible for all financial transactions and the maintenance of books and records for the District of Columbia, including instrumentalities, took control of the books and records of NFPHC. As part of the succession pursuant to foreclosure, OCFO came into possession of the certain of the books and records of the former owner. OCFO made available to OAG, the legal and litigation arm of the District government, data from the books and records of the former owner. As set forth in the OCFO response, as supplemented, OAG created the withheld records for, among other reasons, to analyze the legal claims of the creditors of the former hospital; to determine the effect of a denial of such claims on availability of critical services or supplies for the hospital operated by NFPHC; and to develop settlement strategies or payment plans for creditors whose services or supplies were deemed critically necessary for continuing hospital operations. Thus, the records were clearly created by OAG for the purpose of provision of legal advice to NFPHC, the new operator of the hospital, OCFO, which has statutory responsibility for overseeing the financial transactions of NFPHC as operator of the hospital, and other District government employees involved in the acquisition and operation of the hospital. Such legal advice appears to have been reasonably necessary or desirable for making strategic operational decisions. Thus, the creation of the withheld records falls squarely within the ambit of the protection of the attorney-client privilege. In addition, such records were also created to assist in the assessment of litigation risks related to possible litigation arising

from the denial of claims of the creditors of the former owner of the hospital. These records are also exempt from disclosure under the work product privilege. Thus, the decision of OCFO to withhold the records was correct.¹

As we have stated in many decisions, under DC FOIA, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978).

DC FOIA only requires production of records in the possession of an agency. As indicated, an agency is not required to create or maintain records.

It is well established that an agency is not "required to reorganize (its) files in response to (a plaintiff's) request in the form in which it was made," [footnote omitted] and that if an agency has not previously segregated the requested class of records production may be required only "where the agency (can) identify that material with reasonable effort." [footnote omitted].

Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978).

Nonetheless, as we indicated in Freedom of Information Act Appeal 2011-58, in accordance with provisions of the federal FOIA, which we use as a guideline, an agency will be required to extract records from an electronic database in a requested form or format if it is not difficult to do so. Notwithstanding our conclusion above with respect to the existing withheld records, the question is whether, in consideration of this principle, OCFO should be required to furnish the information in the first category of the FOIA Request. While the source of this information is not the books and records of the NFPHC which maintains in the course of the operation of the hospital, but the books and records of the former owner of the hospital, those records are in the possession and control of OCFO and are agency records. Therefore, we must determine whether it would be difficult to extract the information from those records. Although we invited OCFO to address this question, it did not directly do so. We note that except in the smallest of enterprises, modern accounting records are not kept by Bob Cratchit in a green eyeshade making entries in dusty ledgers and journals, but are maintained electronically. Accordingly, in the absence of contrary evidence on the administrative records, we must presume that the records of the former owners of the hospital in the possession of OCFO are in electronic form. Given the nature of such electronic systems and the features of software, in the absence of contrary evidence on the administrative records, we must also presume that it would not be difficult to extract a list of the names of the creditors as of the date of foreclosure. Therefore, OCFO shall provide to Appellant a list of the names of the creditors as of the date of foreclosure. It should be noted that all that is required is a simple list of the names of the creditors and not the more extensive analysis contained in the withheld records.

¹ In light of this conclusion, it is not necessary to analyze the applicability of the deliberative process privilege.

Conclusion

Therefore, the decision of OCFO is upheld in part and reversed and remanded in part. OCFO shall provide to Appellant a list of the names of the creditors as of the date of foreclosure.

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the response of OCFO pursuant to this order.

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: Charles Barbera, Esq.