GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2015-09

November 26, 2014

Charles A. Moran, Esq.

Re: Freedom of Information Act Appeal 2015-09

Dear Mr. Moran:

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 November 3, 2014 (the "Appeal"). You ("Appellant") assert that the District of Columbia Public Schools ("DCPS") improperly withheld records in response to your request for information under DC FOIA dated October 7, 2014 (the "FOIA Request").

Background

Appellant's FOIA Request sought "all settlement agreement offers regarding the Individuals with Disabilities Education Act (20 U.S.C. § 1400, *et seq*.) for the 2012-2013 school year and the 2013-2014 school year that have the District of Columbia Public Schools as the local education agency."[1]

In response, by email dated October 16, 2014, DCPS denied the FOIA Request, stating that the requested records were exempt from disclosure under the deliberative process privilege pursuant to D.C. Official Code § 2-534(a)(4).

On Appeal, Appellant challenges the denial of the FOIA Request. Appellant maintains that the deliberative process privilege does not apply because the FOIA Request does not seek communications "between two or more agencies (inter-agency communications) nor communications within an agency (intra-agency communications)," only communications with individuals outside government agencies, i.e., "a parent or guardian, adult student, special education advocate, or attorney." Appellant states that he "do[es] not seek any inter-agency or intra-agency communications." Appellant indicates that DCPS provided redacted settlement agreements in response to the FOIA request which was the subject of Freedom of Information Act Appeal 2014-109.

[1] Appellant submitted an earlier FOIA request in the same form, which request was the subject of Freedom of Information Act Appeal 2014-109. However, that request was amended to seek only accepted offers of settlement. The FOIA Request states that this subsequent request "is for any settlement offer communicated beyond DCPS, be it to a parent or guardian, adult student, special education advocate, or attorney."

In response, dated November 20, 2014, DCPS affirmed and amplified its position. First, DCPS claims all records are exempt from disclosure under not only the deliberative process privilege, but under the attorney-client privilege and the work product privilege.

> A number of settlement agreements are initiated and negotiated within the Office of the General Counsel or at the direction of a DCPS attorney. Any documents or records of communications created during the settlement negotiations are of a pre-decisional nature, and exempt from release pursuant to the deliberative process privilege. The significant role DCPS attorneys play in the settlement negotiation process would exempt any settlement agreement offers from release under the attorney-client privilege and attorney work-product exemptions accorded under D.C. Official Code §2-534 (a) (4), (e). . . .
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> Although the offer is communicated beyond DCPS, the communications that take place within DCPS to arrive at a proposed offer lie squarely within the realm of deliberative process, as would any documents created therefrom. The only documents that are proper for release are the final, executed settlement agreements.

Second, DCPS asserts that a search for responsive records would be unduly burdensome.

> Settlement offers may be initiated or agreed upon in an email sent by a DCPS employee, in a meeting regarding the student who is the subject of the litigation, or in a phone conversation between DCPS counsel and opposing counsel. Because of the varying nature in which settlement offers are often initiated, it is difficult to fully determine the entire universe of responsive documents without performing an exhaustive search that goes beyond the scope of what is required by the FOIA statute. Also, every written offer is not necessarily communicated to the parent's counsel for a myriad of reasons. The effort required to identify what offers were actually transmitted to a parent or their counsel would be extremely cumbersome and time consuming.

DCPS was invited to supplement the administrative record regarding the approximate number of Individuals with Disabilities Education Act ("IDEA") cases pending during each school year requested and the approximate number of DCPS attorneys assigned to such cases. DCPS indicated that there were approximately 737 IDEA cases pending during the 2012-2013 school year and approximately 638 IDEA cases pending during the 2013-2014 school year. DCPS also indicated that there were 10 attorneys in the Office of the General Counsel of DCPS involved in IDEA cases during each such school year.[2]

[2] According to DCPS, there were 16 attorneys in total in the Office of the General Counsel of DCPS during 2012, 2013, and 2014.

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 issue raised by Appellant is the applicability of the deliberative process privilege as the basis for the withholding of the requested 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 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).

As Appellant argues, the deliberative process privilege does not apply to settlement offers received by the District from, or transmitted by the District to, outside parties. In *M/A-Com Information Systems, Inc. v. United States Dep't of Health & Human Services*, 656 F. Supp. 691 (D.D.C. 1986), our local federal court found that the federal equivalent of D.C. Official Code § 2-534(a)(4) "does not cover papers exchanged between a government agency and an outside adverse party. The exemption by its terms covers only 'inter' or 'intra' agency documents." *Id*. at 692. Likewise, in *Mokhiber v. United States Dep't of the Treasury*, 335 F. Supp. 2d 65 (D.D.C. 2004), the court confirmed its prior ruling that such exemption "only protects those communications that are between or within agencies; therefore, information pertaining to settlement discussions between an agency and a third party are not exempt from disclosure." *Id*. at 72.[3] The FOIA Request specifically excludes any records reflecting intragovernmental or intragovernmental communications. The argument of DCPS that any records created as a result of a deliberative process are exempt from disclosure, even if transmitted outside DCPS or other governmental agencies, is inconsistent with established law regarding the deliberative process privilege.

On Appeal, DCPS raises for the first time the applicability of the attorney-client privilege and the work product privilege. However, the requested records do not fall within the scope of these privileges. The attorney-client privilege applies to confidential communications between clients and their attorneys made for the purpose of securing legal advice or services. "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 does not apply to communications which are made, or revealed to, third parties. The work-product privilege has been developed in federal courts based on the decision in *Hickman v. Taylor*, 329 U.S. 495 (1947) and, simply stated, protects from disclosure materials prepared in anticipation of litigation or for trial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). There is, however, no protection accorded to records which have already been revealed to an adverse party.

DCPS also raises on Appeal for the first time the argument that a search for responsive records would be unduly burdensome.

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

[3] While not a case involving the applicability of the deliberative process privilege, in *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981), the court rejected "the government's invitation to create a broadranging 'settlement exemption'." The court acknowledged that while revealing written settlement communications may impede resolution and termination of disputes, "[n]onetheless the FOIA's legislative history 'emphasize(d)' that the law 'is not a withholding statute but a disclosure statute….' S.Rep. No. 1219, 88th Cong., 2d Sess. 11 (1954)."

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*.

As under federal law, an agency is required to disclose records available only upon a request which reasonably describes the records sought. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *Marks v. United States (Dep't of Justice)*, 578 F.2d 261, 263 (9th Cir. 1978). A description is sufficient if it enables a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort. *Id*. an agency is not required to conduct a search which is unreasonably burdensome. *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990). 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. By contrast, in Freedom of Information Act Appeal 2011-41, where the agency argued that that "[a] working unit in a given agency may contain dozens, and in some cases hundreds of employees over any given period of time," we found that the search was not unreasonably burdensome where the FOIA request required a search of the records of approximately 12 employees for a 4 ½-month period.

In the case of the Appeal, DCPS states that settlements are "initiated and negotiated within the Office of the General Counsel or at the direction of a DCPS attorney." DCPS indicates that there were approximately 737 IDEA cases pending during the 2012-2013 school year and approximately 638 IDEA cases pending during the 2013-2014 school year. Thus, with resolution of pending cases and additional cases filed, there may have been 750 to 800 cases in the Office of the General Counsel of DCPS during the applicable time period of the FOIA Request. This is not an insubstantial number of cases. On the other hand, the caseload and the accompanying records were managed by ten attorneys, which would indicate that the records to be searched are not excessively voluminous. Moreover, as this number remained stable, it would appear that there was little or no turnover and that such attorneys would be available to assist in a search. In resolving any doubts as to the feasibility of conducting a search, we note that DCPS provided records in response to a prior FOIA request for all accepted settlement offers and the records to be searched in response to the FOIA Request would be the same as in the prior request. While the search here may be time-consuming, DCPS has not persuaded this office that it would be unduly burdensome.[4] Accordingly, we are directing DCPS to search for, and provide to Appellant, responsive records.

[4] We also believe that DCPS has overstated the difficulty of identifying responsive records. For instance, if a settlement offer was communicated orally, there would be no record to be provided. Likewise, a written offer not communicated is not a responsive record and we trust that DCPS attorneys maintain records which are adequate to distinguish between draft of a proposed offer and a transmitted offer.

As part of its submission, Appellant has provided a settlement agreement and filings in administrative and judicial proceedings, which documents, pursuant to the prior FOIA request, were redacted for personal identifying information of the individuals involved in the matters. As Appellant has not indicated any objections to such redactions, which apparently were made on the basis of privacy, we will presume that Appellant consents to the redaction of personal identifying information of students and other third parties, including school employees, on the responsive records which DCPS must produce pursuant to this decision.

Conclusion

Therefore, the decision of DCPS is reversed and remanded. DCPS shall produce the requested records to Appellant subject to redaction for personal identifying information of students and other third parties, including school employees.

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: Eboni Govan, Esq.