

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR  
Freedom of Information Act Appeal: 2015-11**

December 19, 2014

BY EMAIL

Robert Green, Esq.

Re: Freedom of Information Act Appeal 2015-11

Dear Mr. Green:

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 26, 2014 (the “Appeal”). You (“Appellant”) assert that the Office of the Attorney General (“OAG”) improperly withheld records in response to your request for information under DC FOIA on October 29, 2014 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records “related to the handling, by the Office of the Attorney General’s Child Support Services Division (CSSD), of the driver’s license suspension processes established by D.C. Code § 46-225.01.” Stating that “many or all of them are subject to mandatory disclosure—even in the absence of a written request for information—pursuant to D.C. Code § 2-536(a),” Appellant requested the following records:

- (1) Any and all administrative staff manuals and instructions to staff concerning CSSD’s handling of driver’s license suspension proceedings;
- (2) Any and all final CSSD opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of driver’s license suspension proceedings; and
- (3) Any and all CSSD statements of policy and interpretations of policy, acts, and rules which have been adopted by CSSD with respect to driver’s license suspension proceedings.

In response, by letter dated November 20, 2014, OAG denied the FOIA Request. OAG stated that the Child Support Services Division (“CSSD”) indicated that there were no responsive records for the second category of the FOIA Request as “CSSD does not issue formal opinions (including concurring and dissenting opinions) or formal orders related to the adjudications of driver’s license suspension proceedings.” OAG also stated that CSSD indicated that there were responsive records for the first and third categories of the FOIA Request, but withheld the records under the attorney-client privilege pursuant to D.C. Official Code § 2-534(a)(4), stating “these records were prepared by CSSD attorneys intended as legal advice to CSSD staff.”

On Appeal, Appellant challenges the denial of the FOIA Request with respect to the responsive records which were withheld. Appellant first notes that his ability to contest the denial is limited as the OAG response “did not describe the materials being withheld or the context in which they were prepared, aside from a blanket statement that ‘these records were prepared by CSSD attorneys intended as legal advice to CSSD staff.’” By footnote to such statement, Appellant also states that while both D.C. Official Code § 2-533 and DCMR § 1-407.2 require that the denial of a FOIA request contains the name of the official or employee who makes the decision, here the response letter “does not indicate whether it was [the OAG FOIA Officer] or some other unnamed CSSD personnel who determined that they are privileged, or whether that person reviewed the materials before making that determination.”

Notwithstanding such limitations, Appellant sets forth two main arguments regarding the inapplicability of the claimed exemption. First, Appellant states that “many or all of the materials likely to have been identified by CSSD as responsive to my request” are public information under D.C. Official Code § 2-536(2) and (4) and do not require a written request thereunder to be disclosed. Second, citing judicial precedent, Appellant states the attorney-client privilege does not apply where “communications effectively constitute the composition of a body of law that binds members of the public.” With more particularity, Appellant argues that “[t]his is manifestly the case where CSSD counsel, through their communications with CSSD personnel, compose the procedural rules by which CSSD hearing officers conduct the driver’s license suspension proceedings commended to that agency by D.C. Code § 46-225.01.” In addition, Appellant states that

any communications in which CSSD personnel solicited advice from agency counsel regarding the handling of particular cases would also fall outside the ambit of attorney-client privilege because the factual information contained in those communications would not have been provided by CSSD—the ‘client’—in the first instance, but by the third party about whom CSSD would be seeking advice.

In response, dated December 18, 2014, OAG reconsidered and revised its position. OAG states that, in its initial response to the FOIA Request, it withheld two records which were responsive to the FOIA Request. The first record is the responsive portion (two pages) of the agency Enforcement Case Flow Cookbook Procedures, which pages “explain[ ] license revocation computer procedures.” The second record is entitled DMV License and Vehicle Registration Revocation, whose stated purpose is to “advise CSSD personnel on the procedures for revoking an obligor’s driver’s license and/or registration for non-payment of child support.” Rather than withholding both records, OAG has indicated that it will release the second record with redactions for “references to CSSD’s proprietary computer system, DCCSES, and codes specific to this system.” OAG cites and quotes a federal case which allowed the “withholding of internal codes for electronic system” based on a finding of “no significant public interest in the disclosure of identifying codes and similar information.” As to the same type of computer procedures which were in the first record, also citing the same case, OAG states that “while DC Code § 2-536(a) requires the release of staff manuals, it only requires release to the extent that it impacts the public. Codes and computer instructions that are only relevant to CSSD’s case

management system do not affect members of the public.” OAG has provided a copy of the unredacted records for confidential review.

### 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).

With the response to the Appeal of OAG, the tenor of this matter has changed. While the initial response to the FOIA Request gave rise to an inference that there were a significant number of records which were being withheld based upon the assertion of the attorney-client privilege, there are, in fact, only two responsive records and the only withholding or redaction involves processing instructions consisting largely of computer instructions.

The crux of the Appeal is the challenge to the withholding of “communications [which] effectively constitute the composition of a body of law that binds members of the public.” Appellant contests essentially the concealment of a “secret body of law.”<sup>1</sup> Here, upon the reconsideration and revision of its position, OAG is disclosing all of the substantive portions of its responsive records, withholding only ministerial processing instructions. Accordingly, we believe that the Appeal is moot.

While D.C. Official Code § 2-536(a)(2) provides for the disclosure of “[a]dministrative staff manuals and instructions to staff that affect a member of the public,” OAG has justified the withholding or redaction based on its contention that such ministerial processing instructions do not affect the public, supported by a finding in *Maydak v. U.S. Department of Justice*, 254 F. Supp. 2d 23 (D.D.C.), that, under a federal exemption for internal practices of an agency which ostensibly applies by analogy, there is “no significant public interest in the disclosure of

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<sup>1</sup> In *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980), the court stated, although in the context of the deliberative process privilege, that agencies “will not be permitted to develop a body of ‘secret law,’ used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege . . .” *Id.* at 867.

identifying codes and similar information.” While the interpretation of the phrase “that affect a member of the public” in D.C. Official Code § 2-536(a)(2) is a matter of first impression in our administrative appeals, we presume that Appellant would acquiesce in this interpretation, especially given the legal argument which Appellant makes. Nevertheless, we note that Appellant has not had an opportunity to address the revised position of OAG as to the withholding/redaction. Accordingly, if Appellant desires to contest the withholding/redaction of such ministerial processing instructions, Appellant may submit a request for reconsideration of this decision as to such issue. If, after receipt of a request for reconsideration, this office finds that such request merits reconsideration, we will provide Appellant with an opportunity to respond before issuing a revised decision.

### Conclusion

Therefore, subject to a request for reconsideration, we will now consider the Appeal to be moot and it is dismissed.

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: Emma Clark  
Ariel Levinson-Waldman, Esq.