

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-21**

March 10, 2015

Mr. Michael Hamilton

RE: FOIA Appeal 2015-21

Dear Mr. Hamilton:

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) (“DC FOIA”) dated February 26, 2015. You assert that the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) improperly withheld records you requested under the DC FOIA.

Background

On January 13, 2015, you submitted a request to DMPED for “The dollar amounts all participants bid to win the rights to develop 965 Florida Avenue NW.” On February 10, 2015, DMPED denied your request, stating that the information “is exempt from disclosure under D.C. Official Code 2-534(a)(1) as it is ‘commercial or financial information obtained from outside the government,’ that, if disclosed would ‘result in substantial harm to the competitive position of the person from whom the information was obtained.’”

On appeal, you challenge DMPED’s denial of your request, contending that “The amounts bid by people or corporations for public lands is a public record, and of interest to the public for the purpose of examining public business deals to see if they are fair or if they are corrupt.”

In a response to your appeal dated March 9, 2015, DMPED reaffirmed its position that the information you seek is valuable and could be used to the advantage of competitors in future procurements. DMPED further explained that the request was denied in full because it asked only for dollar amounts participants bid, therefore “there was no other responsive information from which any exempt information could be redacted and the final record disclosed.”

Discussion

It is the public policy of the District of Columbia 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). That right, however, is subject to various exemptions that 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). As a result, 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).

D.C. Official Code § 2-534(a)(1) exempts from disclosure “Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.” This standard has been “interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury.” *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). *See also, Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989), citing *CNA Financial Corp. v. Donovan*. In construing the second part of this test, “actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply.” *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption “does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would "likely" do so. [citations omitted]”).

The District of Columbia real estate market is highly competitive and contracts to acquire or develop District government property are no exception. Disclosing financial information submitted in a bid would be likely to cause substantial competitive harm by allowing a company's competitors to calculate its future bids and its pricing structure to estimate and undercut bids. *Boeing Co. v. United States Dep't of the Air Force*, 616 F. Supp. 2d 40, 45 (D.D.C. 2009).

In this instance, DMPED did not produce any portion of the bids to develop 965 Florida Avenue, NW because the only information you sought – the dollar amounts participants bid to win development rights of the property – is exempt from disclosure under D.C. Official Code § 2-531(a)(1).

Conclusion

Based on the foregoing, we uphold the decision of DMPED to deny your request on the grounds that the information you seek is exempt from disclosure under the DC FOIA. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the District of Columbia Superior Court in accordance with the DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor's Office of Legal Counsel

cc: Mr. Tsega Bekele, DMPED (via email)