

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL GENERAL COUNSEL  
Freedom of Information Act Appeal: 2015-24**

June 18, 2015

VIA ELECTRONIC MAIL

Mr. Robert Green, Esq.

RE: FOIA Appeal 2015-24

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 (“DC FOIA”). In your appeal, you (“Appellant”) assert that the Office of the Attorney General (“OAG”) improperly withheld records Appellant requested under the DC FOIA.

Background

On October 29, 2014, Appellant sent a FOIA request to Office of the Attorney General Child Support Services Division (“CSSD”) requesting records related to the driver’s license suspension process established by D.C. Official Code § 46-225.01. The CSSD conducted a search that revealed responsive documents to some of the requests, but the CSSD and OAG determined the records exempt from disclosure on the basis of attorney client privilege. The OAG denied the FOIA request in a letter dated November 20, 2014.

Appellant submitted an appeal November 26, 2014, challenging the withholdings. On December 18, 2014, OAG reconsidered and revised its position identifying two documents that were previously withheld: 1) Enforcement Case Flow Cookbook Procedures (“Cookbook”) and 2) DMV License and Vehicle Registration Revocation (“DMV Document”). The OAG withheld the Cookbook in its entirety and produced a redacted, partial copy of the DMV Document. The OAG claimed that the redacted and withheld material for both documents consisted of ministerial processing instructions and computer input instructions. The OAG based its redaction and withholding on a case pertaining to a federal FOIA exception that allowed for withholding of internal codes for electronic systems because there was “no significant public interest in the disclosure of identifying codes and similar information.” *Maydak v. U.S. Dept. of Justice*, 254 F. Supp. 2d 23, 26 (D.D.C. 2003). The finding in *Maydak* was based on a federal FOIA exemption, 5 U.S.C. § 552(b)(2) (“federal Exemption 2”). *Id.*

Based on the revised position of the OAG, on December 19, 2014, the Office of General Counsel to the Mayor (“OGC”), believing Appellant would acquiesce to the records provided, issued a determination dismissing the appeal as moot. FOIA Appeal 2015-11. The determination was expressly subject to a request for reconsideration by Appellant for two reasons. First, the use of

federal Exemption 2 in *Maydak* to shield disclosure under DC FOIA was considered a matter of first impression. Second, Appellant did not have the opportunity to address the OAG's disclosures or revised position.

Appellant submitted a request for reconsideration, on January 15, 2015, challenging the redaction and withholding.<sup>1</sup> Appellant presented arguments that the finding in *Maydak* should not extend to Appellant's DC FOIA request. Appellant stated that not all administrative handling instructions are *per se* internal matters of no genuine public interest citing *Founding Church of Scientology, Inc. v. Smith*, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983). Appellant claimed that the withheld instructions are of public interest and impact members of the public, because the processing instructions involve agencies' interactions with the public and impact the determination of administrative driver's license revocation. Further, Appellant argued that members of the public facing license suspension have a due process interest and an interest in assessing the integrity of the system used to carry out the suspension. Appellant claimed that an understanding of how improper revocations and fines are processed is particularly important. Appellant argued that disclosure of the records entails minimal administrative burden, and the responsive records should be fully disclosed given presumption favoring disclosure for FOIA requests citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-62 (U.S. 1976).

The OAG responded to Appellant's new appeal by affirming its original decision and resubmitting the unredacted materials in dispute for review.

### 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). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989). The Supreme Court has stated affirmatively that the only shelter from federal FOIA's disclosure requirements is the proper assertion of one of the specific and particular legislatively enacted exemptions. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). In FOIA cases, conclusory and generalized allegations of exemptions are acceptable methods of preventing disclosure. *In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

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<sup>1</sup> For the purposes of this determination, the Appellant's challenge will be treated as a new appeal, because the OAG's revised position and partially disclosed records were not available at the time of the original appeal.

The OAG does not state a specific exemption, but argues that the responsive documents are shielded from disclosure because of a lack of public interest in the information. D.C. Official Code § 2-536(a)(2), which states that administrative staff manuals and instructions to staff must be made public, contains the limitation that the information “affect a member of the public.” *Maydak* states that internal codes for electronic systems have “no significant public interest.” *Maydak* at 26, (citing *Lesar v. Dep't of Justice*, 204 U.S. App. D.C. 200, 636 F.2d 472, 485-86 (D.C. Cir. 1980); *Blanton v. United States DOJ*, 63 F. Supp. 2d 35, 43 (D.D.C. 1999); *Albuquerque Publishing Company v. Dep't of Justice*, 726 F. Supp. 851, 854 (D.D.C. 1989)). The OAG contends that the redaction and withholding was proper because material in dispute has no public interest according to *Maydak*; it does not affect a member of the public under D.C. Official Code § 2-536(a)(2); consequently, disclosure is not required.

This argument does not shield the records from disclosure, because D.C. Official Code § 2-536 pertains to information which *must* be made public *without a written request*. Here, Appellant made a written request for the information. Additionally, the finding at issue in *Maydak* is based on federal Exemption 2. Under DC FOIA, there is no directly analogous exemption.<sup>2</sup> Further, the finding in *Maydak* was based on analysis prior to the Supreme Court case that significantly narrowed federal Exemption 2. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1271 (2011). In *Milner*, federal Exemption 2 was limited to internal records relating solely to issues of employee relations and human resources. *Id.* After *Milner*, courts have found that federal Exemption 2 no longer shields internal computer codes from disclosure. *Skinner v. DOJ*, 806 F. Supp. 2d 105, 112 (D.D.C. 2011) (finding that internal computer codes do not relate to human resources or employee relations matters and that circumvention of risk potentially caused by release of such information is not relevant to post-*Milner* analysis of federal Exemption 2); *see also, Raher v. BOP*, 2011 U.S. Dist. LEXIS 56211, at \*6 (D. Or. May 24, 2011).

Under DC FOIA, lack of public interest, by itself, is not an exemption from disclosure. *See* D.C. Official Code § 2-534 *et seq.* The magnitude of public interest is typically only analyzed when necessary to balance against a competing interest for exemption, such as personal privacy. *See FOIA Update*, Vol. X, No. 2, at 7 (“FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking”). Courts have found that there is a public interest in monitoring how an agency implements its statutory responsibilities. *See Cooper Cameron Corp. v. United States Dept. of Labor*, 280 F.3d 539 (5th Cir. 2002); *see also, Schoenman v. FBI*, 763 F. Supp. 2d 173, 200 (D.D.C. 2011). The driver’s license suspension process was established by D.C. Official Code § 46-225.01 and is implemented in coordination with multiple agencies. As argued by Appellant, an understanding of how agencies correct for improper revocations and the associated fines is particularly important for individuals affected by those determinations.

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<sup>2</sup> Federal Exemption 2 prevents disclosure of records that are “related solely to the internal personnel rules and practices of an agency.” The closest exemption is in D.C. Official Code § 2-534(a)(4) (Exemption 4) which prevents “Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body.” Exemption 4 is often labeled the deliberative process or litigation privilege.

As stated by Appellant, another factor that may weight against disclosure is the administrative burden “of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest.” *Rose*, 425 U.S. at 370. Under DC FOIA, it is the public policy of 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. Here, the administrative burden of disclosing the full responsive records is minimal, as the responsive documents have already been assembled. The copy of the records presented for review consists of eight double-sided pages. As the OAG did not raise an applicable exemption under DC FOIA and the administrative burden of disclosure is minimal, the responsive pages of the Cookbook and the full DMV Document should be disclosed without redaction.

### Conclusion

Based on the foregoing, the decision of the OAG is reversed and remanded for disposition in accordance with this decision. The OAG shall provide Appellant an unredacted copy of the responsive pages of the Enforcement Case Flow Cookbook Procedures and the full DMV License and Vehicle Registration Revocation.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s/ Gregory M. Evans

Gregory M. Evans  
Mayor’s Office of Legal Counsel

cc: Emma Clark (via email)  
Robert White