

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-60**

May 8, 2015

VIA ELECTRONIC MAIL

Mr. Josh Israel

RE: FOIA Appeal 2015-60

Dear Mr. Israel:

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

Background

On April 2, 2015, you requested a copy of a 2004 advisory opinion written by former Attorney General of the District of Columbia Robert Spagnoletti to former Mayor Anthony Williams regarding whether legal same-sex marriages from other jurisdictions were recognized in the District of Columbia.

On April 23, 2015, the OAG responded that it had identified two responsive memoranda but that these documents were exempt from disclosure under the deliberative process and attorney-work product privileges incorporated in D.C. Official Code § 2-534(a)(4) and (e).

Subsequently, you appealed the OAG’s denial of your request to the Mayor, contending that the requested document is “an important historic record of the move toward LGBT equality” and that given the passage of time the advisory opinion should be disclosed.

The OAG provided this office with a response to your appeal on April 30, 2015.¹ The OAG stated that the responsive documents are exempt under the deliberative process privilege and the attorney-client privilege and maintained that both privileges “encourage the free flow of information, advice, discussion of various points of view, and an assessment of the risks associated with various government actions. These promote better decision making by the government, and therefore serve the public interest. The fact that eleven years have elapsed since the memoranda were prepared does not provide any basis for deciding otherwise.”

¹ The OAG’s response included copies of the memoranda at issue for *in camera* review, as well as a declaration from Assistant Deputy Attorney General Arthur J. Parker describing the search he conducted to identify responsive documents.

Discussion

It is the public policy of the District of Columbia 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, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a). The right to inspect a public record, however, is subject to statutory exemptions. *See* D.C. Official Code § 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 may be examined to construe the local law.

Your primary challenge of the OAG’s decision is that the memoranda should be released because the documents are more than a decade old, and the reason they were not released when issued has long since become moot. 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.” Further, D.C. Official Code § 2-534(e) provides that the attorney-client privilege is among the privileges incorporated under the inter-agency memoranda exemption of the DC FOIA.

The attorney-client privilege applies to confidential communications from clients to their attorneys made for the purposes 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). Having reviewed the responsive memoranda *in camera*, we conclude that the memoranda were created in the course of the attorney-client relationship between former Attorney General Spagnoletti and former Mayor Williams. The two responsive memoranda that the OAG identified are unequivocally documents generated by an attorney on behalf of a client to provide confidential legal advice. The memoranda contain legal recommendations and advice as to whether a valid, out-of-state same-sex marriage between two parties domiciled in the District should be recognized by the District. In sum, the memoranda contain the type of confidential legal advice the attorney-client privilege is intended to protect.

Although you assert public policy reasons and the passage of time as grounds for the release of the memoranda, these reasons have no bearing on a document protected by the attorney-client privilege. *See Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (“It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client”).

In light of our conclusion that the memoranda in question are protected by the attorney-client privilege, we shall not discuss our analysis of other exemptions asserted by the OAG.²

² Nevertheless, we find that the memoranda were also properly withheld under the attorney work-product and deliberative process privileges, which the OAG asserted at various stages of this matter.

Conclusion

Based on the foregoing, we affirm the OAG's decision and dismiss your appeal.

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 Melissa C. Tucker

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

/s Bijan T. Hughes

Bijan T. Hughes
Legal Fellow
Mayor's Office of Legal Counsel