

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-64**

May 14, 2015

VIA ELECTRONIC MAIL

Courtney French

RE: FOIA Appeal 2015-64

Dear Ms. French:

This letter responds to the administrative appeal you filed with the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA") on behalf of your client, WUSA. In your appeal, you assert that the Department of Corrections ("DOC") improperly withheld records your client requested under DC FOIA.

Background

WUSA sent a FOIA request to the DOC on April 8, 2015, seeking a copy of the report solicited by the DOC's former deputy director in May 2012 from Public Consulting Group, Inc. ("PCG"), which provides an assessment of DOC's correctional healthcare services. The DOC denied WUSA's appeal on April 22, 2015, on the grounds that the document is an inter-agency, pre-decisional evaluative report produced by a consultant to guide the DOC in making decisions on the delivery of healthcare services to inmates in its custody. According to the DOC, the report is exempt from disclosure by the deliberative process privilege and D.C. Official Code § 2-534(a)(4).

On appeal, WUSA contends that the report does not constitute an inter- or intra-agency document under DC FOIA because it was created by a private, non-governmental agency and does not fall under the exemption set forth in D.C. Official Code § 2-534(a)(4). WUSA further argues that even if the report is an inter- or intra-agency record, the DOC is required to release a redacted version that discloses any factual content.

The DOC provided this office with a formal response to your appeal on May 12, 2015, stating that the requested report is an intra-agency record protected by the deliberative process privilege. According to the DOC, it solicited and contracted with PCG, a management consulting firm, to: (1) evaluate DOC's current inmate health services delivery system; (2) compare DOC's system with other jurisdictions in terms of scope and cost of services; and (3) develop new requests for proposals and make recommendations for re-engineering the system where appropriate. To support its position, the DOC also provided this office with a declaration from Deborah J. White, the supervisory contracting officer at the DOC. Ms. White stated that in 2011, the District's Office of Contracting and Procurement published a solicitation for a contractor to evaluate

inmate health services and subsequently awarded the contract to PCG. Ms. White further indicated that “at no time was PCG an interested party seeking benefit relating to health care services to DOC’s inmates, or to any other D.C. government benefit, which is adverse to others seeking that benefit.”

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 exemptions. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act (“FOIA”), and decisions construing the federal statute may be examined to construe the local law. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

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). Privileges in the civil discovery context include the deliberative process privilege. *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). 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 it 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.

In the context of the deliberative process privilege, the D.C. Circuit Court of Appeals has consistently interpreted “intra-agency” as including “agency records containing comments

solicited from non-governmental parties.” *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 680 (D.C. Cir. 2008) (“NIMJ”). As the court held in *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980), “When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5.”¹

The reason courts have found communications with parties outside of the government to qualify as intra-agency communications under the deliberative process privilege is because

[i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

NIMJ, 512 F.3d at 680 (quoting *Ryan*, 617 F.2d at 789-90).

Communications from consultants are not considered intra-agency communications when they are made by an interested party seeking a government benefit. *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001). Here, the DOC has represented that the PCG contracted with the DOC to advise the agency on providing healthcare services for inmates in its custody and that PCG was not an interested party or seeking any D.C. government benefit. Accordingly, we find that the report is an intra-agency record under the DC FOIA.

Having determined that the report at issue is an intra-agency record, we consider whether it is predecisional and deliberative. The DOC provided this office with a copy of the report, which we reviewed *in camera*. Based on the DOC's representations, as well as language in the report, we conclude that the report was predecisional in that it was issued as a result of a contract with PCG to evaluate inmate health services. Significant portions of the report are also clearly deliberative, such as the “Findings and Conclusions” and “Recommendations” sections. Other portions of the report appear to be strictly factual.

Under the FOIA, even when an agency establishes that it has properly withheld a document under an exemption, it must disclose all reasonably segregable, nonexempt portions of the requested documents. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). “To demonstrate that it has disclosed all reasonably segregable material, ‘the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a

¹ Exemption 5 is the exemption in the federal Freedom of Information Act that covers documents privileged in the civil discovery context, including those protected by the deliberative process privilege.

withheld document to which they apply.” *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F. Supp. 2d 106, 120 (D.D.C. 2010)). In *Judicial Watch*, the court held that “[a]lthough purely factual information is generally not protected under the deliberative process privilege, such information can be withheld when ‘the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.’” *Id.* at 28. (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In these instances, factual information is protected when disclosing the information would reveal an agency’s decision-making process in a way that would have a chilling effect on discussion within the agency and inhibit the agency’s ability to perform its functions. *Id.*

Here, the DOC has not demonstrated that it considered whether the factual portions of the PCG report are reasonably segregable or whether they are inextricably intertwined with the deliberative portions. Instead, the DOC appears to claim that the entire report is exempt from disclosure. In accordance with DC FOIA, we direct the DOC to review the report to determine whether portions are segregable.

Conclusion

Based on the foregoing, we affirm the DOC’s decision in part, and remand it in part. We affirm the DOC’s position that the report is a predecisional, intra-agency report protected by the deliberative process privilege. We remand this matter to the DOC in part to disclose, within 5 business days of this decision, nonexempt portions of the report or provide a detailed explanation for non-segregability.

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

cc: Oluwasegun Obebe, Records, Information & Privacy Officer, DOC (via email)