

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-87**

August 26, 2015

Mr. Kirby Vining

RE: FOIA Appeal 2015-87

Dear Mr. Vining:

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”). In your appeal, you assert that the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) improperly withheld records you requested under DC FOIA.

Background

On May 24, 2015, you sent a request to DMPED for 5 records regarding the development of the McMillan Sand Filtration site. At issue in this appeal is the fifth record, an email message that you identified in your request by date and names of sender and recipient. You also requested an attachment to the email message.

On July 24, 2015, DMPED granted in part and denied in part your request for the fifth record. In its response to you, DMPED confirmed the existence of the email and indicated that the email contained two attachments: “1559_001.pdf” (“Attachment 1”) and “McMillan-WSCP – Conservation Summary (Public) June 2013.pdf” (“Attachment 2”). DMPED provided you with Attachment 2 but withheld Attachment 1 as commercial and financial information protected under D.C. Official Code § 2-534(a)(1) (“Exemption 1”).¹ In addition, DMPED withheld the entire email message, asserting that it is a predecisional and deliberative inter-agency communication exempt from disclosure under D.C. Official Code § 2-534(a)(4) (“Exemption 4”).²

On appeal, you challenge DMPD’s withholding of the email and Attachment 1. Regarding the email, you contend that Exemption 4 is not applicable because the sender was not a government employee at the time that the email was sent;³ therefore, the email does not

¹ Exemption 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.”

² Exemption 4 often known as the “deliberative process privilege” or “litigation privilege,” 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.”

³ In your appeal, you assert that the sender was a DMPED employee from July 2012 through

constitute an inter- or intra-agency document under DC FOIA. Citing case law, you assert that DMPED improperly invoked Exemption 4 because it failed to sufficiently describe how the email is predecisional and deliberative. Additionally, you claim that the use of Exemption 4 is improper because DMPED failed to identify the decision or product that the email predated. Regarding Attachment 1, you assert that DMPED improperly invoked Exemption 1 because it did not describe the financial information or provide the source of the information. Additionally, you claim that DMPED did not adequately show that the party who provided the information faced actual competition and that the disclosure of the information would cause substantial competitive injury to prevent disclosure under Exemption 1. With regard to both the email and Attachment 1, you further argue that even if the exemptions to disclosure apply, DMPED is required to release redacted versions of the documents that disclose any segregable information pursuant to D.C. Official Code § 2-534(b).

DMPED provided this office with a memorandum in response to your appeal on August 22, 2015,⁴ reaffirming its decision to withhold the email and Attachment 1 and clarifying the reasons it invoked exemptions under DC FOIA. DMPED confirms that the sender of the email was an employee of DMPED until October 2014 and, consequently, a government employee at the time he sent the email in April 2014. DMPED states that the recipient was also a DMPED employee at the time the email was sent; therefore, the requested email is an intra-agency record protected from disclosure under Exemption 4. DMPED further argues that the use of Exemption 4 is proper because the substance of the email is both predecisional and deliberative. In its memorandum, DMPED describes the email, stating:

. . . [The sender of the email] asks Deputy Mayor Hoskins for input regarding a potential response he would like to give to employees of Wall Street Capital Partners. [The sender] includes his analysis and thoughts regarding what Wall Street Capital Partners had proposed... this Email was sent to aid [the Deputy Mayor] in evaluating and deciding what he wanted to do as they moved forward. A final decision had not yet been made and this issue was just another one of many decisions and choices that would be made during the process of the development of the McMillan Sand Filtration Site.

DMPED claims that the email consists of the thoughts and analysis of its sender, not facts or settled agency policy, and is therefore protected from disclosure under Exemption 4 and associated case law.

DMPED describes Attachment 1 as a 2-page document entitled “McMillan – Washington DC Estimated Net Economic Benefit Analysis” that was provided to the District by Wall Street Capital Partners containing a financial chart and a brief description of assumptions used for the chart. DMPED identifies Wall Street Capital Partners as a company that uses land conservation strategies to offset taxable income and raise capital for development projects. DMPED reasserts

October 2014. The email is dated on April 25, 2014; therefore, based on the dates you provided, the sender was a DMPED employee at the time the email was sent.

⁴ A copy of DMPED’s memorandum is attached.

its position that the document contains commercial and financial information protected from disclosure under Exemption 1. Additionally, DMPED expands its claim under Exemption 1 to include protection of trade secrets. DMPED cites the definition of trade secrets in D.C. Official Code § 36-401(4)⁵ and argues that the information qualifies because it could be used to determine the economic analysis, modelling, and financial projections of Wall Street Capital Partners. DMPED states that “Wall Street Capital Partners is an investment company, it follows that the company faces actual competition from . . . other investment companies vying for funds, opportunities, management fees, and returns.” According to DMPED, disclosure of the information in Attachment 1 would create a substantial likelihood of competitive injury:

Competitors would be able to use this information to tease out the underlying assumptions and modeling Wall Street Capital Partners’ uses and, in turn, use it to their benefit. They could copy the model and offer similar products/services, stealing future clients away from the company. They could use the information as a baseline to then create an improved model they can offer to prospective clients and steal new future business.

DMPED addresses the argument of segregability by asserting that exempt and nonexempt information in the withheld documents are inextricably intertwined. DMPED claims that the email is largely protected by Exemption 4, and necessary redactions would result in minimal information remaining. Regarding Attachment 1, DMPED claims that all of the information in the document is exempt under Exemption 1.

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. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, 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).

Exemption 4 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.

⁵ D.C. Official Code § 36-401(4) defines “Trade Secret” as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (A) Derives actual or potential independent economic value, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtain economic value from its disclosure or use; and (B) is the subject of reasonable efforts to maintain its secrecy.”

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.

While the ability to pinpoint a final decision or policy may bolster the claim that an earlier document is predecisional, courts have found that an agency does not necessarily have to point specifically to an agency’s final decision to demonstrate that a document is predecisional. *See e.g., Gold Anti-Trust Action Comm. Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 136 (D.D.C. 2011) (rejecting plaintiff’s contention that “the Board must identify a specific decision corresponding to each [withheld] communication”); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 26-27 (D.D.C. 2011).

Along with its formal response to your appeal, DMPED provided this office with a copy of the email message and attachments at issue. It is clear from the email that the sender and recipients⁶ were District employees at the time, as their email addresses are District government accounts. Therefore, the email message constitutes an intra-agency record. To qualify for Exemption 4, a communication must be both predecisional and deliberative. Based on DMPED’s representations, as well as language in the email, we conclude that the email is predecisional in that it was sent in an effort to formulate a response from DMPED to Wall Street Capital Partners regarding Wall Street Capital Partners’ proposal for the McMillan site. Significant portions of the email are also clearly deliberative, reflecting the sender’s personal opinions in weighing the pros and cons of the proposal and potential responses. A few sentences in the email, however, are not deliberative in nature.

Under DC 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

⁶ Aside from the recipient you identified in your request, three other District employees were carbon copied on the email.

document. *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 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 email’s two introductory sentences and its concluding sentence establish the deliberative nature of the email but are not deliberative themselves. Consequently, the majority of the email is protected from disclosure under Exemption 4, but the first two sentences and the final sentence of the email are not exempt and should be disclosed under DC FOIA.

To withhold Attachment 1 under Exemption 1, DMPED must show that the information: (1) is a trade secret or commercial or financial information; (2) was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1). The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, “as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms “commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Id.* at 1290.

Exemption 1 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) 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 passage of time can reduce the likelihood of competitive harm. *See Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990) (rejecting competitive harm claim based partly upon fact that documents were as many as twenty years old). *But see Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000) (declaring that “[i]nformation does not become stale merely because it is old”).

Based on DMPED's representations and our *in camera* review of Attachment 1, it is evident that the document contains commercial and financial information provided by a party outside the government. It is also arguable that the information constitutes trade secrets, as DMPED maintains; however, it is not clear that the information falls within the definition of trade secrets for the purposes of DC FOIA. Nonetheless, we find that the attachment contains commercial and financial data sufficient to meet the threshold for protection under Exemption 1. We also agree with DMPED's claim that actual competition exists from other investment companies and that disclosure of the information would allow competitors to copy or underbid Wall Street Capital Partners and take potential clients and business. Therefore, we find that the commercial and financial information in Attachment 1 was properly withheld under Exemption 1.

Regarding the segregability of Attachment 1, we find that the entire document is protected from disclosure under Exemption 1. The numerical values in Attachment 1 are clearly protected information showing Wall Street Capital Partners' commercial and financial valuations. Additionally, the categories and descriptions in the document reveal Wall Street Capital Partners' commercial and financial strategy. This information, if disclosed, could cause substantial competitive harm to Wall Street Capital Partners.

Conclusion

Based on the foregoing, we uphold DMPED's decision in part and remand it in part. Within seven (7) business days from the date of this decision, DMPED shall disclose a redacted version of the email dated in accordance with the guidance provided in this determination.

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 John A. Marsh*

John A. Marsh
Legal Fellow
Mayor's Office of Legal Counsel

cc: Tsega Bekele, DMPED (via email)

*Admitted in Maryland; license pending in the District of Columbia; practicing under the supervision of members of the D.C. Bar