

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-99**

October 9, 2015

VIA ELECTRONIC MAIL

Ms. Jennifer Wedekind

RE: FOIA Appeal 2015-99

Dear Ms. Wedekind:

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 District of Columbia Public Schools (“DCPS”) improperly withheld records you requested under the DC FOIA.

Background

On March 25, 2015, you submitted a request to DCPS containing 11 requests for documents related to the District’s Empowering Males of Color initiative (“EMOC”). In response, DCPS produced over 400 pages of documents, some of which were redacted. DCPS identified but withheld other responsive documents under various FOIA exemptions.

You appealed DCPS’s decision on September 9, 2015, arguing that DCPS had misapplied the FOIA exemptions, and as a result had improperly redacted and withheld documents to which your organization is entitled. Principally, you argue that: (1) DCPS has relied on an excessively broad interpretation of the deliberative process privilege; (2) the vast majority of withheld documents are not predecisional, as they were created after the announcement of the EMOC initiative; and (3) the deliberative process privilege does not apply to documents that solely reflect the implementation of established agency policy.

DCPS provided this Office with a response to your appeal on September 24, 2015. Therein, DCPS reasserted the same exemptions. Additionally, DCPS included a copy of the withheld and redacted documents for this Office’s *in camera* 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 . . .” D.C. Official Code § 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. *See* D.C. Official Code § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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).

The crux of this matter is DCPS's assertion of three privileges encompassed by D.C. Official Code § 2-534(a)(4): the deliberative process privilege, the attorney-client privilege, and the attorney-work product privilege ("Exemption 4"). Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]" 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 an 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).

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 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.*

Along with its formal response to your appeal, DCPS provided this Office with copies of the email messages and documents that it redacted in part or withheld. The following is an analysis of the redacted and withheld documents.

DCPS’s Initial Response to Your FOIA Request

Part 2: “Any records identifying and/or describing existing or planned education programs created or anticipated to receive funding pursuant to the Empowering Males of Color initiative.”

The only document DCPS withheld with respect to Part 2 of your request is a February 25, 2015, memorandum titled “500 for 500: Mentoring through Literacy – Strategy Meeting Follow up & Next Steps.” DCPS withheld this document under the deliberative process privilege. The two-page document is broken into four sections: “Purpose and Background,” “Current Status & Early Implementation Challenges,” “Five Proposed Solutions (and Budgetary Impact),” and “Additional Support Required from Other DCPS Offices.” The first two sections are neither deliberative nor predecisional; rather, they are “communications made after the decision and designed to explain it . . .” *N.L.R.B. v. Sears*, 421 U.S. 132, 152 (1975). These sections do not constitute opinion or debate as to actions to be taken but instead represent a recounting of actions already taken and the current status of an agency’s program. Analysis of ongoing policy is not deliberative. *See Citizens for Responsibility & Ethics v. United States Dep’t of Homeland Sec.*, 514 F. Supp. 2d 36, 46 (D.D.C. 2007). This part of the document must be disclosed.

The other two sections, “Five Proposed Solutions (and Budgetary Impact),” and “Additional Support Required from Other DCPS Offices” are deliberative. They are the type of documents that are “gauging the appropriate response to a specific type of problem . . .” *Citizens for Responsibility & Ethics*, 514 F. Supp. 2d at 45-46. These sections describe possible agency action and the opinion of a specific writer as to how the agency should address problems. As a result, these sections are protected under the deliberative privilege process and may be redacted from the remaining non-exempt portions of the document.

Part 3: “Any records reflecting the eligibility and/or admission criteria for existing or planned education programs created or anticipated to receive funding pursuant to the Empowering Males of

Color initiative. This request includes but is not limited to the following programs: Urban Prep DC, the Proving What's Possible Fund, the five-week Summer Reading Camp and the 500 for 500 Mentoring through Literacy program."

DCPS withheld three documents that are responsive to Part 3 of your FOIA request. One of the documents is the "500 for 500" memorandum, which this decision has already addressed. The other two documents are "RE: Next Steps on PWP: Social Emotional Focus Area" and "Request for Proposals Proving What's Possible Grant." DCPS withheld both of these documents under the deliberative process privilege, asserting they are drafts and therefore protected by the privilege.

The first document, "RE: Next Steps on PWP: Social Emotional Focus Area" is not deliberative. The document consists of two emails from high-ranking DCPS officials, the Director of Psychological Services and the Chief of Staff of the Office of Innovation & Research. The two emails describe actions that these officials have decided will be taken with regard to grants. Generally, intra-agency memoranda or similar communication from subordinates to superiors on an agency ladder are more likely to be deliberative than those flowing in the opposed direction. *Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983); *Coastal States Gas Corp.*, 617 F.2d at 868 ("The identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made."). The emails do not consist of opinion or deliberation as to what an appropriate course of action would be; rather, they are directives. As a result, this document should be released.

The second document, "Request for Proposals Proving What's Possible Grant." DCPS asserts that this document is a draft that has never been finalized. Therefore, the contours of DCPS's RFP may have changed since this document was drafted, and this document may "inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Id.* at 866. Based on the information before us, the document was properly withheld. *But see Coastal States Gas Corp.*, 617 F.2d at 866 ("Finally, even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public."). If this document has been shared with Urban Prep or another non-District entity, the document would lose its protection under the deliberative process privilege. As such should DCPS seek to continue withholding this document from you, it should provide this Office with a declaration or affidavit indicating that: (1) the commitments expressly stated within the document have not been adopted since it was drafted; and (2) no non-District entity, such as Urban Prep, has received a copy of this document, which would mean it is not an interagency record.

Part 4: "Any records related to eligibility, criteria, or guidelines for grants made pursuant to the Proving What's Possible Fund, and any records related to grant applications submitted to or grant awards made from the Proving What's Possible Fund."

The only document DCPS withheld in response to Part 4 of your initial FOIA request is the document titled “Request for Proposals Proving What’s Possible Grant,” which this decision has previously addressed.

Part 5b: “Any records — created, modified or obtained between January 1, 2006 and the present — relating to DCPS’s reasons for authorizing any single-sex education program within DCPS, created or anticipated to receive funding pursuant to the Empowering Males of Color initiative. This request includes but is not limited to: . . . Any records reflecting evaluations of existing or past single-sex education programs in DCPS or elsewhere, including but not limited to evaluations of any school owned or operated by Urban Prep Academies, including any entities owned by, directed by, or otherwise associated with Tim King and/or Urban Prep Academies[.]”

The three documents DCPS withheld under Part 5(b) of your initial FOIA request are entitled “20150219_Urban Prep Budget.xlsx,” “Urban Prep Capital Budget 1pager_TWFeedback.pdf,” and “Urban Prep Dist. Chart Compact Framework.draft.pdf.” The first document, “20150219_Urban Prep Budget.xlsx,” is not an opinion of an individual within DCPS. It appears to be a draft budget of the DC Public Education Fund, a non-governmental entity that has publicly posted its total budget for supporting EMOC.¹ The document bears the sole logo of the DC Public Education Fund, rendering it unclear why DCPS considers it an agency document entitled to protection. In the absence of further context about this document, it should be released.

The “Urban Prep Capital Budget 1pager_TWFeedback.pdf,” is a compilation of factual information and charts about Urban Prep Academies (“Urban Prep”), a nonprofit organization that operates a network of all-male high schools identified by DCPS as a potential EMOC partner. It is unclear who authored this document. Nevertheless, the document does not contain opinion, candor, or analysis. Prevailing case law indicates that purely factual information cannot be withheld under the deliberative process privilege. *Coastal States Gas Corp.*, 617 F.2d at 869. Accordingly, this document is not protected by the deliberative process privilege.

The third document “Urban Prep Dist. Chart Compact Framework.draft.pdf,” appears to have been properly withheld because it is deliberative.² The draft document is a chart that outlines a series of “decision points” and corresponding proposed commitments from DCPS and Urban Prep. DCPS asserts that this document is a draft that has never been finalized. Therefore, the commitments of either DCPS or Urban Prep may have changed since this document was drafted, and this document may “inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that which is as yet only a personal position.” *Id.* at 866. Based on

¹ <http://www.dceducationfund.org/wp-content/uploads/2015/01/Empowering-Males-of-Color1.pdf>

² You have argued that this document, among others, is not pre-decisional because it was created after the announcement of the EMOC initiative. While the decision to create EMOC had been made at the time this document was drafted, the decision as to which charter school would pilot the program and the terms by which it would be done had not yet been made as of the creation of this document.

the information before us, the document was properly withheld. *But see Coastal States Gas Corp.*, 617 F.2d at 866 (“Finally, even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”). If this document has been shared with Urban Prep or another non-District entity, the document would lose its protection under the deliberative process privilege. As such should DCPS seek to continue withholding this document from you, it should provide this Office with a declaration or affidavit indicating that: (1) the commitments expressly stated within the document have not been adopted since it was drafted; and (2) no non-District entity, such as Urban Prep, has received a copy of this document, which would mean it is not an interagency record.

Part 5c: “Any records — created, modified or obtained between January 1, 2006 and the present — relating to DCPS’s reasons for authorizing any single-sex education program within DCPS, created or anticipated to receive funding pursuant to the Empowering Males of Color initiative. This request includes but is not limited to: . . . Any records pertaining to any legal analyses about the constitutionality and/or legality under Title IX, the D.C. Human Rights Act or other applicable law or regulation of any such programs.”

DCPS withheld four documents under Part 5(c) of your initial FOIA request: (1) “Feb 12, 2015 letter to Racine from Chancellor Kaya Henderson,” (“Racine Letter”); (2) “Empowering Males of Color: Frequently Asked Questions (FAQ);” (3) “SUBJECT: Urban Prep Academy Guidance Memo;” and (4) “March draft letter to Cheh.” Unusually, and broadly, DCPS has asserted that the attorney-work product, attorney client, and deliberative process privileges apply to all four of these documents. Each privilege will be analyzed in turn.

The Racine Letter consists of correspondence sent from DCPS Chancellor Henderson – the highest ranking member of DCPS – to Attorney General Karl Racine. That the letter was written by Chancellor Henderson is significant vis a vis the deliberative process privilege, as courts have held that “[t]he identity of the parties to the memorandum is important’ a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.” *Coastal States Gas Corp.*, 617 F.2d at 868. *See also, Citizens for Responsibility & Ethics*, 514 F. Supp. 2d at 46; *Schlefer*, 702 F.2d at 238. Chancellor Henderson writes to Attorney General Racine that the purpose of her letter is to “provide . . . a fuller explanation of our single-gender high school . . . to make [the attorney general] aware of the full range of work we are doing. . . .” Thus, by its own terms, the letter was sent to inform another high ranking government official about agency policy. Further, even if it were deliberative, the letter is filled with pages of purely factual information and graphs that should have been disclosed. Any perceived deliberative material should be redacted.

Notwithstanding DCPS’s assertion, the Racine Letter is not protected by the attorney-client privilege. For this correspondence to be protected by the attorney-client privilege, Chancellor Henderson would have to be soliciting legal counsel or advice from Attorney General Racine. In the Racine Letter, Chancellor Henderson writes to the Attorney General to “provide [him] with the analysis and legal assurances that we will have in place to ensure that all students have access to strong educational opportunities.” At no point in the letter does Henderson solicit legal advice

or counsel from the Attorney General. DCPS asserts in its response to your appeal that the Racine Letter contains legal analysis by DCPS attorneys; yet, there is no such indication in the letter. Moreover, even if attorneys helped Chancellor Henderson draft the letter, the substance of the communication remains unchanged; it is still an explanatory letter without any solicitation of legal counsel.

The attorney work product privilege protects the legal strategies and plans of an attorney made in anticipation of litigation. *E.g. Hickman v. Taylor*, 329 U.S. 495, 513 (1947). In the Racine Letter, Chancellor Henderson explicitly states, “I am not a lawyer[.]” Further, as previously mentioned, there is no indication that the letter was prepared by an attorney or solicits legal advice. As a result, the attorney work product privilege does not apply to the Racine Letter. Having determined that none of the FOIA exemptions DCPS invoked to withhold this letter applies, we conclude that it should be disclosed.

The second withheld responsive document for Part 5(c), the Empowering Males of Color: Frequently Asked Questions (FAQ) draft, is not protected by the attorney-work product privilege. The attorney-work product privilege is designed to protect the mental impressions and strategies of an attorney in preparation for litigation. This document is an FAQ, a document designed to share the thoughts of the agency with the public. It cannot be properly considered a document designed to stay confidential. It is therefore not protected by the attorney work product privilege.

This document is also not protected by the attorney-client privilege, as it is not a communication from a client to a lawyer seeking legal counsel; however, the document is deliberative and predecisional. The seven-page draft is heavily redlined and contains 19 comments from agency employees. Having reviewed the document, we concur that this is the very sort of give and take of the deliberative process that is meant to be protected. While the EMOC program was announced before this document was created, many items in this draft FAQ reveal implementing decisions that had not been fully made at the time the document was written. Further, the item is a draft, and its release may confuse the public as to DCPS’s final, official position. The FAQ does not describe agency action taken but is instead forward looking to action the agency is considering taking in implementing its larger EMOC policy objective. This item was properly withheld, subject to an affidavit or declaration to this Office that no final version was ever created and that this document was never shared with Urban Prep, DC Public Education Fund, or any other non-governmental entity.

The third withheld responsive document for Part 5(c), SUBJECT: Urban Prep Academy Guidance Memo, is protected by the attorney work product privilege and need not be disclosed. Upon review, the document was clearly created in contemplation of and preparation for possible litigation, and is work product which agency attorneys made for their clients. It was therefore properly withheld.

The fourth withheld responsive document for Part 5(c), “March draft letter to Cheh,” is a moot issue. While DCPS claimed in its response to this Office that “[t]here is no final version of that

document,” it appears that a final version of the document was sent on March 30, 2015.³ This Office will therefore not reach the question of whether a communication from the Office of the Attorney General to a legislative branch member, Councilmember Cheh, qualifies as an interagency communication. Moreover, the draft is protected by attorney-work product privilege, as it is filled with comments from agency lawyers in anticipation of litigation.

Part 7: “Any records reflecting the teaching methods or curricula used or proposed to be used in any single-sex education program created or anticipated to receive funding pursuant to the Empowering Males of Color initiative.”

The only document DCPS withheld under Part 7 of your initial FOIA request is the document entitled, “500 for 500,” which this decision previously addressed.

Part 9(a): “Any records in the possession of DCPS related to Urban Prep Academies, including any entities owned by, directed by, or otherwise associated with Tim King and/or Urban Prep Academies. This request includes but is not limited to: Records reflecting graduation rates, suspension rates, expulsion rates, transfer rates and/or drop-out rates at any Urban Prep Academies school[.]”

The only documents DCPS withheld under Part 9 (a) of your initial FOIA request are the documents entitled, “20150219_Urban Prep Budget.xlsx,” “Urban Prep Capital Budget 1pager_TWFeedback.pdf,” and “Urban Prep Dist. Chart Compact Framework.draft.pdf,” which this decision previously addressed.

Part 9(b): “Any records in the possession of DCPS related to Urban Prep Academies, including any entities owned by, directed by, or otherwise associated with Tim King and/or Urban Prep Academies. This request includes but is not limited to: . . . Records reflecting proposals, plans, agreements and/or understandings between DCPS and Tim King, or between DCPS and Urban Prep Academies[.]”

The only document DCPS withheld for Part 9(b) of your request is entitled, “Letter of understanding.” This document is a draft agreement letter between DCPS and Urban Prep Academies, filled with comments by agency lawyers. The document is not protected by the attorney work product privilege because it is a document designed to formalize a relationship and is not made in preparation for litigation. Not every document created by a lawyer is protected by the attorney work product privilege. The comments in the document are, however, protected by the deliberative process privilege, as is the substance of the agreement. The terms of the agreement are in draft form and the obligations of either DCPS or Urban Prep may have changed since this document was drafted. Therefore, this document may “inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Coastal States Gas Corp.*, 617 F.2d at at 866. Based on the information before us, the document was properly withheld. If the commitments of DCPS and Urban Prep have since been integrated into agency policy, the document would have to be disclosed. Similarly, if this document has ever been shared with Urban Prep or any other non-

³ <https://s3.amazonaws.com/s3.documentcloud.org/documents/1698174/minority-school-oag-opinion.pdf>; <http://www.washingtoncitypaper.com/blogs/looselips/2015/03/30/browsers-all-boys-school-plan-gets-attorney-general-approval/>

District entity, the document would lose protection under the deliberative privilege process. As a result, this document shall be withheld, subject to an affidavit from DCPS to this Office that: (1) the commitments expressly stated within this document have not been agreed to since; and (2) neither Urban Prep, nor any other non-executive branch entity, has ever received a copy of this document, which would cause the document to lose the characteristic of being an interagency record.

Part 10: “Any records reflecting the funding structure to be applied to Urban Prep DC, the Proving What’s Possible Fund, the five-week Summer Reading Camp, the 500 for 500 Mentoring through Literacy program, and any other program anticipated to receive funding pursuant to the Empowering Males of Color initiative. This request includes but is not limited to correspondence, exchange of payments, proposals, plans, agreements, and/or understandings between DCPS and the DC Public Education Fund.”

The only document DCPS withheld under Part 10 of your initial FOIA request is the document entitled, “20150219_Urban Prep Budget.xlsx,” which this decision previously addressed.

DCPS’s Supplemental Response to your Initial FOIA Request

Part 3: “The document named ‘Overall EMOC document’ refers to a ‘working group’ which assisted in developing the EMOC initiative. Any documents related to that working group, or created by or in conjunction with that working group would be responsive to our requests, however were not provided. Please advise if this omission was pursuant to a FOIA exemption and if so, which exemption applies. If no exemption applies, please provide all responsive documents.”

This Office has reviewed the 17 documents withheld in the supplemental response to Part 3 of the FOIA request. Of those documents, it is clear that 16 of them are protected by the deliberative process privilege and are not reasonably segregable. These documents consist of meeting agendas of a DCPS working group that met throughout 2014. These documents are interagency records. They were created before the January 21, 2015, announcement of the EMOC program, and are therefore predecisional. Further, they reflect quintessential deliberation, as they contain speculation as to what DCPS needs to do and reveal the decision making process of the agency. These documents do not contain factual information that could be reasonably segregated; the entire document is a record of the decision making process. Therefore DCPS properly withheld 16 of the documents in their entirety.

One of these documents, however, should be redacted and released. The document titled “BEAMS Committee Meeting – May 16, 2014” contains a page and a half of purely factual information. This portion of the document is not an opinion or advice, nor is it a recommendation of future agency decisions. Conversely, the remainder of the document, beginning with “Points to Consider,” is clearly deliberative, as it outlines a series of decision points, with some recommendations, still open to agency action. The document should be redacted and released accordingly.

Part 4: “The document named “Overall EMOC document” refers to an “internal analysis” conducted as part of the development of EMOC. Any documents related to that internal analysis would be

responsive to our requests, however were not provided. Please advise if this omission was pursuant to a FOIA exemption and if so, which exemption applies. If no exemption applies, please provide all responsive documents.”

The only document DCPS withheld in its supplemental response with respect to Part 4 of your request is entitled, “Empowering Males of Color (EMOC): Strategic Plan.” DCPS asserts that this document was properly withheld under the deliberative process privilege. DCPS’s assertion is incorrect; this document is not deliberative. This document is filled with factual information, and is the type of “communications made after the decision and designed to explain it . . .” *N.L.R.B. v. Sears*, 421 U.S. 132, 152 (1975). For example, the document states “The Empowering Males of Color initiative was developed . . .”, “we are working to make sure [EMOC] efforts are aligned, . . .” and “This initiative utilizes . . .” The language of the document demonstrates that it is describing and explaining an already-existing program and is not contemplating or debating the merits of the program. As a result, the document is not protected by the deliberative process privilege and should therefore be disclosed.

Inter-agency Communications Applicable to your FOIA Request in its Entirety

In addition to the analysis above as to whether the withheld documents are deliberative, there remains an open question as to whether the documents may properly be considered inter or intra-agency records. This question remains open because it appears that some of the documents may have been shared with Urban Prep, among other non-governmental entities.

As we explained in DC FOIA Appeal No. 2013-11R, communications with parties outside of the government may still qualify as “inter-agency” communications for the purposes of the deliberative process privilege. *E.g. Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001).

When interpreted in light of its purpose, . . . the language of Exemption [4] clearly embraces this situation. The exemption was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. In 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.

Nat’l Inst. of Military Justice v. U.S. Dep’t of Def., 512 F.3d 677, 680 (D.C. Cir. 2008) (quoting *Ryan v. Department of Justice*, 617 F.2d 781 (D.C.Cir.1980))

Communications from consultants are not considered inter-agency communications when they are made by “an interested party seeking a Government benefit at the expense of other applicants.” *Klamath Water Users Protective Ass’n*, 532 U.S. at 12. Urban Prep is an interested party, seeking to open a new school with new funds in the District to the exclusion of other LEAs. Urban Prep is not the only entity capable of carrying out this program, and as a result

everything it does is in its own best interest. Urban Prep's interests are not perfectly aligned with the government's. Where the government would benefit for expending less for more education services, Urban Prep would benefit from more expenditures for fewer educational services. As a result, all documents shared with Urban Prep would no longer be interagency documents and would no longer be protected by deliberative process privilege. Therefore, for all documents identified as being properly withheld in this decision, DCPS shall in an affidavit or declaration, to this Office, certify that the documents have never been shared with Urban Prep or any other non-government third party.

Emails Redacted and Withheld by DCPS

The email messages that DCPS partially redacted or withheld in response to your FOIA request consist of hundreds of pages. As we have noted in past decisions, an administrative appeal under DC FOIA is a summary process.⁴ It is not possible for us to review and analyze all of the email messages and issue a decision in a timely manner. As a result, we have reviewed approximately fifty email messages to glean the types of electronic communications DCPS redacted or withheld based on the asserted privileges. We shall address some of them in an attempt to provide guidance as to the remainder.

Inter-agency Emails

DCPS withheld or redacted a large number of emails that include communications to individuals and entities that are not affiliated with DCPS or the District government. For the reasons previously explained, none of these individuals or entities qualifies under the third-party consultant exception to the interagency document rule. For example, an email from the DC Trust for Youth to Chancellor Henderson about bringing a program to DCPS to support EMOC and other youth issues in parts of the city would not be privileged. Nor would an email to and from a DCPS official to the White House initiative on Educational Excellence for Hispanics regarding EMOC.

Emails Withheld to Protect Personal Privacy:

The only personally identifiable information in many of these emails appears to be the sender's personal email address. These email addresses should be redacted and the remainder of the messages should be released.

Emails Exchanges Between DCPS Employees that are Neither Deliberative nor Pre-decisional:

A number of the emails DCPS withheld consist of communications between a DCPS employee, such as a teacher, to a DCPS official expressing an interest in working on or shaping the EMOC initiative. The emails were sent after January 21, 2015, when the EMOC initiative was released. Although certain policy aspects of the EMOC initiative had not been finalized as of January 21, 2015, many of the emails we reviewed in this category pertain to EMOC decisions that were finalized at the time the email was sent. Accordingly, the messages cannot be

⁴ See FOIA Appeal 2015-03.

construed as predecisional. The messages are also not deliberative in that the individuals who sent the emails were not attempting to shape policy; they were expressing an interest in participating in the EMOC program. The same can be said of one particular email from a staff member of the Mayor's Office of Community Relations and Services ("MOCRS") who wrote to a DCPS official volunteering to help recruit for a literacy program. The MOCRS has no role in creating policy or strategy for EMOC; it was simply offering assistance in making phone calls.

Some information in the withheld emails is clearly informational as opposed to deliberative (e.g., an email from a DCPS staff member to other DCPS staff saying she was inadvertently copied on a letter to Chancellor Henderson that should have been addressed to someone else.). Another example is an email from one DCPS staff member to another DCPS staff member asking to help the Chancellor prepare for an EMOC presentation she was to give at a Mayor's cabinet meeting. This is not deliberative and there is no back-and-forth; it is merely instructional.

A sample of the withheld emails we reviewed involve EMOC only tangentially and are not protected by any FOIA exemption. For example, an email from a DCPS staff member to a DCPS official telling him she enjoyed listening to a radio interview in which he discussed EMOC. There is no substantive discussion about the initiative or deliberation. Therefore, the message is not exempt from disclosure.

Conclusion

Based on the foregoing, we affirm in part and remand in part this matter to DCPS. DCPS shall, within 10 business days of the date of this decision, redact and release certain documents and provide this Office with the affidavits or declarations described in detail in this decision. DCPS shall also review all redacted and withheld email messages in accordance with the guidance in this decision to determine if they are subject to disclosure.

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

/s/ Ronald R. Ross

Ronald R. Ross
Deputy Director

cc: Eboni J. Govan, Attorney Advisor, DCPS (via email)