

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-22**

January 11, 2016

VIA ELECTRONIC MAIL

Mr. Will Sommer

RE: FOIA Appeal 2016-22

Dear Mr. Sommer:

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 Executive Office of the Mayor (“EOM”) improperly withheld records you requested under the DC FOIA.

Background

On November 12, 2015, you submitted a request to the EOM for “All emails and attachments sent or received by the following EOM accounts: - john.falcicchio@dc.gov, - michael.czin@dc.gov, -latoya.foster@dc.gov, -beverly.perry@dc.gov and all email accounts associated with Muriel Bowser that contain the phrases ‘FreshPAC,’ ‘Soto,’ ‘Horton,’ ‘Binitie,’ ‘Buwa,’ or were received or sent from the following email addresses: - chico@ghajifirm.com, -bsoto@premiumtitlellc.com.”

On December 3, 2015, EOM provided you with 154 unredacted pages and 28 partially redacted pages of documents. EOM withheld 116 pages in their entirety. The 116 withheld pages consist of 34 documents, all of which are email messages or email chains.

Subsequently you appealed to the Mayor, asserting that EOM’s withholding of emails under D.C. Official Code § 2-534(e) was overbroad.¹ You explain that you are unable to offer a more substantial argument because EOM did not provide you with an explanation or *Vaughn* index describing the documents it withheld.

EOM provided this Office with a response to your appeal on January 8, 2016.² EOM’s response included a *Vaughn* index describing the 34 withheld documents. EOM also provided copies of the emails for our *in camera* review. In its response, EOM partly revised its initial position and stated that by January 11, 2016, it would release to you the following documents: 1, 2, 3, 4, 8, 9,

¹ D.C. Official Code § 2-534(e) is not an exemption under DC FOIA itself, but D.C. Official Code § 2-534(e) illustrates some of the exemptions available under D.C. Official Code § 2-534(a)(4).

² A copy of the response and *Vaughn* index EOM provided to this Office are attached for your reference.

13, 14, 21, 22, 23, 24, 26, 30, and 32. EOM defended its withholding of documents: 5, 6, 7, 10, 11, 12, 15, 16, 17, 18, 19, 20, 25, 27, 28, 29, 31, 33, and 34.

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 a public record 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. *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).

D.C. Official Code § 2-534(a)(4) (“Exemption 4”), vests public bodies with discretion to withhold “[i]nter-agency or intra-agency memorandums or letters . . . which would not be available by law to a party other than a public body agency in litigation with the public body.” One of the privileges that falls under the umbrella of Exemption 4 is the deliberative process privilege. *See* D.C. Official Code § 2-534(e).

The deliberative process privilege protects an agency document that is 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 a document 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.

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 opposite 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.”).

When an agency establishes that it has properly withheld a document under an asserted exemption, it must still 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 light of EOM’s revised position that it will release to you documents 1, 2, 3, 4, 8, 9, 13, 14, 21, 22, 23, 24, 26, 30, and 32, we shall limit our analysis to the remaining documents that EOM continues to withhold. Our analysis of these documents corresponds to the *Vaughn* index EOM provided this Office.

Documents 5, 6, 7, and 29

The EOM withheld 4 emails sent between EOM staff discussing the events of a hearing held by the Council of the District of Columbia and debating how the Mayor’s Administration should respond to these events. This is the type of communication which, if released, would chill intra-agency discussion and discourage employees from being frank with their employers. *FOP v. District of Columbia*, 79 A.3d 347, 355 (D.C. 2013) (“In ascertaining whether the documents are deliberative, the ‘key question . . . is whether disclosure of the information would discourage candid discussion within the agency.’ As a rule, to be deliberative, the document must ‘reflect the personal opinions of the writer rather than the policy of the agency.’”). The emails were clearly intended to be deliberative, as evidenced by the fact that they all contain the phrase “Deliberative and Confidential” in their subject line. Although labeling a record “deliberative” or “confidential” does not automatically protect it from disclosure under FOIA, we conclude that documents 5, 6, 7, and 29 were properly withheld under the deliberative process privilege.

Documents 10 and 11

Documents 10 and 11 consist of an email chain that is partially responsive to your request. The portion of the emails that is responsive to your request involves a senior EOM staff member commenting on a news article and directing a subordinate to take certain action. This exchange is not deliberative, as there is no consultation or back-and-forth discussion; rather, the senior official is directing a subordinate to perform a task within the subordinate’s duties. Accordingly, this discussion should be released.

The exchange that occurs at the end of the email chain, which EOM describes as including “discussions among a senior official and several subordinate officials, including an attorney to the senior official,” is not exempt under the deliberative process privilege. Although the exchange is a back-and-forth discussion between EOM staff members, the discussion does not relate to official action, decisions, or policy-making. The discussion also has nothing to do with the portion of the email chain containing one of your search terms and may therefore be withheld on the grounds that it is not responsive to your request.

Documents 12, 15, 16, 17, 18, 27, 31, 33, and 34

The EOM withheld 9 emails related to the drafting of a press release by EOM staff regarding the Mayor’s delegation to China. The email messages in documents 12, 15, 16, 17, 18, 27, and 31 consist of back-and-forth exchanges between EOM staff attempting to refine a document before its public release. Therefore, these emails are intra-agency documents. The emails are also predecisional, in that they constitute the process used to reach a final agency position: the official message the Mayor’s communications director issued to the public. The emails are not reasonably segregable, and releasing any portion of them would reveal EOM’s decision-making process and inhibit its ability to perform its functions.

With respect to Documents 33 and 34, this Office is unable to discern if the draft of the press release discussed in these documents was ultimately deemed the final press release. Document 33 contains an intra-agency discussion of the press release, whereas document 34 contains only text of the press release. Accordingly, EOM should determine if either email contains the version of the Mayor’s press release that was ultimately considered final. If the final version is contained in Documents 33 or 34, the text of the final version should be released.

Documents 19 and 20

Documents 19 and 20 consist of an email chain. The chain begins with exchanges between an EOM staff member and an individual outside of the District government. These communications do not constitute inter or intra-agency documents and are therefore not protected by the deliberative process privilege. With the exception of redacting personally identifying information pursuant to D.C. Official Code § 2-534(a)(2), the content of these exchanges should be disclosed.

The other portion of Documents 19 and 20 involves a conversation solely between EOM staff members discussing their thoughts about an event the Mayor will be attending. These messages were properly withheld under Exemption 4 as deliberative, intra-agency documents.

Documents 25 and 28

Documents 25 and 28 consist of a back-and-forth exchange between two EOM staff members discussing draft talking points for the Mayor. The exchange is clearly intra-agency and pre-decisional, and release of any portion would reveal strategy and deliberation. Accordingly, EOM properly withheld documents 25 and 28 under Exemption 4.

Conclusion

Based on the foregoing, we affirm in part and remand in part EOM's response to your request. EOM shall, within 5 business days of the date of this decision, disclose portions of documents 10, 11, 19, and 20 and review documents 33 and 34 for disclosure in accordance with the guidance in this decision.

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

cc: Jim Slattery, FOIA Officer, EOM (via email)