

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-26**

February 8, 2016

VIA ELECTRONIC MAIL

Mr. Mark Eckenwiler

RE: FOIA Appeal 2016-26

Dear Mr. Eckenwiler:

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 Department of Consumer and Regulatory Affairs (“DCRA”) improperly responded to a request you submitted.

On November 25, 2015, you asked DCRA for records related to a particular address and building permit. DCRA responded on January 6, 2016, providing you with 206 pages of responsive documents. Subsequently you filed an administrative appeal consisting of four issues: (1) one of the 206 pages produced by DCRA was illegible; (2) one document was redacted based on an improper use of D.C. Official Code § 2-534(a)(2) (“Exemption 2”); (3) DCRA unlawfully refused to produce building permit documents that are required to be made available on the internet or by other electronic means under D.C. Official Code § 2-536; and (4) DCRA failed to conduct an adequate search in response to your request. In support of the fourth assertion you provided thirteen examples of partial emails that you claim would have been fully produced if DCRA had conducted an adequate search.

On January 21, 2016, DCRA provided this Office with a response to your appeal.¹ DCRA responded as follows: (1) DCRA acknowledged that the illegible document was mistakenly formatted and created a legible copy of the document; (2) DCRA determined that the use of Exemption 2 was erroneously applied and created an unredacted version of the document in question²; (3) DCRA reasserted its position that the permit file, which is publicly available in its Permit Center Records Room, need not be produced under DC FOIA, and that all the documents relevant to your request are available in the permit file; (4) DCRA asserted that no documents were missing or withheld in their entirety, and that the documents you claim it failed to produce were produced in redacted form pursuant to D.C. Official Code § 2-534(a)(4) (“Exemption 4”).³

¹ A copy of DCRA’s response is attached.

² Your appeal states that you suspect DCRA made an additional unidentified redaction; however, after comparing the original document with the copy DCRA provided you, we did not find unidentified redactions.

³ DCRA cites Exemption 2 in its response but confirmed with this Office that the redactions were made pursuant to Exemption 4. Exemption 4 vests public bodies with discretion to withhold “[i]nter-agency or

DCRA also described the way in which it conducted its search for responsive documents. On February 1, 2016, DCRA provided this Office with copies of the redacted documents that you received and with 9 unredacted files that correspond to some of the documents you allege were inadequately produced.

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 public records is subject to various exemptions that may form the basis for denial of a request. D.C. Official Code § 2-534.

DCRA agreed to remedy the first two issues presented in your appeal by providing you with a legible version of the illegible document at issue and an unredacted version of the document that was redacted pursuant to Exemption 2. Therefore, this decision shall address only the third and fourth issues you raise.

Production of Records Related to Permitting

In accordance with the plain language of D.C. Official Code § 2-536(a)(8A) and (b), building permit files are required to be made available on a District website or “by other electronic means.” Here, DCRA has failed to post permit files onto its agency website. DCRA advised you that the records you are seeking are available in the agency’s Permit Center Records Room; however, we find that DCRA’s lack of compliance with D.C. Official Code § 2-536 constitutes an improper withholding. Because DCRA has demonstrated that it is unable to post permit files on its website, it must provide you with an electronic copy of the file you have requested in order to satisfy its obligations under DC FOIA.

It is our understanding that while this appeal was pending you received a copy of the permit file. Whether the file you received satisfies your FOIA request remains disputed. You assert that you are seeking permit records that exist beyond the contents of the permit file. DCRA claims that all documents related to a permit are contained in the permit file. Therefore, DCRA shall contact you to determine if the documents you received constitute all available responsive documents, and if you require additional documents, DCRA shall provide you them in an electronic format.

Documents Redacted Pursuant to Exemption 4

intra-agency memorandums and letters . . . which would not be available by law to a party other than a public body in litigation with the public body.”

The fourth issue you raise concerns whether DCRA conducted a proper search to respond to your request. To address this allegation, we compared a copy of the documents DCRA provided you with unreacted versions of some of the thirteen emails you listed in your appeal.⁴ We were unable to find evidence of missing documents. Further, DCRA's FOIA officer satisfactorily described the locations and methods involved in his search.⁵ As a result, we find, based on selected emails we were able to review, that DCRA conducted an adequate search.

We also analyzed DCRA's application of Exemption 4 on pages 76, 77, 127, 172, 182, 183, and 184 of the documents you received to determine whether DCRA's redactions were proper.

Exemption 4: Deliberative Process Privilege

To withhold information based on the deliberative process privilege, the information must be contained in an inter- or intra-agency document. Therefore, the deliberative process privilege is typically limited to documents transmitted within or among government agencies. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (U.S. 2001) (noting that the deliberative process privilege may apply when documents provided by outside consultants "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done"). In addition to being contained in an inter- or intra-agency document, the information must also be predecisional and deliberative to qualify for protection under the deliberative process privilege. *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.

Of the documents this Office reviewed, it appears that DCRA invoked the deliberative process privilege on pages 76, 77, and 127. These emails exclusively involve government personnel; therefore, the threshold for protection as inter- or intra-agency documents has been met. To be redacted, the emails must also contain information that is both predecisional and deliberative. None of the emails we reviewed on these pages reflects the give and take process of

⁴ The emails were provided to us in varying formats, and for technical reasons we were unable to view all of them.

⁵ See page 2 of DCRA's response.

deliberation.⁶ Instead, the documents contain informational statements and descriptions of determinations. For example, the email dated November 9, 2015, sent from R. Woodard to F. Gamboa at 1:06 p.m. requests further action based on a prior determination.

Moreover, none of the emails is clearly predecisional. For example, the email dated November 20, 2015, sent from M. LeGrant to M. Bolling at 4:12 p.m. states that a response will be provided later. This statement is not predecisional in itself. If the email contained a draft response for comments and revisions, the communication might qualify as predecisional, but simply stating that a response might be sent later is not protected under the deliberative process privilege. We therefore direct DCRA to review the documents it redacted under the deliberative process privilege of Exemption 4 and release unredacted versions of communications that are not predecisional or deliberative.

Exemption 4: Attorney-Client Privilege

The attorney-client privilege exists to protect open and frank communication between counsel and client. *See Harrison v. BOP*, 681 F. Supp. 2d 76, 82 (D.D.C. 2010). The attorney-client privilege does not protect every communication between counsel and client; it protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” *Mead Data Cent. Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *see also Rein v. U.S. Patent and Trademark Office*, 553 F. 3d 353, 377 (4th Cir. 2009). The privilege also applies to facts divulged by a client to an attorney. *Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010). In addition, it “encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts.” *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

Of the documents this Office reviewed, it appears that DCRA applied the attorney-client privilege on pages 172, 182, 183, and 184. Pages 172 and 184 contain the same email dated November 23, 2015 from M. LeGrant to M. Bolling sent at approximately 5:49 p.m.⁷ One of the recipients of the email on pages 172 and 184 is a DCRA attorney. Although multiple individuals are included in the email, an attorney-client relationship exists between the attorney and agency employees. While the communications on pages 172 and 184 do not expressly request legal advice, it appears that the attorney’s response contains advice on page 183. As a result, most of the back and forth exchange on pages 182 and 183 are protected by the attorney-client privilege of Exemption 4. The only email message that is clearly not protected is the message on page 182 from M. Tondro to M. LeGrant sent on November 24, 2015 at 10:43 a.m. because it involves neither facts nor legal advice. Accordingly, DCRA should review the documents it redacted pursuant to the attorney-client privilege of Exemption 4 and release unredacted versions of those messages that do not solicit or provide legal advice.

Conclusion

⁶ Page 76 contains two redactions made pursuant to Exemption 4. Based on the unredacted documents we received, we were able to review only the second redaction in the email from Woodard to Gamboa sent on November 9, 2015, at 1:06 p.m.

⁷ Page 172 states the time of the email as 5:48:54 p.m., and page 184 states the time as 5:49 p.m.

Based on the foregoing, we remand your request to DCRA. DCRA shall, within 5 business days of the date of this decision: (1) contact you to determine whether you are still seeking an electronic copy of the permit file at issue; and (2) review the documents it redacted pursuant to Exemption 4 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

/s John A. Marsh

John A. Marsh
Legal Fellow

cc: Brandon Bass, FOIA Officer, DCRA (via email)