

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-73**

June 27, 2016

VIA ELECTRONIC MAIL

Ms. Francisca Recio

RE: FOIA Appeal 2016-73

Dear Ms. Recio:

This letter responds to the administrative appeal you submitted 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 pertaining to an injury your son sustained at a DCPS school.

Background

On May 23, 2016, you requested from DCPS all records related to an incident that occurred on May 9, 2016, in which your son was injured at a DCPS school. On June 1, 2016, DCPS responded to your request and provided you with only one document: an incident report from the Office of School Security describing the circumstances surrounding your son’s injury. DCPS acknowledged the existence of additional records responsive to your request but asserted that it was withholding documents pursuant to the deliberative process privilege of D.C. Official Code § 2-534(a)(4)¹ (“Exemption 4”),² and video footage as part of an investigatory record exempt from disclosure under D.C. Official Code § 2-534(a)(3)(C) (“Exemption 3(C”).³ In your appeal you challenge DCPS’s use of both claimed exemptions.⁴ You assert that DCPS did not properly justify its use of Exemption 4, and that Exemption 4 does not specifically

¹ DCPS cites this exemption as D.C. Official Code § 2-534(a)(4)(e), which appears to be a hybrid citation of D.C. Official Code § 2-534(a)(4), which includes the deliberative process privilege and D.C. Official Code § 2-534(e) which states that the deliberative process privilege is included in Exemption 4.

² Exemption 4 allows withholding of “[i]nter-agency or 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.”

³ Exemption 3(C) allows the withholding of “[i]nvestigatory records compiled for law-enforcement purposes ... to the extent that the production of such records would... [c]onstitute an unwarranted invasion of personal privacy.”

⁴ You also assert that DCPS’s response is legally defective for lacking a sufficient explanation of its denial; however, the jurisdiction of this Office is limited to reviewing a District agency’s denial of the right to inspect public records. *See* D.C. Official Code §2-537. Based on the citation

reference the deliberative process privilege. Regarding Exemption 3(C), you assert that the video footage is not an investigatory record because it was not created pursuant to an investigation. You also assert that privacy concerns do not justify withholding the footage because you waive the privacy rights of your son, and the privacy rights of other children in the footage can be preserved by obscuring their images. You also assert that you have a strong personal interest in viewing the footage, as you are the parent of the child whose injury is captured on the recording.

DCPS sent this Office a response to your appeal and a *Vaughn* index, on June 20, 2016.⁵ In its response, DCPS reaffirmed its position to withhold the contested records and provided additional explanation of its application of Exemptions 4 and 3(C). With its response, DCPS provided this Office with 28 pages of documents withheld pursuant to Exemption 4 for our *in camera* review. On June 21, 2016, DCPS submitted to us the video footage withheld pursuant to Exemption 3(C). Regarding the documents withheld pursuant to Exemption 4, DCPS asserts that they constitute a draft of the agency's investigative report, which has not been finalized; therefore, the documents are properly withheld under the deliberative process privilege. As for the video withheld pursuant to Exemption 3(C), DCPS asserts that it is an investigatory record because it is being used in a law enforcement investigation, and because it contains the images of other minor children whose privacy interests should be protected.

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 DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The issues that will be addressed in this decision are the application of Exemptions 4 and 3(C) to the withheld documents and video footage.

The Withheld Documents

DCPS asserts that all 28 pages of documents it withheld are protected under Exemption 4. To be properly withheld under Exemption 4, a record must be contained in an inter- or intra-agency document. Therefore, Exemption 4 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.

you provided, it appears that DCPS's response does meet the minimum requirement under the DC FOIA.

⁵ Copies of DCPS's response and *Vaughn* index are attached.

1, 10-11 (U.S. 2001). One of the litigation privileges that Exemption 4 is commonly invoked to protect is the deliberative process privilege. *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). To qualify for protection under the deliberative process privilege, information must be 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).

DCPS asserts that the 28 pages of the documents withheld here are in draft form and will be used to create the agency’s final investigative report on the incident involving your son. After reviewing the withheld documents, we do not agree with DCPS’s representation. None of the withheld records appears to be a draft version of a document, and the fact that portions of the documents may be used to create a final report does not make the underlying records drafts themselves. We find that the 28 pages include three categories of records: (1) four handwritten, signed statements by individuals who were involved with or responded to the incident in which your son was injured; (2) personnel notices and documents; and (3) emails discussing the incident and its potential ramifications.

The first two categories of records, handwritten statements and personnel documents, are not deliberative; rather, these records express factual statements rather than opinions, proposals, or suggestions. As a result, we find that the deliberative process privilege under Exemption 4 is not applicable to these categories of records. These records, however, were created as a part of DCPS’s investigation of the incident in which your son was injured. As a result, we will analyze these records for protection under Exemption 3(C) at a later point in this decision.⁶

⁶ D.C. Official Code § 2-534(a)(3)(A)(i) which allows an agency to withhold “[i]nvestigatory

Application of Exemption 4 to Emails

The deliberative process privilege is applicable to portions of the third category of records, the emails. Some of the emails, however, are to or from the parents of the injured child; therefore, these emails do not meet the threshold requirement of Exemption 4 of being an inter- or intra-agency document. With respect to withheld emails that exclusively involve District personnel, these emails contain a mixture of information that is and is not protected under Exemption 4. Information that is not protected includes factual statements, descriptions, and determinations. For information to be protected it must be both predecisional and deliberative. For example, statements that a response will be provide later are factual rather than predecisional or deliberative; however, statements that express opinions or propose options for potential responses are protected under the deliberative process privilege. As a result, DCPS must review the documents withheld in their entirety under the deliberative process privilege of Exemption 4 and determine which portions of the emails are both predecisional and deliberative.

Under D.C. Official Code § 2-534(b), even when an agency establishes that an exemption is applicable, 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.*

We glean from our *in camera* review of the withheld documents that DCPS did not consider whether they were reasonably segregable. For example, the email sent on May 19, 2016 at 7:47 a.m. from Ms. Dawn contains two introductory sentences, followed by two sentences of Ms. Dawn’s opinions, and concludes with more factual statements and a request for advice. Only the two sentences involving Ms. Dawn’s opinions are protected under the deliberative process privilege; the remainder of the email is not protected under Exemption 4 and should be disclosed under DC FOIA absent the application of other valid exemptions.

records compiled for law-enforcement purposes ... to the extent that the production of such records would ... [i]nterfere with ... [e]nforcement proceedings” may also apply, but DCPS has not supplied sufficient information regarding its enforcement procedures for us to conduct this analysis.

Application of Exemption 3(C) to Handwritten Statements and Personnel Documents

The purpose of Exemption 3(C) is to protect personal privacy interests.⁷ To qualify for protection under Exemption 3(C), the analysis turns on the existence of a sufficient privacy interest and a balancing of this individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). On the issue of privacy interests, the D.C. Circuit has held:

[I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)⁸. “The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators.”

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (quoting *Bast v. United States Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)).

Here, we find that there is a sufficient privacy interest associated with the investigation into wrongdoing regarding the incident in which your son was injured. An agency is justified in not disclosing documents that allege wrongdoing even if the accused individual was not prosecuted for the wrongdoing, because the agency’s purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *Bast*, 665 F.2d at 1254.

With regard to the second part of the privacy analysis under Exemption 3(C), we examine whether the public interest in disclosure is outweighed by the individual privacy interest at issue. The public interest in the disclosure of a public employee’s disciplinary files was addressed by the court in *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held:

The public's interest in disclosure of personnel files derives from the purpose of the [FOIA]--the preservation of "the citizens' right to be informed about what their government is up to." *Reporters Committee*, 489 U.S. at 773 (internal quotation marks omitted); *see also Ray*, 112 S. Ct. at 549; *Rose*, 425 U.S. at 361. This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that

⁷ Two provisions of DC FOIA provide exemptions relating to personal privacy, Exemption 3(C) and D.C. Official Code § 2-534(a)(2) (“Exemption 2”). While Exemption 2 requires that the invasion of privacy be “clearly unwarranted,” the word “clearly” is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption 2. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

⁸ Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

"reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.

Id. at 1492-93.

We recognize, as you assert on appeal, that you have strong personal interest in understanding the circumstances of your son's injury. Nevertheless, the public interest to be considered in the context of FOIA is whether the information sheds light on an agency's performance of its duties. Here, the information focuses on the alleged misconduct of non-managerial DCPS employees. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) ("In the usual case, we would first have identified the privacy interests at stake and then weighed them against the public interest in disclosure . . . In this case, however, where we find that the request implicates no public interest at all, 'we need not linger over the balance; something . . . outweighs nothing every time.'). *See also, Bartko v. United States Dep't of Justice*, 79 F. Supp. 3d 167, 173 (D.D.C. 2015) ("In an ultimate balancing, something in the privacy bowl outweighs nothing in the public-interest bowl every time."). As a result, the handwritten statements and personnel documents are properly withheld under Exemption 3(C).

Withheld Video Footage

The standard of analysis for Exemption 3(C) as described in the previous section applies here as well. For the video footage, we note that in addition to the privacy interest of certain DCPS staff there is also a privacy interest of the minor children shown in the footage. Regarding the assertion that Exemption 3(C) is not applicable because the video was not originally created for a law enforcement purpose, the Supreme Court has held that information not initially obtained or generated for law enforcement purposes may still qualify if it is subsequently compiled for a valid law enforcement purpose at any time prior to "when the Government invokes the Exemption." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989); *see also Lion Raisins v. USDA*, 354 F.3d 1072, 1082 (9th Cir. 2004) ("Information need not have been originally compiled for law enforcement purposes in order to qualify for the 'law enforcement' exemption, so long as it was compiled for law enforcement at the time the FOIA request was made."); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990).

According to the email exchanges reviewed *in camera*, the video at issue became a part of the investigatory record at least by May 19, 2016; therefore, the video footage was part of the investigatory record before your FOIA request was submitted on May 23, 2016. As a result, Exemption 3(C) provides protection to the video footage.

As previously discussed, D.C. Official Code § 2-534(b) requires an agency to produce reasonably segregable portions of public records after redacting portions that are exempt from disclosure; however, cases have held that records may be withheld in their entirety if an agency

lacks the technological capacity to remove exempt portions of a record.⁹ Additionally, previous District FOIA appeal decisions have held that records may be withheld in their entirety when an agency lacks the technical capacity to redact the record.¹⁰ DCPS did not indicate in its response to your appeal whether it currently has the technical capacity to redact the video recording at issue. If DCPS has this capability, it should disclose to you the video recording of the incident, with redactions made to personally identifiable information (i.e., blurring the images of individuals other than your son). If DCPS lacks the technical capacity to redact the recording, the recording is exempt from disclosure in its entirety pursuant to Exemption 3(C).

⁹ *Milton v. United States DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on “the agency’s current technological capacity” and holding that responsive telephone conversations were not reasonably segregable because an agency did not possess technological capacity to segregate non-exempt portions of requested records); *see also Mingo v. United States DOJ*, 793 F. Supp. 2d. 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because an agency “lacks the technical capability” to segregate information that is digitally recorded); *Antonelli v. BOP*, 591 F. Supp. 2d 15, 27 (D.D.C. 2008) (same); *Swope v. United States DOJ*, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (same).

¹⁰ *See, e.g.*, FOIA Appeal 2010-08 finding OUC lacked the technical capacity to redact audio recordings.

Conclusion

Based on the foregoing, we uphold DCPS's decision in part and remand it in part. Within seven (7) business days from the date of this decision, DCPS shall disclose redacted versions of the email documents in accordance with the guidance provided in this determination. In addition, if DCPS has the technical capacity, it shall disclose appropriately redacted video recordings 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 John A. Marsh

John A. Marsh
Staff Attorney

cc: Eboni Govan, Attorney Advisor/FOIA Officer, DCPS (via email)