

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-84**

July 13, 2016

VIA ELECTRONIC MAIL

Mr. Jose A. Cuesta Leiva

RE: FOIA Appeal 2016-84

Dear Mr. Leiva:

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 Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

You submitted a request to MPD seeking any reports, declarations, and recordings relating to the investigation of the death of your child. MPD partially granted and partially denied your request. For the records MPD withheld, MPD asserted exemptions under DC FOIA related to personal privacy.

You appealed MPD’s denial, contending that you need the records being withheld in order to provide them to the Honduran government to assist in its investigation. Further, you argue that there is an overriding public interest in the release of the records in order to know if “the department has acted improperly (or properly).” On July 7, 2016, MPD sent its response to your appeal to this Office.¹ Therein, MPD reasserted D.C. Official Code §§ 2-534(a)(2), (3)(C) arguing that the release of recorded witness statements would amount to an unwarranted invasion of privacy. MPD also raised D.C. Official Code § 2-534(a)(4) for two groups of records being withheld: one set of records under the deliberative process privilege and one email under the attorney-client privilege.

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

¹ MPD’s response is attached to this decision.

body . . .” *Id.* at § 2-532(a). The right created under DC FOIA to inspect public records 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).

This decision will analyze each of MPD’s asserted exemptions in turn: the privacy exemptions, the attorney-client privilege, and the deliberative process privilege.

Exemptions 2 & 3 - Witness Recordings

The crux of the privacy exemptions is whether the witness recordings you requested are exempt from disclosure under DC FOIA because releasing them would constitute an invasion of privacy.

D.C. Official Code § 2-534(a)(2) (“Exemption 2”) provides an exemption from disclosure for “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). The first part of the analysis determining whether a sufficient privacy interest exists. *Id.*

D.C. Official Code § 2-534(a)(3)(C) (“Exemption 3”) goes further than Exemption 2, and protects from public disclosure information contained in an investigatory file that would constitute an “unwarranted invasion of privacy.” Exemption 3 lacks the key-word “clearly” which Exemption 2 has, and therefore is a broader privacy privilege. Here, the broader standard of Exemption 3 applies because the records being withheld are located in an investigatory file.

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep’t. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Moreover, there is a sufficient privacy interest in recorded witness statements. *See Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990) (finding a “‘strong interest’ of individuals, whether they be suspects, witnesses, or investigators, ‘in not being associated unwarrantedly with alleged criminal activity.’”). As a result, this Office finds that there is a substantial privacy interest in the two video recorded witness statements.

The second part of a privacy analysis examines whether the individual privacy interest is outweighed by the public interest. The Supreme Court has stated that this analysis must be conducted with respect to the central purpose of FOIA, which is

‘to open agency action to the light of public scrutiny.’” *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of ‘full agency disclosure unless

information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Reporters Comm. for Freedom of Press, 489 U.S. at 772-773.

Courts have consistently held that the purpose of FOIA is to inform citizens of "what their government is up to." *Id.* "This inquiry . . . should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld." *Schrecker v. United States Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (internal citations omitted). Information is deemed valuable under FOIA when it would permit public scrutiny of an agency's behavior or performance. *Id.* at 666.

Here, you have argued that release of withheld documents could aid in evaluating whether "the department has acted improperly (or properly)." However, this Office does not find this argument persuasive, as these isolated witnesses' statements would reveal very little into the manner in which MPD conducts itself. As a result, MPD acted properly in withholding these recorded witnesses' statements pursuant to Exemption 3.

Exemption 4 - Attorney-Client Privilege

The next issue in this matter concerns the document MPD is withholding under the attorney-client privilege pursuant to D.C. Official Code § 2-534(a)(4) ("Exemption 4"). Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memorandum[a] 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 attorney-client privilege 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 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 "also 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).

Here, MPD has characterized the withheld document as an “email” that is a “communication between the investigator and an Assistant United States Attorney . . . [in which the] attorney is providing a legal opinion” Upon review, it appears that the document is not in fact an email or a communication to or from an attorney, but is instead an entry made by an investigator in the running resume that memorializes a conversation between an attorney and the investigator.

Here, MPD is the client and the USAO is the lawyer. *See In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998); *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (“In the governmental context, the ‘client’ may be the agency and the attorney may be an agency lawyer.”). The withheld document involves legal advice given by the USAO to the MPD and is therefore protected under the attorney-client privilege pursuant to Exemption 4. This document may be withheld in its entirety, as the legal advice contained within is not reasonably segregable under D.C. Official Code § 2-534(b).

Exemption 4 - Deliberative Process Privilege

The final issue in this matter concerns those documents MPD is withholding under the deliberative process privilege pursuant to Exemption 4. 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).

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.*

Having reviewed the documents being withheld by MPD *in camera*, this Office disagrees with MPD’s assertion that the deliberative process privilege justifies withholding the records in their entirety. There are two categories of documents being withheld under the deliberative process privilege, the running resume and an unapproved investigation report. While both categories of documents are intra-agency communications, and are both arguably predecisional, neither category of documents appears to contain sufficient deliberation. *See FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 818-19 (D.C. 2014) (“The description of the documents as ‘draft calibration and accuracy checklist’ does not ‘pinpoint an [MPD] decision or policy to which these [forms] contributed,’ nor is one able to infer from the Vaughn Index that the forms were part of a consultative process”).

MPD in its response characterized the documents as being such that their release would “hamper discussions between investigators and their superiors for fear that their comments would be released.” However, this Office has been unable to locate any discussion or any comment within the documents; the withheld documents are almost entirely factual narratives without opinion, candor, evaluation, or anything that could be described as “consultative.” *See Abtew v. United States Dep't of Homeland Sec.*, 47 F. Supp. 3d 98, 112 n.14 (D.D.C. 2014) (“The notes a person takes during an interview do not necessarily include the interviewer’s analysis or subjective opinion about the veracity or consistency of what the interviewee is saying. The Assessment, on the other hand, includes that type of subjective analysis, which is why the Court found it protected by the deliberative process privilege.”). Documents that contain no deliberation may not be withheld under the deliberative process privilege.

Moreover, the facts assembled in the withheld documents are not so selective that their release would reveal the decision making process of MPD. *But see ViroPharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193-94 (D.D.C. 2012) (“where factual material is ‘assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action[,]’ the information may be withheld.”). This matter is dissimilar from *Goodrich Corp. v. United States EPA*, in which purely factual material

was withheld because revealing the data would reveal the assumptions of the underlying draft statistical model. 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (“even if the data plugged into the model is itself purely factual, the selection and calibration of data is part of the deliberative process”). It is difficult to see how one could glean MPD’s decision making process from the factual material, in the withheld documents, in the same manner one could derive the draft groundwater flow model at issue in *Goodrich Corp.* The factual material in the withheld documents does not appear to reveal information regarding the decision making process to justify withholding under the deliberative process privilege.

As a result, it was inappropriate for MPD to withhold these documents in their entirety. MPD shall release these documents after making reasonable redactions of personally identifiable information. To the extent that MPD believes portions of these documents to be deliberative, they may redact those portions.

Conclusion

Based on the foregoing, we affirm in part and remand in part MPD’s decision. Records withheld by MPD under Exemptions 3 and the attorney-client privilege are affirmed as exempt from disclosure. MPD shall provide you with the documents withheld in their entirety under the deliberative process privilege, subject to appropriate redaction, within 10 business days of 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 DC FOIA.

Sincerely,

Mayor’s Office of Legal Counsel
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cc: Ronald Harris, Deputy General Counsel, MPD (via email)