

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-18**

February 16, 2017

VIA ELECTRONIC MAIL

Mr. Derek Kravitz

RE: FOIA Appeal 2017-18

Dear Mr. Kravitz:

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 Alcoholic Beverage Regulation Administration ("ABRA") improperly redacted records you requested under the DC FOIA.

Background

On January 21, 2017, on behalf of ProPublica, you submitted a FOIA request to ABRA for records related to the Trump Old Post Office LLC's license applications. On January 30, 2017, and February 2, 2017, ABRA disclosed responsive records. No records were withheld entirely, the records were redacted pursuant to D.C. Official Code §§2-534 (a)(1) ("Exemption 1")¹ and (2) ("Exemption 2").²

On appeal, you acknowledge and accept the redactions ABRA made based on personal privacy interests pursuant to Exemption 2; however, you challenge the redactions ABRA made pursuant to Exemption 1. You assert that, while the Exemption 1 redactions involve commercial or financial information, disclosure would not result in substantial competitive harm, particularly for information related to the percentage of ownership and details of ownership structure. Additionally, you argue that there is a public interest in the records sought; therefore, Exemption 1 should not be used to prevent disclosure.

On February 15, 2017, ABRA provided this Office with a response to your appeal, including four exhibits and a Vaughn index.³ ABRA's response reaffirmed its use of Exemption 1, claiming that: the redacted information is commercial and financial; there is actual competition

¹ Exemption 1 exempts from disclosure "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would results in substantial harm to the competitive position of the person from whom the information was obtained."

² Exemption 2 exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

³ A copy of ABRA's response is attached for your reference.

in the hotel industry in the District; and release of the redacted information has been judicially recognized to result in competitive harm. Specifically, ABRA categorized the information redacted pursuant to Exemption 1 into four types⁴ and provided judicial precedent supporting the redaction of each category in the context of FOIA.

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).

To withhold information under Exemption 1, the information must be: (1) a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1). The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, “as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms “commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Exemption 1 has been “interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury.” *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *see also, Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, “actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply.” *Essex Electro Eng’rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The

⁴ The four types are: (1) Amounts of money spent, amounts of money provided by various sources, and revenue estimates; (2) percentages and amounts of shares owned by each person or entity identified in the documents; (3) organizational information that identifies the lender and amount of interest each entity holds in the business; and (4) contractual terms that may identify ownership shares, profits, internal operations, and other financial information.

exemption “does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would ‘likely’ do so. [citations omitted]”).

Statements of ownership percentages for commercial ventures have been protected under FOIA. *See Nadler v. F.D.I.C.*, 92 F.3d 93, 95, 97 (2d Cir. 1996); *see also, People for Ethical Treatment of Animals v. U.S. Dep't of Agric.*, No. CIV. 03 C 195-SBC, 2005 U.S. Dist. Lexis 10586, at *7 (D.D.C. May 24, 2005) (“insights into the company’s operations, give competitors pricing advantages over the company, or unfairly advantage competitors in future business negotiations.”); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976). (finding that insights into the operational strengths and weaknesses of a business allow others to engage in “[s]elective pricing, market concentration, expansion plans, . . . take-over bids[,] . . . bargain[ing] for higher prices . . . unregulated competitors would not be similarly exposed.”). Additionally, details of an entities organizational structure have been protected in the context of FOIA. *See Prof'l Review Org. of Florida, Inc. v. U.S. Dep't of Health & Human Servs.*, 607 F. Supp. 423, 425 (D.D.C. 1985) (Upholding an agencies decision to withhold an organization structure).

Here, you acknowledge that the challenged redactions involve commercial and financial information; therefore, the threshold for protection under Exemption 1 has been met. Based on ABRA’s representation, we find that actual competition exists in the District’s hotel industry. Finally, we accept ABRA’s representation that disclosure of the commercial and financial information could cause substantial harm by allowing competitors unfair insights regarding the business’s assets and operations. *See* ABRA’s response at 14-16. Specifically, disclosure of the percentage of ownership and details of the ownership structure could allow competitors unfair advantages in future negotiations, pricing advantages, and potential take-over bids. Therefore, we find that ABRA properly redacted commercial and financial information pursuant to Exemption 1.

Conclusion

Based on the foregoing, we affirm ABRA’s 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,

Mayor’s Office of Legal Counsel

cc: Jessie Cornelius, FOIA Officer, ABRA (via email)
Jonathan Berman, Assistant General Counsel, ABRA (via email)