GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-44

April 21, 2017

VIA ELECTRONIC MAIL

Mr. Jarrod Sharp

RE: FOIA Appeal 2017-44

Dear Mr. Sharp:

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

On March 17, 2017, you submitted a FOIA request for "all e-mails sent and or received by MPD employee Mr. Donald Kaufman that include the name 'Jarrod Sharp.'"

On April 3, 2017, your request was granted in part and denied in part by MPD. MPD provided you with 51 pages of records. MPD partially redacted the records pursuant to D.C. Official Code §§ 2-534(a)(2) ("Exemption 2") and (4) ("Exemption 4") to protect personal privacy and deliberative process respectively. MPD also explained that some emails were withheld entirely pursuant to the attorney-client privilege under Exemption 4.

On April 6, 2017, you appealed MPD's denial, stating, "I hereby appeal this unlawful FOIA denial for reasons including but not limited to: (1) lack of adequate and/or comprehensive search; (2) lack of legal authority for denial; (3) improper use of FOIA exemptions; (4) improper use of attorney-client privilege; and (5) improper withholding of relevant public records."

This Office notified MPD of your appeal. MPD's response reaffirmed its decision to deny your FOIA request.[1] Additionally, MPD provided this Office with copy of the responsive records for an *in camera* review.

[1] A copy of MPD's response is attached.

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. Under the DC FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *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).

Adequacy of the Search

One of the primary issues in your appeal is whether MPD conducted an adequate search for the records at issue. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. U.S. Dep't of Justice*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

> 'the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.' [*Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a 'reasonableness test to determine the 'adequacy' of a search methodology, *Weisberg v. United States Dep't of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

To conduct a reasonable and adequate search, an agency must make a reasonable determination as to the locations of records requested and search for the records in those locations. *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). This first step may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.*

Here, the request asked for the emails of a specific MPD employee and that employee conducted an email search of the requested phrase. All responsive records were disclosed except for those withheld pursuant to Exemption 4. On appeal you have not stated any factual basis that additional records may exist or that any known records were absent from MPD's disclosure. As a result, we find that the FOIA officer's search was reasonable and adequate in response to your request.

Application of Exemptions

You also assert without explanation that MPD used exemptions improperly in response to your request. The MPD claims it used Exemption 2 to make redactions to protect personal privacy and Exemption 4 to withhold communications protected by the attorney-client privilege and to redact deliberative communications.

Exemption 2 applies to "[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 unwarranted invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

After reviewing the information redacted pursuant to Exemption 2, we find that there is a personal privacy interest in the information which includes identifying information such as names, phone numbers, email addresses, and personal incident descriptions. You have not asserted any countervailing public interest in disclosure. *See 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, MPD's redaction made pursuant to Exemption 2 was proper. Further, MPD's disclosure is consistent with the requirements of reasonably redacted disclosure found in D.C. Official Code § 2-534 (b)

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 and deliberative process privilege. *See Harrison v. BOP*, 681 F. Supp. 2d 76, 82 (D.D.C. 2010); *see also McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

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 "communications between attorneys that reflect client-supplied information." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

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.

Here, the communications withheld under the attorney-client privilege involve emails among MPD attorneys regarding a legal matter. The redaction made pursuant to the deliberative process privilege discusses a potential resolution to an administrative issue; therefore, it is both predecisional and deliberative. As a result, MPD's withholding made pursuant to the attorney-client privilege and redaction made pursuant to the deliberative process privilege were proper under Exemption 4.

<u>Conclusion</u>

Based on the foregoing, we affirm MPD'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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Ronald Harris, Deputy General Counsel, MPD (via email)