GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-49

April 25, 2017

VIA ELECTRONIC MAIL

Ms. Rachel George

RE: FOIA Appeal 2017-49

Dear Rachel George:

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 challenge the response made by the Office of the Inspector General ("OIG") to a record request you submitted to the OIG under DC FOIA.

Background

On February 15, 2017, you submitted a series of FOIA requests to OIG for records relating to OIG report # 15-I-0068. OIG responded to your request, granting it in part and denying it in part. OIG provided you with responsive documents totaling 27 pages, some of which OIG redacted pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"). Additionally, OIG withheld some responsive records pursuant to D.C. Official Code § 2-534(a)(4).

On April 10, 2017, this Office processed your appeal. In your appeal, you provide biographical information about yourself and your career, and assert that the withheld documents would be personally helpful to you in a forthcoming administrative proceeding.

The OIG responded to your appeal in a letter to this Office in which it reasserted its position that the records were properly redacted and withheld. OIG's response emphasized that while it had redacted the names of individuals, it had left their respective job titles intact as to sufficiently advance the purpose of FOIA. Further, OIG's response explained that the withheld documents were draft policy documents that where both predecisional and deliberative in nature. OIG provided this office with a signed affidavit attesting to the legal positions it asserted in its response.

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, DC FOIA creates the right "to inspect … and … copy any public record of a public body

. . .” *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

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), and 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).

Personal Privacy

One of the issues in your appeal is the redaction of government employee names in parts of the documents provided to you by OIG. D.C. Official Code § 2-534(b) requires that an agency produce “[a]ny reasonably segregable portion of a public record . . . after deletion of those portions” that are exempt from disclosure. Here, OIG has made redactions on the basis of the personal privacy exemption, D.C. Official Code § 2-537 (a)(2), by redacting the names of government employees.

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*.

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.’”) *See also See Banks v. DOJ*, 813 F. Supp. 2d 132, 142 (D.D.C. 2011). Given the case law, this Office finds that there is a substantial privacy interest in the names of government employees in OIG’s report.

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 proffered no overriding public interest in unmasking the names of the government employees in the report – instead you have stated the identities of these officials would be of personal value to you in an administrative proceeding. This Office agrees with OIG. The unredacted job titles allow you to sufficiently analyze agency conduct, and the redaction of personal identities would prevent the potential for unnecessary embarrassment and harassment. As a result, OIG's redactions were proper.

Deliberative Process

OIG withheld two Office of the Attorney General draft documents pursuant to the deliberative process privilege of Exemption 4. The primary purposes of the deliberative process privilege under Exemption 4 are to "assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations …; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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. 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* 617 F.2d at 866. 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*. Documents can be deliberative either by assessing

the merits of a particular viewpoint, or by articulating the process used by the agency to formulate a decision. *Id*. at 867.

> 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. at 866.

The threshold requirement that Exemption 4 applies only to inter- or intra-agency documents is met here because the documents were transmitted from one agency, OAG, to another agency, OIG. OIG notes that the documents are marked as a draft, and that at least one of the documents at the time of transmittal was noted as being under review for final approval. OIG has by signed affidavit attested that: (1) the documents are both predecisional and deliberative; (2) their release could have the effect of preventing open and frank discussion of internal policy matters by OAG; and (3) the release of draft language could cause public confusion if released prior to the final version. *See e.g.*, *Viropharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193-94 (D.D.C. 2012) (deciding what to include in a report would reveal decisions of the drafter); *Hamilton Sec. Group Inc. v. HUD*, 106 F. Supp. 2d 23, 33 (D.D.C. 2000) (protecting facts in a draft report to prevent chilling or future deliberations). This Office accepts OIG's representations and finds that the deliberative process privilege of Exemption 4 applies to the two draft OAG reports. As a result, OIG's withholding of the two documents was proper.

Conclusion

Based on the foregoing, we affirm OIG's decision and hereby dismiss your appeal.

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.

Respectfully,

Mayor's Office of Legal Counsel

cc: Daniel W. Lucas, Inspector General, OIG (via email)