

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

October 30, 2017

VIA ELECTRONIC MAIL

Allison Purmort

RE: FOIA Appeal 2018-015

Dear Ms. Purmort:

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 Office of Contracting and Procurement (“OCP”) improperly withheld records you requested under the DC FOIA.

Background

On September 22, 2017, OCP received your request for records relating to a solicitation for community dining and home-delivered meals.¹ Your request sought six categories of records:

- (1) all proposals submitted by vendors in conjunction with the RFP;
- (2) all pricing pages, attachments, exhibits or additional documents submitted by any vendor relating to the RFP;
- (3) any internal or external correspondence or documentation relating to the RFP that was created or received by any individual employed by or working on behalf of the District of Columbia;
- (4) any scoring sheet or criteria evaluation related to the RFP;
- (5) any protests submitted by any other vendor in conjunction with the RFP; and
- (6) the previous contract and the contract entered into as a result of the RFP.

On October 10, 2017, OCP informed you that portions of your request were denied pursuant to the deliberative process privilege of D.C. Official Code § 2-534(a)(4) (“Exemption 4”).

On October 16, 2017, you appealed OCP’s denial. On appeal you assert that the deliberative process privilege of Exemption 4 is inapplicable to most of the records you seek because the records were submitted to OCP by vendors. Further, you claim that the vendors cannot qualify

¹ You initially filed your request with the DC Office on Aging, and OCP’s receipt of your request was delayed by complications from transferring the request.

for the consultant corollary exception to Exemption 4, because they are competing for a contract and representing their own interests. Therefore, you claim that the documents cannot be withheld pursuant to the deliberative process privilege of Exemption 4 because they do not meet the threshold requirement of inter-agency or intra-agency documents.

This Office notified OCP of your appeal on the same day it was received. On October 23, 2017, OCP provided you with a supplemental response to your request. On October 24, 2017, OCP provided this Office with a response to your appeal.² In its response, OCP included a chart describing the status of each category of your request. OCP Response at 2.³ OCP clarified that some of the records you seek have been provided to you or will be provided pending payment of fees. OCP reasserted its position that some of the records were withheld pursuant to Exemption 4.⁴ OCP further asserted that some of the responsive records were also withheld pursuant to D.C. Official Code § 2-534(a)(1) (“Exemption 1”). OCP also cited District regulations which prohibit the disclosure of certain categories of bidding information prior to the award of a contract. Finally, OCP indicated that it does not maintain documents responsive to the fifth category of your request, as those documents would be maintained by the Contract Appeals Board.⁵

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, *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).

Exemption 4

Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in

² OCP’s response is attached.

³ We accept OCP’s representation that only the first four categories of your request remain at issue on appeal.

⁴ OCP mistakenly cites case law construing federal FOIA’s Exemption 4 in support of DC FOIA’s Exemption 4. *See* OCP Response at 4-5. However, federal FOIA’s Exemption 4 is analogous to DC FOIA’s Exemption 1, so the case law remains relevant.

⁵ 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).

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). As a result, Exemption 4 encompasses multiple privileges. Here, the two relevant privileges are the deliberative process privilege⁶ and the commercial information privilege.⁷

OCP has invoked the deliberative process privilege of Exemption 4 for the third and fourth categories of your request. 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 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.

Here, the third category of your request seeks any internal correspondence discussing the bidding process. This information is clearly predecisional because the correspondence occurred before the contract award. Any correspondence evaluating the competing bids would also be deliberative, reflecting the opinions of OCP’s employees in an effort to reach a decision on the contract award. Similarly, the fourth category of your request seeking OCP’s scoring and evaluations before the contract award are both predecisional and deliberative as premature disclosure would risk inaccurately reflecting the views of the agency.

The fourth category of records is also likely protected by the commercial information privilege of Exemption 4. The Supreme Court has held that there is a limited privilege for confidential commercial information for an agency *before it completes the process of awarding a contract* to avoid placing an agency at a competitive disadvantage or endanger consummation of a contract. *See Federal Open Market Committee*, 443 U.S. at 357-60.

Disclosure of information regarding OCP’s scoring and evaluations before the contract award would risk placing the District at a competitive disadvantage in the contract bidding process, because a competitor could modify their bid to exploit the District’s position. As a result, we find

⁶ *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

⁷ *See Federal Open Market Committee v. Merrill*, 443 U.S. 340, 359-60 (1979).

that OCP properly withheld records responsive to the third and fourth categories pursuant to Exemption 4.

Similarly, disclosure of the information responsive to the first and second categories of your request pertaining to proposals, pricing, and documents submitted by vendors could place the District at a competitive disadvantage and interfere with the integrity of the still ongoing contracting process. Further, the information responsive to the first and second categories of your request appears to fall squarely within the protection of Exemption 1.

Exemption 1

Exemption 1 protects information that: (1) is a trade secret or commercial or financial information; (2) 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 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]”).

Here, the first and second categories of your request seek competitive bidding information from vendors. As a result, commercial competition clearly exists. Further, disclosure of the information could harm the vendors by informing competitors of their strengths and weaknesses, allowing for selective pricing, and unfairly influence bidding negotiations. *See People for Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 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”). Therefore, records responsive to the first and second categories of your request were properly withheld pursuant to Exemption 1.

Conclusion

Based on the foregoing, we affirm OCP's decision, and your appeal is hereby dismissed. 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: Ryan Koslosky, Associate General Counsel, OCP (via email)