

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



Mayor's Office of Legal Counsel

November 9, 2017

VIA ELECTRONIC MAIL

Natasha Rodriguez

RE: FOIA Appeal 2018-023

Dear Ms. Rodriguez:

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 Department of Energy and Environment (“DOEE”) improperly withheld records you requested under the DC FOIA.

Background

On July 28, 2017, you submitted a request to DOEE for emails responsive to a set of search terms.¹ DOEE responded to your request on or around October 13, 2017.² DOEE’s response indicated that its search retrieved 102 emails responsive to your request. DOEE asserted that it completely redacted the content of 100 of the 102 emails pursuant to the deliberative process privilege of D.C. Official Code § 2-534(a)(4) (“Exemption 4”). Most of the content of the remaining two emails was disclosed.

On October 26, 2017, you appealed DOEE’s application of Exemption 4. On appeal, you assert that several of the emails redacted by DOEE were fully disclosed by the Department of Health (“DOH”) in response to another FOIA request; therefore, DOEE should not be able to redact them. Further, you claim that the protection of Exemption 4 is not applicable because the content is not sufficiently deliberative.³

¹ This request was the subject of your previous FOIA Appeal 2017-162, based on DOEE’s failure to respond to your request. FOIA Appeal 2017-162 was remanded to DOEE instructing the agency to respond to your request. The current appeal is based on withholdings and redactions in DOEE’s substantive response to your request.

² This Office only received DOEE’s response to your request as it was included in your appeal.

³ In your appeal, you also make arguments applicable to the attorney-client privilege, which is also encompassed by Exemption 4; however, it does not appear that DOEE has invoked the attorney-client privilege, and as a result this decision will not address those arguments.

This Office notified DOEE of your appeal on the same day it was received. After we repeatedly reminded the agency to provide a response, on November 8, 2017, DOEE requested an extension until November 13, 2017, to respond to your appeal. In accordance with 1 DCMR § 412.7, DOEE's request for an extension was denied because it was beyond the deadline for a decision, and it is possible for us to reach a determination on the existing record.

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

DOEE has invoked the deliberative process privilege of Exemption 4 to redact a vast majority of the emails responsive to 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, it appears that the redacted emails meet the threshold requirement of being inter-agency or intra-agency documents as internal correspondence between DOEE and DOH. It is unclear if the redacted information is predecisional because DOEE's response to your request does not adequately describe the deliberative process involved and the role of the emails in the course of that process. *See Coastal States Gas Corp.*, 617 F.2d at 686; *see also Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991). It is also unclear that DOEE's limited explanation, describing that the emails involve DOEE and DOH discussing production of records,⁴ describes the type of decision process where premature disclosure would risk inaccurately reflecting the views of the agency. As a result, DOEE has not sufficiently established that the redacted information should be protected under Exemption 4.⁵

Additionally, if DOH has fully disclosed the same emails redacted by DOEE, such disclosure suggests that the emails may not be subject to the protection of Exemption 4. Unless DOH's disclosure was inadvertent and accidental, disclosure of the emails to a third party would also mean that they were no longer inter-agency or intra-agency documents, removing the threshold requirement for protection under Exemption 4.

Conclusion

Based on the foregoing, we remand DOEE's decision. Within 10 business days from the date of this decision, DOEE shall review the redacted emails and disclose to you nonexempt portions of those records or issue to you a new letter clarifying its justification for its redactions. This constitutes the final decision of this Office. You may assert any challenge, by separate appeal, to the substantive response that the DOEE sends you.

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: Norah Hazelton, Program Support Assistant, DOEE (via email)

⁴ We note that under D.C. Official Code § 2-502(18), it is not relevant which agency it primarily responsible for a contract; an agency is required to disclose materials that it retains.

⁵ We are unable to determine whether or not the redacted information is deliberative, because it was not provided for an *in camera* review.