

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



Mayor's Office of Legal Counsel

November 21, 2017

VIA ELECTRONIC MAIL

Mr. Andrew Medici

RE: FOIA Appeal 2018-30

Dear Mr. Medici:

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 the Mayor for Planning and Economic Development (“DMPED”) improperly redacted records you requested under the DC FOIA.

Background

On September 22, 2017, you submitted a FOIA request to DMPED for records related to the grant agreement between the District and 1776, a startup incubator. On October 19, 2017, DMPED disclosed responsive records with redactions having been made to certain commercial and financial information pursuant to D.C. Official Code §§2-534 (a)(1) (“Exemption 1”).¹

On appeal, you accept the scope of DMPED’s disclosure but challenge the redactions. You assert that disclosure of the commercial and financial information would not cause harm because the company later changed its structure and ownership. Additionally, you assert that the grant agreement 1776 signed states that documentation it submits to the District will be subject to FOIA.² Finally, you argue that the records should be disclosed because the District granted funds to 1776 and has maintained an ongoing relationship with the company.

This Office contacted DMPED on November 6, 2017, and notified the agency of your appeal.³ On November 21, 2017, DMPED provided this Office with a response to your appeal, including copies of the disputed records and a Vaughn index.⁴ After reviewing its application of Exemption

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 You did not include a copy of the grant agreement with your appeal. We note that documents subject to FOIA may still be protected in whole or in part by FOIA exemptions.

³ DMPED requested and was granted an extension to respond to the appeal.

⁴ A copy of DMPED’s response and Vaughn index are attached.

1, DMPED decided to fully disclose some of the previously redacted records. DMPED reaffirmed its use of Exemption 1 for portions of three annual reports and a vendor payment enrollment form. DMPED asserted that: (1) the redactions involve commercial and financial information; (2) there is actual competition in field of startup incubation and shared office space; and (3) release of the redacted information would likely result in competitive harm. DMPED asserted that releasing the redacted information in the annual reports could allow competitors to undercut the companies pricing and replicate its business model. Finally, DMPED stated that the redacted information payment enrollment form contains banking and routing information that if disclosed could expose 1776 to fraud.

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 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]”).

Commercial pricing information has been protected under FOIA. *See 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.”).

Here, you allege that the information should not be redacted because it does not involve trade secrets; however, commercial and financial information is also protected under Exemption 1. After reviewing the records *in camera*, we find that the redactions clearly involve commercial and financial information. Based on DMPED’s representation, we find that actual competition exists for startup incubation and shared office space. Finally, we accept DMPED’s representation that disclosure of the commercial and financial information could cause substantial harm by allowing competitors unfair insights regarding the business’s pricing and operations. Specifically, disclosure of confidential membership discounts and effective pricing would likely allow competitors to undercut the company’s service charges and replicate its business model. Therefore, we find that DMPED properly redacted commercial and financial information pursuant to Exemption 1.

Conclusion

Based on the foregoing, we affirm DMPED’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: Molly Hofsommer, FOIA Officer, DMPED (via email)