

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel

January 2, 2018

VIA ELECTRONIC MAIL

Mr. P.J. Goel

RE: FOIA Appeal 2018-55

Dear Mr. Goel:

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 Department of General Service's ("DGS") response to your request under the DC FOIA.

Background

On December 14, 2017, you submitted a FOIA request to DGS for records pertaining to "Section 1.4, 2.6, and 3.5." of a "Bidder/Offeror Certification Form" for a specified pricing proposal. These sections ask:

(Section 1.4) If your company, its principles, shareholders, directors, or employees own an interest or have a position in another entity in the same or similar line of business as the Bidder/Offeror, please describe the affiliation in detail.

(Section 2.6) Has any current or former owner, partner, director, principal or any person in a position involved in the administration of funds or currently or formerly having the authority to sign, execute or approve bids, proposals, contracts or supporting documentation on behalf of the Bidder/Offeror with any entity: Been suspended, cancelled, terminated or found non-responsible on any government contract, or had a surety called upon to complete an awarded contract.

(Section 3.5) Has the bidder been disqualified or proposed for disqualification on any government permit or license?

On December 15, 2017, DGS withheld the responsive information pursuant to D.C. Official Code §2-534 (a)(1) ("Exemption 1").¹

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."

On appeal, you assert that Section 8 of the form required the bidder to identify whether the bidder believed its responses to other sections of the form were exempt under DC FOIA. You further argue that DGS should disclose the form if the bidder answered that it did not believe the answers to the form were exempt from DC FOIA. Additionally, you argue that some of the information you seek, relating to company ownership, is a matter of public record and should not be withheld. To support this argument, you attached screenshots of such information being public on a Department of Consumer and Regulatory Affairs website. Further, in a phone call to this office, you indicated that you are seeking the requested information to support your belief of the existence of fraud.

This Office contacted DGS on December 15, 2017, and notified the agency of your appeal. On December 27, 2017, DGS provided this Office with a response to your appeal.² DGS reaffirmed its use of Exemption 1 and argued that the release of the redacted information would likely result in competitive harm because “[r]elease of this information to the public/competitors and use of this information as a marketing campaign against a business will directly affect a business’ ability to successfully compete for contracts and substantially harm the competitive position of the bidder.” Additionally, DGS has asserted that the portions of Section 1.4 and 3.5 that were withheld are exempt under the personal privacy exemption, Exemption 2.³

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

² A copy of DGS’s response is attached.

³ Exemption 2 prevents disclosure of “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

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]”).

Competitive Harm

In *Washington Post Co.*, the court considered on appeal the withholding of a “business profile” that included:

depth information regarding their corporate structure and by-laws, the financial structure and management of this enterprise, the ownership of stock in the company, and whether the company is certified as a minority business in any other jurisdiction. Individuals associated with the enterprise must reveal their other business interests. Each enterprise must provide information regarding any prior government contracting experience, as well as any history of debarment on its part or on the part of its principals, partners or stockholders.

560 A.2d 517, 519-20 (D.C. 1989).

This “business profile” is similar in kind to the document you requested of DGS, and as with DGS, the agency at issue in *Washington Post Co.* initially withheld the entire document. The Court of Appeals remanded the matter to the District Court to reconsider the segregability of portions of the “business profile,” noting the soundness of the government’s concession that “not all of the materials submitted in or with the . . . business profiles was exempt.” *Id.* at 522. The only portion of the “business profile” that the Court of Appeals identified as clearly exempt was a “marketing techniques” portion that is dissimilar to the record at issue here. *Id.* Unfortunately, there is no subsequent case history that shows what the District Court decided on remand.

In evaluating the “business profile,” the Court of Appeals highlighted “marketing techniques” as information which, if disclosed, could cause “substantial competitive harm.” The Court did not address ownership structure or history of government contracting experience, which are at issue here. Generally, pricing details and a company’s proprietary processes for operation are

considered the type of information that could cause substantial competitive harm if released.⁴ This type of information does not appear to be at issue here.

It is unclear from DGS's response how revealing the information in sections 1.4, 2.6, and 3.5 could cause "substantially competitive harm" to the company that provided the information. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 41 (D.D.C. 1997) (holding that submitter had failed to demonstrate that it would suffer competitive harm from release of information incorporated into government contract, court notes importance of opening government procurement process to public scrutiny) (reverse FOIA suit).

DGS argues that release of the information could be used "as a marketing campaign against a business [that] will directly affect a business' ability to successfully compete for contracts and substantially harm the competitive position of the bidder." DGS's Response at 3. This is not, however, the type of harm contemplated by Exemption 1. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (rejecting "unfavorable publicity" as basis of competitive harm.)⁵

Exemption Not Asserted by Company

You have argued on appeal that a portion of the record you requested specifically asked the bidder whether the information is exempt from disclosure under DC FOIA. You argue that if the bidder asserted in the form that it did not consider any of the information it provided to be exempt, DGS cannot now override the bidder's assertion and claim that the information would cause the bidder commercial harm if released. DGS, in turn, has argued that its FOIA Officer is authorized to make the final determination as to whether information is exempt from disclosure, and that the bidder's perspective on whether the information it provided is exempt is not dispositive.

⁴ *See 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.")

⁵ *See also Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997) (denying competitive harm claim for disclosure that would cause "unwarranted criticism and harassment" inasmuch as harm must "flow from competitors' use of the released information, not from any use made by the public at large or customers"), *appeal dismissed*, No. 97-5357 (D.C. Cir. Feb. 2, 1998); *Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n*, No. 96 5152, 1997 WL 578960, at *4 (W.D. Ark. Feb. 5, 1997) (declaring that court "cannot condone" use of FOIA "as shield[] against potentially negative, or inaccurate, publicity") (reverse FOIA suit), *aff'd*, 133 F.3d 1081 (8th Cir. 1998); *Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 415 n.2 (D.D.C. 1997) (opining that it is "questionable whether the competitive injury associated with 'alarmism' qualifies under Exemption 4," because competitive harm does not encompass "adverse public reaction").

We agree with DGS to an extent. In the context of DC FOIA, the bidder does not have authority to determine whether records are subject to the deliberative process, or to waive the personal privacy interests of persons described in the DGS form. Ultimately, these are determinations that DGS must make. Similarly, if the bidder wished to assert an overly broad use of exemptions, then DGS could of course override the bidder's determination of the applicability of exemptions.

However, given the above-discussed lack of clear "substantial competitive harm" to the bidder with respect to the withheld information, the opinion of the bidder is persuasive. Disclosure would appear to be appropriate if the bidder failed to assert that release of the form would cause it "substantial competitive harm" when directly asked. *Herrick v. Garvey*, 298 F.3d 1184, 1194 (10th Cir. 2002) ("where the submitter or owner of documents held by the government grants the government permission to loan or release those documents to the public, those documents are no longer "secret" for purposes of Exemption 4. In such a situation, FOIA creates an obligation for the government to release the documents."). Here, DGS has withheld the bidder's answer to whether the bidder believed the submitted information to be protected commercial information. Instead, without revealing the bidder's thoughts on its own competitive position vis-à-vis this information, DGS has advanced a competitive harm claim on behalf of the bidder. Competitive harm claims advanced solely by agencies are frequently rejected by courts.⁶

For these reasons, we remand this matter to DGS to consider the bidder's answer to question 8 – whether the bidder believes the information is subject to any FOIA exemptions – and afford it great weight.

Personal Privacy

On appeal, DGS has asserted that the withheld information in sections 1.4 and 2.6 are protected by Exemption 2. Summarily, we conclude that section 2.6 is not covered by Exemption 2, as it does

⁶ See, e.g., *N.C. Network for Animals v. USDA*, No. 90-1443, *slip op.* at 8-9 (4th Cir. Feb. 5, 1991) (finding "evidence presented by" agency "insufficient to support" its burden, remanding case, and noting absence of sworn affidavits or detailed justification for withholding from submitters); *Newry Ltd. v. U.S. Customs & Border Prot. Bureau*, No. 04-02110, 2005 WL 3273975, at *4 & n.8 (D.D.C. July 29, 2005) (rejecting competitive harm argument advanced solely by agency), *reconsideration granted* (D.D.C. Mar. 30, 2006) (upholding competitive harm argument following agency's submission of supplemental declarations, including one from submitter); *Pentagon Fed. Credit Union v. Nat'l Credit Union Admin.*, No. 95-1475-A, *slip op.* at 4-5 (E.D. Va. June 7, 1996) (rejecting competitive harm argument, noting failure of agency even to give notice to submitters who, in turn, ultimately provided sworn declarations to requester explicitly stating that disclosure would not cause them harm); *Wiley Rein & Fielding v. U.S. Dep't of Commerce*, 782 F. Supp. 675, 676 (D.D.C. 1992) (rejecting competitive harm argument, ordering disclosure, and emphasizing that "no evidence" was provided to indicate that submitters objected to disclosure), *appeal dismissed as moot*, No. 92-5122 (D.C. Cir. Mar. 8, 1993); *Brown v. Dep't of Labor*, No. 89-1220, 1991 U.S. Dist. LEXIS 1780, at *7 (D.D.C. Feb. 15, 1991) (denying competitive harm claim, ordering disclosure, and noting failure of submitters to object to disclosure), *appeal dismissed*, No. 91-5108 (D.C. Cir. Dec. 3, 1991).

not identify any persons but instead asks in the aggregate if any of a company's personnel has been "suspended, cancelled, terminated or found non-responsible on any government contract, or had a surety called upon to complete an award contract." To the extent that the names of such individuals were identified, that information could be redacted pursuant to Exemption 2. As to section 1.4, we note that corporate entities do not possess privacy rights. Accordingly, whether a company owns another company would not be information protected by Exemption 2. *FCC v. AT&T Inc.*, 562 U.S. 397, 409-410 (2011). Additionally, to the extent that one's business ownership is a matter of public record, such information is not protected by Exemption 2. On remand, DGS shall review the applicability of Exemption 2 in accordance with these guidelines and with its obligation under DC FOIA to release segregable information.

Conclusion

Based on the foregoing, we remand DGS's decision. DGS shall, within 10 days, review the withheld information and release responsive material consistent with the guidance in this decision. You may challenge DGS's subsequent response by separate 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Camille Sabbakhan, General Counsel, DGS (via email)