

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



Mayor's Office of Legal Counsel

January 4, 2018

VIA ELECTRONIC MAIL

Mr. Martin Auster Muhle

RE: FOIA Appeal 2018-57

Dear Mr. Auster Muhle:

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

Background

On November 27, 2017,¹ you submitted a request to DMPED for records DMPED submitted to Amazon detailing any incentives offered to encourage Amazon to locate its second headquarters in the District. On December 13, 2017, DMPED granted your request in part and disclosed a majority of the records it submitted to Amazon. DMPED denied your request in part and withheld six pages of responsive records pursuant to D.C. Official Code §§2-534 (a)(1) (“Exemption 1”) and (a)(4) (“Exemption 4”).

On appeal, you challenge DMPED’s application of both Exemptions 1 and 4. You assert that Exemption 1’s protection applies only to trade secrets and commercial or financial information obtained from outside the government, whereas you are seeking financial incentives offered by the District, not from outside parties. As a result, you believe Exemption 1 should not apply. Additionally, you assert that Exemption 4 is not applicable because, as a threshold requirement, it applies only to “inter-agency or intra-agency” documents. Since DMPED’s proposal was submitted to Amazon, you contend that it is not an “inter-agency or intra-agency” document. Further, you argue that because DMPED’s proposal to Amazon is neither predecisional nor deliberative, it is not protected by the deliberative process privilege under Exemption 4. Finally, you maintain that disclosure is in the public interest because the District’s proposed incentives involve taxpayer funds.

¹ DMPED’s response states that the date of the request was September 22, 2017; however, according to FOIAXpress the request was submitted on November 27, 2017.

This Office contacted DMPED on December 19, 2017, and notified the agency of your appeal.² On January 2, 2017, DMPED provided this Office with a response to your appeal, including a *Vaughn* index and a copy of the withheld documents for our *in camera* review.³ In its response, DMPED reasserted its withholdings under Exemptions 1 and 4. Regarding Exemption 1, DMPED asserts that the proposal it submitted to Amazon includes commercial offers and incentives from private entities. DMPED also claims that the private entities face competition in their respective fields, and release of the commercial information would cause them and the District competitive harm. DMPED further claims that the commercial information associated with the District is inextricably intertwined with commercial information associated with the private entities, such that segregated disclosure of the District's information is not possible. With respect to Exemption 4, DMPED asserts that the common interest doctrine applies to satisfy the "inter-agency or intra-agency" document requirement. DMPED argues that the withheld records are predecisional and deliberative because the District may negotiate with Amazon and change its incentives. Finally, DMPED claims that revealing its incentives would weaken the District's competitive position to attract Amazon and potentially impair the District's ability to attract other new businesses as well.

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).

Exemption 1

Exemption 1 protects from disclosure "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained." 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 Freedom of Information Act, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or

² DMPED requested and was granted an extension to respond to the appeal.

³ A copy of DMPED's response and *Vaughn* index are attached.

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.

Documents prepared by the government can be protected under Exemption 1 to the extent that they contain summaries or reformulations of information supplied by a source outside the government. *See, e.g., OSHA Data Inc. v. U.S. Dep’t of Labor*, 220 F.3d 153, 162 (3d Cir. 2000) (finding that individual component data supplied by private-sector employers was protected commercial information); *Gulf & W. Indus. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979); *Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007).

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, you allege that the incentives offered directly from the District should not be protected under Exemption 1; however, DMPED asserts that the commercial and financial information contained in its proposal to Amazon is inextricably linked to information provided by private entities. After reviewing the records *in camera*, we find that a majority of the withheld information involves incentives offered solely by the District and should be disclosed.

Of the six pages that DMPED withheld, the first page is a title page that does not contain any protected information. The second and third pages describe how Amazon would benefit from an “incentive program” under the District’s tax laws. These tax benefits, which include abatements, credits, and reductions, are available to any entity that satisfies certain statutory criteria. Accordingly, we find nothing proprietary about this “incentive program.” There is one section of page 2, however, that may be protected from disclosure. This section contains estimates and calculations as to the benefits that Amazon might receive under the District’s tax laws. These values appear to have been calculated by the District, in which case they would not be protected by Exemption 1. If the estimated values were provided by private entities, the values would potentially be protected from disclosure.

The fourth page consists of six columns describing additional incentives. Again, a majority of the potential incentives appear to be offered exclusively by the District, and, as a result, are not protected by Exemption 1. The fifth column on the page is the only column that may be protected by Exemption 1, as it references incentives and concepts developed by private entities. Nevertheless, it is unclear based on the incentive descriptions whether actual competition exists or

whether the private entities would be competitively harmed by disclosure of the incentives mentioned in this column.

The fifth page appears to contain incentives offered to Amazon by private entities who have partnered with the District. DMPED's generalized assertions that these entities face competition in their respective fields and would suffer competitive harm if the information were disclosed are insufficient to warrant protection under Exemption 1. The sixth page of the document was released in the public version of the District's bid, with the exception of one text box that we reviewed *in camera*. The text box consists of a summary of the "unique features" offered in the proposal. Only two of the features tangentially relate to private entities and are potentially exempt from disclosure for the reasons previously discussed.

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 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).

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.

Exemption 4 has also been applied to include protections available in civil discovery for "trade secret or other confidential research, development, or commercial information" under Rule 26(c)(1)(G) of the Federal and District of Columbia Superior Court Rules of Civil Procedure. The basis for this protection is to prevent disclosure of confidential commercial information that would place the government at a disadvantage or endanger the consummation of a contract. *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360 (1979). If the government documents sought in a request "contain sensitive information not otherwise available, and if immediate release of these

[documents] would significantly harm the Government's monetary functions or commercial interests, than a slight delay in [release] . . . would be permitted under Exemption [4]." *Id.*

Here, the withheld information has been supplied to Amazon, an entity outside of the government. Therefore, in order for either the deliberative process privilege or commercial information privilege of Exemption 4 to apply, an exception must exist to the threshold requirement that the withheld records involve "inter-agency or intra-agency" documents. Two recognized exceptions are the consultant corollary and the common interest doctrine. The consultant corollary applies when the government has hired a consultant to effectively function as a government employee. In these instances, documents exchanged between the government and the consultant do not lose the protections available under Exemption 4. *See, e.g., Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001). The common interest doctrine applies when an agency collaborates with a private litigation partner in a case. *See, e.g., Hunton & Williams v. DOJ*, 590 F.3d 272, 288 (4th Cir. 2010).

Neither the consultant corollary nor the common interest doctrine applies here. Amazon is not acting as a consultant on behalf of the District; rather, it is in the adverse position of selecting from among multiple locations where to locate its second headquarters, while maximizing the incentives it receives from the location. Further, this matter does not involve litigation, and Amazon is not the District's litigation partner. DMPED's assertion that the common interest doctrine applies to contract awards outside of a litigation context appears to be without basis.⁴

The documents that DMPED submitted to Amazon are neither predecisional nor deliberative under Exemption 4. Even if the District's proposed incentives are renegotiated at a later point, the offer that DMPED submitted to Amazon constitutes the final version of DMPED's initial proposal. Moreover, there is no evidence before us suggesting that Amazon is prohibited from sharing with one jurisdiction the incentives offered by another for leverage purposes. Therefore, potential competitive harm from disclosure may not exist, rendering Exemption 4 further inapplicable.

Conclusion

Based on the foregoing, we remand DMPED's decision. Within 5 business days from the date of this decision, DMPED shall review the documents it withheld and disclose to you nonexempt portions in accordance with the guidance in this decision.

⁴ DMPED cites *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979) in support of its common interest argument. While this case holds that the government's commercial information may be withheld from disclosure prior to the award of a contract, it does not involve the common interest doctrine. Further, the commercial information in *Federal Open Market Committee* was not shared outside of the agency that created it, so the threshold requirement that the information involve "inter-agency or intra-agency" documents was not at issue.

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, Esq., FOIA Officer, DMPED (via email)