

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel

February 27, 2018

VIA ELECTRONIC MAIL

Mr. P.J. Goel

RE: FOIA Appeal 2018-76

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 15, 2017, you submitted a FOIA request to DGS for records pertaining to Solicitation No: DCAM-17-CS-0123. Specifically, you sought the "Full electronic submissions of all bidders" including "Price Volumes," "as well as DGS technical panel evaluators [sic] review of each bid and score for each bidder." Your request states your belief that "There should be no privileged information on the bids unless the bids were specifically marked as exempt[.]" You provided a copy of your passport card with the request.

On January 31, 2018, DGS granted your request in part and denied it in part. DGS redacted and withheld some records pursuant to D.C. Official Code §2-534 (a)(2) ("Exemption 2"),¹ D.C. Official Code §2-534 (a)(4) ("Exemption 4"),² and D.C. Official Code §2-534 (a)(6) ("Exemption 6").³

On February 11, 2018 you submitted this appeal, in which you assert your suspicion that "a panelists [sic] committed fraud from the District. . . ." Without further explanation, you assert that "[b]ased on the debriefing, one of the panelists appears to have lied and then created a libelous

¹ 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."

² Exemption 4 exempts from disclosure "[i]nter-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[.]"

³ Exemption 6 exempts from disclosure "[i]nformation specifically exempted from disclosure by statute . . ."

situation by propagating her lie about Goel Services in front of others.” Your appeal also indicates that you have referred this matter “to the OIG and the FBI.” Lastly, your appeal questions whether DGS’s FOIA Officer is “as well acting or implicit is [sic] the crimes that are occurring . . .” In a subsequent email message sent to this Office, you attached an article and complained that DGS’s response “. . . is just like Trumps [sic] on Friday – It is unacceptable, leads to unaccountability, hides the truth, is deceitful and with the intent to hide a crime and major errors that have been committed . . .” Your email states your belief that the underlying matter “should be referred to the OIG,” and that “if DGS will not be held accountable, it will end up in the Washington Post.”

This Office contacted DGS on February 12, 2018, and notified the agency of your appeal. On February 20, 2018, DGS provided this Office with a response to your appeal.⁴ DGS reaffirmed its use of Exemptions 2, 4, and 6, providing legal citations and explanations for its reliance on these exemptions for each category of withheld records. Further, DGS determined upon review of your appeal that additional disclosures relating to the successful bid were warranted. DGS asserted that it would provide you with these documents.

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).

This decision shall review the three exemptions DGS invoked in redacting documents responsive to your request to determine whether the agency’s partial denial was proper.

Disclosure Prohibited by Other Law

DGS redacted portions of the records it provided you under Exemption 6. Exemption 6 protects from disclosure records which are specifically exempted from disclosure by a statute other than DC FOIA. D.C. Official Code § 2-534(a)(6). In documents it provided to you, DGS redacted tax identification numbers under Exemption 6, pursuant to D.C. Official Code § 47-1805.04 (“it shall be unlawful . . . to divulge or make known in any manner . . . any other federal, state, or local income tax information either submitted by the taxpayer or otherwise obtained”).

⁴ A copy of DGS’s response is attached.

In FOIA Appeal 2016-75R, this Office found that pursuant to Exemption 6, 26 U.S.C. § 6103 is a federal statute that prevents disclosure of EINs⁵. Under 26 U.S.C. § 6103(a), tax return information, including the tax payer identifying number, is deemed confidential, and unless otherwise authorized by the U.S. Code, no officer or employee of any state, including the District of Columbia, who has access to return information shall disclose any return information obtained by him in any manner in connection with his service as an employee. 26 U.S.C. §§ 6103(a), (b)(5), (b)(6). This prohibition extends to corporations as well as individuals. *See* 26 U.S.C. § 7701(a)(14). The statute leaves no discretion as to whether tax information may be disclosed. Accordingly, the tax identification numbers were properly redacted by DGS under Exemption 6.

Deliberative Process

Exemption 4 of DC FOIA 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.

Here, DGS withheld responsive documents pursuant to Exemption 4 under the deliberative process privilege. The withheld documents are inter-agency documents used to evaluate and score bids to assist the Chief Contracting Officer in making a final decision. Notwithstanding your repeated allegations of a crime and a cover up that you believe has disadvantaged your company in

⁵ An Employer Identification Number (“EIN”) is also known as a Federal Tax Identification Number, and is used to identify a business entity.

a particular bidding process, we find that the documents DGS withheld pursuant to Exemption 4 are the very type of documents contemplated by the deliberative process privilege. If an agency's pre-decisional bid evaluations were shared with an unsuccessful bidder, the agency would be discouraged from being candid in its deliberations, which would harm any future decision making process. As a result, we affirm DGS's use of Exemption 4.

Personal Privacy

DGS indicates that it redacted from disclosure individuals' names, driver's license numbers, and resumes pursuant to Exemption 2. It appears from your appeal that you are not challenging these redactions. However, since DGS has or will be providing further disclosures to you, we note that DGS appropriately invoked Exemption 2 to withhold information such as names, driver's license numbers, and resumes of the unsuccessful bidders, which would constitute an unwarranted invasion of privacy if disclosed.

Conclusion

Based on the foregoing, we affirm DGS'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: C. Vaughn Adams, Senior Assistant General Counsel, DGS (via email)