

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor



May 11, 2009

[Redacted]  
Williamsport, PA 17  
[Redacted]

Dear [Redacted]:

This letter responds to your appeal (the "Appeal") to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. §§ 2-351 *et seq.* ("DC-FOIA"), dated February 11, 2009. We forwarded your Appeal to the District of Columbia Water and Sewer Authority ("WASA") with a request for a response. WASA responded to the Appeal on March 6, 2009. The foregoing represents the appellate record, upon which we base this decision.

**Background**

Your original FOIA request was submitted to WASA on February 19, 2007. As part of your request, you sought copies of e-mails between Dr. Tee Guidotti and Dr. Jerome Paulson of George Washington University Center for Risk Science and Public Health ("CRSPH"). WASA provided you with some of the responsive documents that you requested, however it refused to provide seven sets of records, claiming that the documents were protected under the Deliberative Process Privilege, as articulated by D.C. Official Code §2-534(a)(4). You contend that the records are not protected by the Deliberative Process Privilege because this privilege extends only to inter-agency and intra-agency memoranda or letters, which you argue should not apply to CRSPH because it constitutes an "outside organization."

WASA responded to your appeal by letter dated March 6, 2009. The agency also provided our office with the set of records that are in contention so that our office could conduct an *in camera* review. WASA argues that although CRPSH is not an agency, the fact that the organization was hired by an agency to perform work, necessarily affords WASA the ability to withhold from release any communications from or to CRPSH and certain CRPSH produced records under FOIA's Deliberative Process Privilege.

## Discussion

It is the public policy of the District government 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, 2001 Ed. § 2-531. In aid of that policy, the DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . . .” *Id.* § 2-532(a). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. D.C. Official Code, 2001 Ed. § 2-534.

### *Can WASA Withhold Records Produced By A Non-Agency Under the Deliberative Process Privilege?*

At issue in this case is whether the communications between CRSPH and WASA and certain records produced by CRSPH are protected by the Deliberative Process Privilege, given that CRSPH is not considered an agency. After conducting an *in camera* inspection of the records submitted by WASA, we reach the conclusion that the records are in fact protected under D.C. Official Code §2-534(a)(4). Precedent as dictated by current case law supports this decision. For example, in *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the U.S. Department of Justice sent questionnaires to U.S. senators, soliciting information about how they selected and recommended nominees for the federal judiciary. One of the issues on appeal was whether the Department of Justice could use the Deliberative Process Privilege as a basis to exclude the questionnaires from production, even though the U.S. Senate did not qualify as an “agency” for the purpose of intra-agency communications. The court found that Congress did not intend “inter-agency” and “intra-agency” to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process, stating that “efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice or officially part of the agency or are solicited to give advice only for specific projects.” *Ryan* at 790. The court determined that when interpreted in light of the purpose of the Deliberative Process Privilege, that the privilege “clearly embrace[d] the situation” as presented by the facts in that case. *Id.*

The facts in this case similarly warrant the application of the Deliberative Process Privilege. CRSPH was hired to assist WASA regarding risk management issues related to levels of lead in District of Columbia water. In performing the tasks it was contracted to do, CRSPH communicated with WASA staff and prepared memoranda, documents and other records. As stated in *Ryan*, communications from such deliberations, “although not literally inter-agency or intra-agency can be an integral part of the agency’s deliberative process.” *See Id.* At 789-90. In a more recent decision, *Nat. Inst. Of Military Justice v. U.S. Dep’t of Defense*, 512 F.3d 677 (D.C. Cir. 2008), the court stated:

When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an ‘intra-agency’ memorandum for purposes of determining the applicability of [the Deliberative Process Privilege].”

*Id.* at 680. Clearly, the courts recognize that government agencies often consult with non-government bodies and courts have found that certain resulting records should be shielded by the Deliberative Process Privilege. Similarly, in this instance, the seven records in dispute should be availed of this exemption under FOIA's Deliberative Process Privilege.

Therefore, WASA's decision is UPHeld and this Appeal is hereby DISMISSED.

Sincerely,



Runako Allsopp  
Deputy General Counsel  
Executive Office of the Mayor

cc:

