

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

December 7, 2006

BY HARD COPY AND ELECTRONIC MAIL

[REDACTED]
Washington, D.C.
[REDACTED]

Re: Freedom of Information Act Appeal

Dear [REDACTED]

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act (the "FOIA"), D.C. Official Code § 2-531 *et seq.* (2001 & 2006 Supp.), dated November 15, 2006, and received in this office on the following day. On November 21, 2006, you submitted a supplement to the appeal, which we received on November 22. We deem your appeal complete as of the last-stated date.

In an initial request to the District of Columbia Water and Sewer Authority ("WASA" or the "Authority"), dated October 18, 2006, the text of which is set out in the margin, Julyan & Julyan (another law firm in Washington, D.C., referred to hereafter as the "Appellant") sought 12 separately numbered categories of records.¹ On November 9,

¹ The 12 items were:

- "1) All memos, emails, telephone logs, internal and external correspondence, and other written or electronic files pertaining to the following DC WASA RFP/Q: *WAS-06-026-AA-ND: RFP/Q for Biosolids Management.*
- "2) All memos, emails, telephone logs, internal and external correspondence, and other written or electronic files pertaining to the following DC WASA DFP/Q: *WAS-06-035-AA-ND: RFP/Q for Biosolids Management.*
- "3) Without limiting the above . . . hard copy or electronic documents, relevant to the referenced RFP/Q that were created by, sent to, or copied to any of the following DC WASA employees: Barbara A[,] Grier, Christopher Peot, Neville Daley, Ed Hamilton, Walter Vailey, and Jerry Johnson.
- "4) Without limiting the above, . . . all documents or files relevant to the referenced RFP/Q that were created or modified during the period April 1, 2006 to the [*sic*] October 21, 2006.
- "5) Without limiting the above, . . . a copy of the written document canceling *WAS-06-026-AA-ND: RFP/Q for Biosolids Management* and all written or electronic files addressing the cancellation prepared in the ten-day period prior to the cancellation.
- "6) Without limiting the above, all memos, emails, telephone logs, internal and external correspondence, and other written or electronic files relating to the role, purpose, elimination, or postponement of the proposed interviews initially scheduled for August 4, 2006.

2006, WASA's FOIA officer responded by identifying 66 e-mails and one memorandum all of which were withheld under the "deliberative process" exemption of the FOIA. The FOIA officer further denied requests no. 5 and 8-11 on the same ground, advised that the Authority had no documents responsive to requests no. 6 and 7, and stated that the agency would make available a document in response to request no. 12.

On November 14, 2006, WASA wrote the Julyan lawyers to identify 18 records, all of which the agency said it would withhold on the basis of the "deliberative process" privilege. You brought the November 14 letter to our attention in your supplemental appeal.

In your administrative appeal to the Mayor, you contend that WASA has improperly invoked the "deliberative process" exemption in withholding the records sought and that the Mayor should direct the Authority either to produce the records outright or to provide a fuller statement of the reasons for the assertion that the claimed exemption applies to each document. In your supplement, you appeal the agency's withholding of documents responsive to your request no. 12.

We forwarded a copy of your appeal to WASA, which responded on December 4, 2006, after requesting and receiving an enlargement of time within which to do so. The Authority reiterates its contention that the records withheld are subject to the "deliberative process" exemption and provides a *Vaughn* index, itemizing the records withheld (or, in certain cases, marked "release"). The agency notes further that one of the two RFP's at issue remains open and that the Appellant's client is one of the bidders on the proposed contract.

On December 6, 2006, you submitted a reply to the WASA response. You note that WASA's decision to release numerous documents previously withheld casts doubt on the validity of the agency's continued withholding of other documents, and you call

"7) Without limiting the above, all memos, emails, telephone logs, internal and external correspondence, and other written or electronic files relating to the removal of Neville Daley as the Contracting Officer assigned to *WAS-06-035-AA-ND: RFP/Q for Biosolids Management*[".

"8) Without limiting the above, any written documents or electronic files created by Neville Daley after his call with James Hecht on August 14, 2006.

"9) Without limiting the above, all memos, emails, telephone logs, internal and external correspondence, and other written or electronic files received from or sent to any proposers to *WAS-06-035-AA-ND: RFP/Q for Biosolids Management* after 2:00PM EST July 3, 2006.

"10) Without limiting the above, all memos, emails, telephone logs, internal and external correspondence, and other written or electronic files relating to the ranking by the evaluation committee of technical capabilities of the proposers.

"11) Without limiting the above, all memos, emails, telephone logs, internal and external correspondence, and other written or electronic files prepared by WASA employees for presentation to the WASA Operating Committee Meeting scheduled for on or about October 19, 2006 relevant to the referenced RFP/Qs.

"12) All memos, emails, telephone logs, internal and external correspondence, and other written or electronic files pertaining to the following 2001 RFP: DC WASA RFP WAS-01-023-AA-DW, prepared by WASA employee Christopher Peot."

upon the Mayor to undertake an *in camera* review of the documents that WASA continues to withhold. You cite a special need for the documents in question in order to assist in the prosecution of a bid protest currently pending before the Authority.

At the outset, we must consider whether the Mayor has jurisdiction to entertain your administrative appeal, given that WASA is not a subordinate agency within the Executive Branch of the District government. Under its enabling act, WASA is an independent authority of the District government, having a separate existence therein. D.C. Official Code § 34-2202.02(a) (2006 Supp.). With two exceptions not pertinent here, the Authority is “subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District government . . .” *Id.* § 34-2202.02(b). That language is sufficiently broad to bring WASA within the ambit of “public bodies” subject to the FOIA and to the Mayor’s jurisdiction on administrative appeals. *See id.* § 2-537(a) (2006 Supp.) (“any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection”).

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 § 2-531 (2006 Supp.). In aid of that public policy, the FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* § 2-532(a). However, the statutory right does not extend to the imposition of an obligation on the agency to create documents that do not exist. Moreover, even as to extant records, the agency is permitted to charge fees in reimbursement of the costs incurred in retrieving, reviewing, and reproducing responsive documentation to the extent provided by the statute. *Id.* § 2-532(b).

The FOIA requires that certain categories of documents be provided upon request, without the formality of a demand under the FOIA. D.C. Official Code § 2-536(a) (2006 Supp.). Conversely, the public right of access to records is subject to limits, in the form of exemptions from the disclosure requirement, including a so-called “Exemption 4” for “inter-agency or intra-agency memorandums or letters, . . . which would not be available by law to a party other than a public body in litigation with the public body.” *Id.* § 2-534(a)(4). This exemption is understood to encompass information protected by the attorney-client, deliberative-process, and work-product privileges. *See Maydak v. United States Dept. of Justice*, 254 F. Supp. 2d 23 (D.D.C. 2003) (interpreting counterpart provision of federal FOIA). The deliberative-process privilege, in turn, encompasses pre-decisional recommendations or advice upon which the agency may rely in the future or may have relied in the past in making administrative decisions. The agency may withhold such documents, although factual aspects are subject to disclosure unless inextricably intertwined with the recommendations or advice.

It is apparent from the memorandum submitted by WASA in response to the administrative appeal that the agency has considered the law governing the “deliberative

process" privilege. The accompanying *Vaughn* index indicates that the Authority has sought to apply the governing legal principles to each document identified as responsive to the FOIA request.

By contrast, the Appellant's FOIA requests read in some instances more like sweeping documentary demands served in civil litigation than like *bona fide* requests for information. The broadside character of requests no. 1, 2, 4, and 12 disqualify them as "reasonabl[e]" descriptions of public records, within the meaning of D.C. Official Code § 2-532(c) (2006 Supp.). To like effect is the demand in request no. 8 for all records produced by Mr. Daley on and after a date in August 2006, evidently without limitation as to subject-matter. The sweeping nature of these requests is particularly troublesome, given their potential, if granted, to overturn WASA's processes for soliciting, receiving, and evaluating commercial bids in the course of the agency's administrative activities. Except as stated in subsequent paragraphs of this letter ruling, we affirm WASA's denial of those requests, in their entirety, on the ground that the requests are too broadly stated to meet the statutory prerequisite of reasonableness.

By contrast, request no. 3 seems reasonably tailored to seek communications related to the RFP's identified in requests no. 1 and 2 and passing to or from one or more of six named personnel. It is impossible to determine from WASA's response the extent to which the 66 itemized e-mails and one memorandum are responsive to this request. Likewise, and perhaps more significantly, because neither the Appellant nor WASA has identified the positions held by the six personnel in question, it is impossible to infer from the information provided in the appeal or the *Vaughn* index whether the items in question constitute pre-decisional advice or recommendations entitled to withholding under Exemption 4 or records subject to any other applicable exemption. Accordingly, we must remand this request to WASA for clarification of its response. If WASA stands by its invocation of the "deliberative process" privilege for documents otherwise responsive to request no. 3, the agency should justify its response by providing the positions held by the authors and addressees of each record so withheld, so that the Appellant can evaluate the Authority's position that the record constitutes pre-decisional advice or recommendations.

WASA should provide either the document described in request no. 5 as canceling the 06-026 RFP or a more definitive statement why the document is subject to withholding under Exemption 4 or any other applicable exemption.

We do not disturb WASA's responses to requests no. 6 and 7, for which the Authority said it had no responsive documents and concerning which the Appellant raises no challenge.

In response to request no. 9, documents exchanged with "proposers" might entail pre-decisional deliberations reflecting recommendations and advice, but they seem as likely – if not more than likely – to involve discussions concerning the terms of the RFP and the proper formulation of responses. This item is remanded to WASA for

clarification of the grounds of withholding any documents responsive to this request. The Authority's further consideration may include matters such as the confidential or proprietary nature of the information exchanged.

On their face, requests no. 10 and 11 seek pre-decisional recommendations and advice that are subject to withholding under the "deliberative process" exemption. Hence, WASA's denial of records responsive to these requests is affirmed.

The supplemental appeal provides no reasons, in addition to those set forth in the initial appeal, to justify reversal of WASA's invocation of the "deliberative process" privilege. However, given that WASA has itemized the documents (otherwise responsive to your request) that the agency has withheld on this ground, we will vacate and remand for further explanation as to Docs. No. 16-18, identified in the agency's November 14, 2006 letter. As described, the records appear to be exercises of contract options or contract extensions. Such documents would not, on their face, appear to qualify as pre-decisional advice or recommendations unless more specifically justified as such. WASA should provide greater specificity to support its withholding of these three records on the ground of the "deliberative process" privilege.

We take it that documents remarked "release" on WASA's *Vaughn* index have been or will be made available to the Appellant within a reasonable time, not to exceed 10 business days from the date of this letter decision. If not, the agency should state that the documents are not subject to disclosure. This order will be deemed moot insofar as it might apply to any document, otherwise the subject of a vacatur or remand, that WASA determines to release to the Appellant.

We have considered the remaining contentions advanced by the Appellant in support of the administrative appeal to the Mayor and have concluded that they are without merit. In particular, the stringent time limitations imposed by statute upon the Mayor's decision on the administrative appeal forecloses an independent, *in camera* review of the many records withheld by the agency. Unlike the Appellant, we do not infer from WASA's release of numerous records that its decision to continue to withhold other records necessarily is erroneous. The commercial interest of the Appellant's client in securing release of the records sought neither enhances nor detracts from the merits of the appeal, which, to the extent upheld, must apply to any member of the public who makes a counterpart request for the records.

WASA's action is affirmed in part, and vacated and remanded in part, as provided in the foregoing paragraphs of this letter. WASA is directed to provide the additional information required by this letter decision within 30 days of the date of this letter, except that, as noted above, records subject to release by the agency's acknowledgment in its submission on the appeal shall be made available to the Appellant within 10 business days. (We enlarge the customary 20-day response to 30 in order to make allowance for the upcoming year-end holidays.) WASA's obligation to produce records in conformity with the directives of this letter is subject to the Agency's authority, to the extent

provided in FOIA, to charge reasonable fees for the retrieval, review, and reproduction of records furnished the Appellant. The Appellant may renew his present appeal if for any reason he is dissatisfied with the Agency's actions in response to this letter. If the appeal is renewed after December 31, 2006, it should be addressed to the Office of the Secretary for the District of Columbia.

The Appellant additionally is free under the FOIA to commence a civil action against the District of Columbia government at any time in the District of Columbia Superior Court, without awaiting the outcome of further proceedings before WASA.

Sincerely,



Leonard H. Becker
General Counsel, EOM

cc (by e-mail):

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