

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-082**

July 16, 2020

VIA ELECTRONIC MAIL

Mr. Michael McDuffie

RE: FOIA Appeal 2020-082

Dear Mr. McDuffie:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Department of Health (“DOH”) failed to properly respond to a request for documents.

Background

On December 9, 2019, you submitted a FOIA request to DOH for five (5) categories of documents relating to a major private hospital in the District of Columbia. DOH provided documents in response to your FOIA request. However, DOH withheld two internal hospital policies relating to medical waste disposal and a neighborhood trash pick-up policy. On January 27, 2020, you appealed challenging DOH’s decision to withhold the two internal hospital policies. On February 3, 2020, DOH responded to your appeal indicating that it properly withheld two internal policies under D.C. Code § 2-534(a)(1) (“Exemption 1”). DOH states that the policies constitute trade secrets, commercial information, or financial information obtained from outside the government to the extent disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.

Discussion

It is the public policy of the District of Columbia 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. In aid of that policy, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemption 1

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) the disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained. *See* 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 has also instructed that the terms “commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Id.* at 1290.

We understand that you are not challenging the assertion that the policies in question are trade secrets or commercial information obtained from outside the government. However, you contend that both actual competition and a likelihood of substantial competitive injury are required under Exemption 1.

We agree that 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.”)(internal citations omitted). *See also* *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.”).

DOH notes that other hospitals could benefit from getting the detailed information on how a major area hospital handles its medical waste and trash disposal. This information presumably reflects careful consideration by the hospital of its legal obligations, need to maintain a positive relationship with the community, and financial costs to the hospital. Under DOH’s assessment, the release of the two documents is likely to assist other hospitals in developing their own policies to produce even greater cost savings and operational efficiencies, thereby giving them a competitive edge at least in a very important area of core hospital operations. Even worse, DOH notes, release of the policies can give a third party a road map to disrupt hospital operations by showing exactly how hazardous materials and waste is collected, stored, and

shipped. This information if used improperly can lead to short-term and long-term disruption of the hospital's operations.

DOH provided to this Office a copy of the hospital's two documents (Hazardous Materials and Waste Management Program and the Neighborhood Trash Detail) for our *in camera* review. We have reviewed the two documents and conclude that DOH may withhold the Hazardous Materials and Waste Management Program in its entirety under Exemption 1. However, the Neighborhood Trash Detail is not subject to Exemption 1. The Neighborhood Trash Detail is a one page document with four (4) sentences that confirm the reassignment of an individual to handle neighborhood trash with a work schedule each week and a daily tour of duty. The release of this document is not likely to lead to substantial harm to the competitive position of the hospital.

Segregability

The last issue to be considered is whether DOH can redact the withheld records to delete confidential commercial information. D.C. Official Code § 2-534(b) requires that an agency produce “[a]ny reasonably segregable portion of a public record . . . after deletion of those portions” that are exempt from disclosure. The phrase “reasonably segregable” is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009). Based on our *in camera* review, redacting the Hazardous Materials and Waste Management Program policy would result in blank pages with only page numbers. This would provide little to no informational value to you. However, DOH should redact the names of the employees and the contractor from the Neighborhood Trash Detail under D.C. Code § 2-534(a)(2) (“Exemption 2”).

Conclusion

Based on the forgoing, we find that DOH's decision to withhold the hospital's Hazardous Materials and Waste Management Program was proper under Exemption 1. However, we remand this matter back to DOH to produce to you the Neighborhood Trash Detail with the names of the employees and contractor redacted. This shall constitute the final decision of this Office with respect to your appeal. 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Phillip L. Husband, General Counsel/FOIA Officer
DOH (via email)