

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-086**

July 16, 2020

VIA ELECTRONIC MAIL

Ms. Allyson Kitchel

RE: FOIA Appeal 2020-086

Dear Ms. Kitchel:

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”), challenging the failure of the Department of General Services (“DGS”) to properly respond to your FOIA request.

Background

You submitted a FOIA request to DGS regarding the Hardy Recreation Center. On January 9, 2020, DGS responded to your FOIA request. On January 29, 2020, you appealed the response from DGS. You challenge DGS’s assertion of the deliberative process privilege for the redactions in the documents produced to you. You contend the redacted texts are neither deliberative nor pre-decisional. This contention is based on the fact that some of the redactions involved factual issues such as a timeline of events. On February 5, 2020, DGS responded to your appeal.<sup>1</sup> In its response, DGS asserts that it provided you with the responsive records redacting the information or text that was subject to the deliberative process privilege pursuant to D.C. Code § 2-534(a)(4) (“Exemption 4”).

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. 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.* § 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).

---

<sup>1</sup> A copy of the DGS response to your appeal is attached to this decision.

#### *Exemption 4 - Deliberative Process Privilege*

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 pre-decisional and deliberative. *Coastal States Gas Corp., v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional 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.*

DGS asserts that it redacted documents produced to you under Exemption 4. However, DGS did not provide a Vaughn Index or a copy of the redacted documents (showing the text that was redacted) for our review. This review is required in order for us to determine whether the redacted text were both pre-decisional and deliberative. Without the Vaughn Index and the opportunity to review the redactions, we are unable to uphold the agency’s assertion of privilege to the documents in question.

We therefore remand this appeal back to DGS to provide this Office with a Vaughn Index and a copy of the redacted documents with the redactions underlined or highlighted so that we can review the language that has been redacted. These items are to be provided to the MOLC within 5 business days of the date of this 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 in the Superior Court of the District of Columbia in accordance with D.C. Official Code § 2-537.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Victoria Black Johnson, FOIA Officer  
DGS (via email)