**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**EXECUTIVE OFFICE OF THE MAYOR**
**MAYOR'S OFFICE OF LEGAL COUNSEL**
**Freedom of Information Act Appeal: 2020-109**

July 8, 2020

VIA ELECTRONIC MAIL

Ms. Lee-Ann C. Brown

RE: FOIA Appeal 2020-109

Dear Ms. Brown:

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"), on the grounds that the District of Columbia Housing Authority ("DCHA") failed to respond to requests you made on behalf of your client, F&L Construction, Inc. ("F&L"), for records regarding specified requests for proposals considered by the agency.

Background

On November 14, 2019, you submitted a DC FOIA request for certain records regarding a specified contractor and all documents and communications regarding a specified request for proposal ("RFP"). On November 18, 2019, you submitted a second DC FOIA request for records regarding another RFP. DCHA responded to your requests on December 20, 2020, and stated that it was withholding records responsive to each request pursuant to DC Code § 2-534(a)(1) ("Exemption 1") and DC Code § 2-534(a)(4) ("Exemption 4"). On January 9, 2020, you requested that the agency clarify its response, but your appeal indicates that DCHA did not respond to you.

On February 10, 2020, you filed an appeal with this Office. Your appeal asserts that (1) DCHA improperly withheld all records pursuant to Exemption 1, when the agency should have produced reasonably segregable portions of the records; and (2) that DCHA failed to claim a specific privilege under Exemption 4.

On February 19, 2020 DCHA responded to your appeal and argued that it withheld responsive records in their entirety because the disclosure of information contained in the records "would result in substantial harm to the competitive position of the persons from whom the information was obtained." The agency also stated that Exemption 4 supported its withholding of "[e]mails, DCHA internal documentation, evaluations of all the offerors' proposals, bid tabulation sheets, scoring sheets, documents and communications submitted by the offerors in response to or related to the DCHA proposal . . ." The agency further noted that some records responsive to

your DC FOIA appeal were the subject of since-dismissed litigation involving F&L and were previously subject to a protective order.

DCHA requested an additional seven business days to review potentially responsive records and create a *Vaughn* index reflecting records withheld under the DC FOIA exemptions. To date, the agency has produced to this office some of the responsive records it withheld, including records that were subject to the protective order. The agency has indicated that it is still in the process of reviewing email records for responsiveness and creating the *Vaughn* index.

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 . . ." D.C. Code § 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) obtained from outside the government; and (3) of such a nature that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained. *See* D.C. Code § 2-534(a)(1). The D.C. Circuit has instructed that the terms "commercial" and "financial" used in the federal FOIA (and correspondingly, in the DC FOIA) should be accorded their ordinary meanings. *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). '

As for the requirement under Exemption 1, that disclosure of the subject information would "result in substantial harm to the competitive position of the person," case law reflects that there must be "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.*, 560 A.2d at 522. In construing "substantial competitive injury," courts have determined that "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); *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.") (citations omitted).

*Commercial Information from Outside the Government*

DCHA withheld from production "proposals, bid tabulation sheets, scoring sheets, documents and communications submitted by the offerors in response to or related to the DCHA proposal" on the basis that all of those records "concern competitive information . . ." The agency has offered no authority supporting such broad application of Exemption 1. Indeed, this Office has adjudicated several DC FOIA appeals in the past in which segregable portions of bid proposal records were disclosed to competitors. *See, e.g.*, DC FOIA Appeal 2015-70; DC FOIA Appeal 2018-55. We remind the agency of the core aim of the FOIA, to facilitate the disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory duties . . ." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

> In perhaps no sphere of governmental activity would that purpose appear to be more important than in the matter of government contracting. The public, including competitors who lost their business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and, indeed, even to learn how to be more effective competitors in the future.

*Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 41 (D.D.C. 1997). DCHA has certainly satisfied the Exemption 1 requirements that an exempt record contain commercial information from outside the government. However, it does not automatically follow that the records at issue here on appeal be withheld.

*Competitive Injury*

In *Washington Post Company*, the District of Columbia Court of Appeals held that applications submitted by minority businesses as part of a program administered by a D.C. commission were not completely exempt from disclosure under Exemption 1 of the DC FOIA. 560 A.2d 517 (D.C. 1989). The Court acknowledged that the DC FOIA "explicitly focuses on the question of harm to the competitive position of the person providing the information." *Id*., at 522. However, it disagreed with the trial court's broad application of the exemption. *Id.* Remanding the matter, the court encouraged the trial court to determine the segregability of responsive portions of each document or class of document. *Id*. at 523.

Generally, pricing details and a company's proprietary processes for operation are considered the type of information that could cause substantial competitive harm if released. *See Treatment of Animals v. U.S. Dep't of Agric.*, No. Civ. 03 C 195-SBC, 2005 U.S. Dist. Lexis 01586, at *7 (D.D.C. May 24, 2005); *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 competitors to engage in selective pricing, market concentration, expansion plans, and takeover bids).

DCHA maintains that it withheld responsive records which "would result in substantial harm to the competitive position of the persons from whom the information was obtained" if disclosed. The agency produced technical and cost proposal records to this Office and we have reviewed them *in camera*. We find that the agency has too broadly construed Exemption 1. The records do not, on their face, present a risk of substantial competitive injury, and the agency's response to this appeal does not offer any explanation as to how the subjects of the records might be injured by their disclosure. This is particularly so for responsive records originally submitted to the agency by the requester.

*Segregability*

In order to facilitate the production of responsive records, we must determine whether DCHA can redact the records to delete confidential commercial information, particularly pricing information, without rendering the records useless. DC 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, DCHA has made no attempt at such demonstration or explanation. Applying lawful and appropriate redactions to the pricing and technical proposals would produce an edited record with some informational value to you. For those records that DCHA has already identified as responsive, but withheld to date, the agency should redact confidential information and produce reasonably segregable portions.

*Exemption 4*

DCHA also withheld records under Exemption 4. The agency asserted in its response to your appeal that "[e]mails, DCHA internal documentation, evaluations of all the offerors' proposals, bid tabulation sheets, scoring sheets, documents and communications submitted by the offerors in response to and related to the DCHA proposal . . ." all involve the deliberative process and are precluded from production.

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.* The agency has informed this Office that it is currently reviewing a large volume of email records for responsiveness and that it is preparing a *Vaughn* index reflecting those records it intends to withhold under Exemption 4.

*Protective Order*

The final issue to be considered is whether DCHA may withhold, in their entirety, those records which were previously subject to a protective order. In a conversation with this office on February 28, 2020, DCHA explained that the order was issued by the District of Columbia Contract Appeals Board in a matter involving F&L. We do not endeavor at this time to grasp the facts underlying that matter, as they were relevant only to the Contract Appeals Board. It is important to note that the decision of that body has no bearing on this Office's review of DCHA's actions with regard to the present DC FOIA appeal. *See Morgan v. U.S. Dep't of Justice*, 923 F.2d 195, 198 (recognizing that a defendant's right to obtain information from the government in discovery is independent from the right to obtain information under the FOIA). We echo the sentiments expressed by the D.C. Circuit Court of Appeals, when it considered whether records sealed under a Rule 26(c) protective order were automatically exempt from production pursuant to Exemption 3 of the FOIA. *See Found. Church of Scientology of Wash., D.C, Inc*. v. *Nat'l Sec. Agency*, 610 F.2d 824, 951-52 (D.C. Cir. 1979).

> [W]e believe that the interests guarded by protective orders are not endangered by our refusal to approve automatic nondisclosure of such material Exemption 3. A Rule 26(c) order is issued to avoid injury in the context of a particular suit between particular litigants. Whether such harm will arise from disclosure of the material in a later FOIA suit is an entirely different question from that which faced the court that issued the protective order. Circumstances change, as may the interests of the parties involved in the original litigation. If the concerns behind the protective order are still valid at the time of the later FOIA action, nondisclosure may be approved under the Act's substantive exemptions.

*Id.* at 952. Here, we observe that Contract Appeals Board General Rule 104 allows for the issuance of protective orders to "control[ ] the treatment of protected information" that "may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms." The DC FOIA does not explicitly encompass the Contract Appeals Board rules. Therefore, this Office is entitled to conduct its own review of agency responses to requests made under that statute.

Conclusion

Based on the foregoing, we remand this matter to DCHA to conduct a review of the responsive records identified by its searches. The agency should determine which portions of those records may be withheld pursuant to the DC FOIA exemptions, following the guidance in this decision, and produce non-exempt portions of records to you. With regard to the email records currently under review by the agency, DCHA should prepare a *Vaughn* index reflecting those records it intends to withhold pursuant to the exemptions. Please note that you are free to challenge DCHA's subsequent response by separate appeal to this Office.

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 D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Ashley E. McFarland, Office of General Counsel
DCHA (via email)