

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-221**

February 12, 2021

VIA ELECTRONIC MAIL

Ms. Kate Bailey

RE: FOIA Appeal 2020-221

Dear Ms. Bailey:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the District Department of Transportation (“DDOT”) improperly withheld documents in response to your DC FOIA request for public records.

Background

On June 19, 2020, you submitted a DC FOIA request to DDOT for “[r]ecords, including emails and text messages, about the closure of 16th Street, N.W. between H and K Streets,” with a specified date range. On July 14, 2020, DDOT responded to your request and stated that it had located 616 pages of records responsive to your request, but that it was withholding all but one of those pages pursuant to the deliberative-process privilege, D.C. Code § 2-534(a)(4) (“Exemption 4”). You filed an appeal with this Office the following day. In your appeal, you challenge DDOT’s “barren assertion” that the deliberative-process privilege applies, claiming that DDOT has not provided sufficient detail to determine whether the privilege is applicable.

On October 29, 2020, DDOT responded to your appeal.¹ In that response, the agency explained:

A review of the hundreds of pages of [withheld] document files shows that the discussions were logistical and directional in nature. Many of the email chains were duplicative and were shared among DDOT management and the Agency’s Transportation Operations and Safety Administration. The documents withheld were internal directives and communications pertaining the logistics and directions to staff on closing off the District of Columbia city street in question. The emails included information to and from DDOT divisions on the placement of jersey walls and traffic barriers. A large number of the documents were communications and alerts from Homeland Security and Emergency Management Agency pertaining to the ensuing public demonstrations that occurred at the 16th Street location.

¹ A copy of the agency’s response to your appeal is attached to this decision.

As a result, DDOT argues, the deliberative-process privilege shields those records from disclosure.

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.* 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, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemption 4 – Deliberative Process Privilege

DDOT indicated in response to your initial DC FOIA request that it withheld records under Exemption 4. *See* D.C. Code § 2-534(a)(4). 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.* Applying these criteria, this office has conducted an *in camera* review of the withheld records and determined that, although DDOT has properly withheld some records, many others are not exempt from disclosure. Below we discuss the withheld documents by category.

Properly Withheld Documents

FEMA Alerts

The first set of documents DDOT has withheld include real-time law-enforcement incident notifications compiled and distributed by the Federal Emergency Management Agency (FEMA), based on seemingly sensitive information supplied by the Metropolitan Police Department (MPD), the District’s Homeland Security and Emergency Management Agency (HSEMA), and the United States Secret Service. These documents describe the location,

movements, and actions of demonstrators. Examples of these records include, for example, pages 1 through 45 of the PDF file of withheld documents labeled “bailey withhold 1,”² but many more are found throughout all six PDF files of withheld documents.

Although the agency invokes the deliberative-process privilege to withhold these records under Exemption 4, they may more appropriately be withheld under Exemption 3, which protects investigatory records compiled for law-enforcement purposes, *see* D.C. Code § 2–534(a)(4). Such records are exempt from disclosure if, for example, disclosure would interfere with enforcement proceedings or reveal investigative techniques or procedures generally not known outside the government. *See id.* Disclosure of these real-time reports from FEMA, which share information gleaned from law-enforcement partners and law-enforcement officers on the ground, could potentially reveal investigative techniques and interfere with investigations into incidents that occurred during that time period. Therefore, regardless of whether Exemption 4 applies, we agree with DDOT’s decision to withhold the FEMA alerts (and analogous HSEMA alerts) at issue.

Deliberative Emails

DDOT has also withheld several emails that fit squarely under the deliberative-process privilege because they are both pre-decisional and deliberative. These include the email from Associate Director Matthew Marcou at the top of page 66 in the “bailey withhold 4” file, which seeks staff input on a DDOT policymaking matter; page 86 in “bailey withhold 4,” which provides recommendations in response to that request for input; and pages 26 and 27 of “bailey withhold 5,” which continue that discussion. They also include emails between Chief of Staff Lee Goodall and other staff members at pages 17 to 26 of “bailey withhold 6,” which reflect internal deliberations about whether, where, and how to engage in street closures. Any other emails to the same effect, in which agency staff engage in deliberations about what policies and procedures DDOT should follow, are similarly protected by the privilege and may be withheld.

Deliberative Briefing Documents and Drafts

DDOT has further withheld drafts of potential parking-restriction plans, which by their nature as draft proposals are generally treated as deliberative. *See, e.g., City of Virginia Beach v. United States Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993). These are found, for example, at pages 32, 33, and 44 of “bailey withhold 6,” and may be withheld under the deliberative-process privilege. So too with the briefing document located at pages 34 to 39 and 46 to 50 of that file, which includes discussion about DDOT’s planning assumptions and how DDOT may want to respond to various contingencies. DDOT also properly withheld a draft service management plan for Metrobus, which contains draft proposals for bus service and begins at page 51 of “bailey withhold 6.” Any other drafts and proposals circulated for discussion are likewise protected by the deliberative-process privilege.

² Because DDOT’s production of documents to MOLC does not include Bates numbers, we refer to the page numbers in the six PDF files transmitted to our office.

Improperly Withheld Documents

DDOT Situational Updates

Hundreds of the withheld pages are made up of so-called “DDOT Situational Reports,” many of which are duplicates. These generally take the form of emails from Chief of Staff Lee Goodall to staff members, which report factual matter related to DDOT’s operations and other information that has been reported to DDOT about street and transportation conditions. With perhaps some limited exceptions, the material contained in them does not appear to be deliberative. In other words, it is aimed at informing agency staff about matters that have already taken place or updating them on actions DDOT has taken or decided to take. Based on our review, these communications do not disclose agency deliberations on proposed agency policy.

One example is the email sent by Lee Goodall to a large number of agency staff on June 3, 2020, which can be found starting at page 22 of the “bailey withhold 2” file. Among other pieces of factual information provided to staff, the update shares the following types information:

- That DDOT established a time code for employees working on certain matters.
- That curfew times for the District had been updated.
- That a DDOT employee represented the agency on a call.
- That the U.S. Secret Service had announced various street closures.
- That the Mayor had held a press conference.
- That various traffic signals needed to be repaired.
- Scheduling information for streetcars, the Circulator, WMATA, Capital Bikeshare, and other scooters and bikes.
- Reports on damage to street signs.
- The timing of when agency officials would testify.
- That a heat advisory was in effect.
- A construction notice that went out to developers and contractors.
- Updates on maintenance work.

None of this information is exempt from disclosure under the deliberative-process privilege. It is true, of course, that this information was shared internally among agency staff, but that is merely a threshold requirement—that fact alone does not protect the information from disclosure. The documents at issue must actually be deliberative.

The point of that requirement is to encourage open, frank discussions on matters of policy between subordinates and superiors; protect against premature disclosure of proposed policies before they are finally adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). None of those rationales applies to the majority of the content in the withheld DDOT situational updates. Disclosing what actions DDOT took and the information that DDOT possessed about

streetlights, traffic operations, and parking, for instance, does not reveal any intra-agency deliberations or discussion about proposed agency actions or policy decisions.

To be sure, DDOT *may* be able to redact some limited material from those updates that would reveal agency deliberations or otherwise disclose private information—*e.g.*, bullet points discussing what policies or actions DDOT is “assessing,” “planning,” or “considering,” or the confidential phone number for an operational command center. Some of that information could potentially reveal the matters that DDOT staff deliberated acting on. However, based on our review, such bullet points appear to be few and far between. The bulk of the information contained in those dozens of situational reports is factual and retrospective, informing agency staff about DDOT’s operations and actions. In general, that is precisely the type of information to which requestors are entitled under the DC FOIA.

As a result, the agency should produce non-exempt portions of the DDOT situational update emails to the requestor. Similarly, the agency should produce other documents that are public and do not reflect internal agency deliberations, such as the MPD traffic advisories located at pages 28 to 31 of “bailey withhold 6.”

Conclusion

In sum, we remand this matter to DDOT with instructions to produce the DDOT situational update emails, with any appropriate redactions. We also direct DDOT to produce any public documents that were determined to be relevant. However, we affirm DDOT’s decision to withhold the FEMA alerts, deliberative emails among DDOT staff members discussing agency policy, and briefing or draft documents that discuss recommendations or proposals for DDOT’s actions.

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: Karen R. Calmeise, Hearings/FOIA Officer
DDOT (via email)