

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2021-001**

March 15, 2021

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2021-001

Dear Mr. Mulhauser:

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 Office of the State Superintendent of Education (“OSSE”) improperly withheld a document in response to your DC FOIA request for public records.

Background

On July 21, 2020, you submitted a DC FOIA request to OSSE for a single record: a memo entitled “Concerns with the Proposed Accountability System.” On September 21, 2020, OSSE responded to your request, informing you that it had found a draft document named “Concerns with the Proposed Accountability System,” written by a former OSSE employee named Etai Mizrav. OSSE stated that it was withholding that document under the deliberative-process privilege. In your appeal, you challenge OSSE’s claim that the deliberative-process privilege applies, arguing that (1) the deliberative-process privilege does not shield factual information, (2) the privilege does not shield documents that the agency adopts as its official position, and (3) the record at issue may lack the essential character of a deliberative document.

On October 7, 2020, OSSE responded to your appeal.<sup>1</sup> In that response, the agency explained its search process:

Etai Mizrav is no longer employed with OSSE; therefore, we did not have access to his documents and projects. We conducted an email search for the requested document. We discovered several drafts of the same document, however a final version of the same document was not found.

The agency then explained why it invoked the deliberative-process privilege:

---

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

[T]he document in question was generated based on opinions of the D.C. proposed accountability system; therefore we believe it's appropriate to withhold under deliberative process privilege. . . .

The document in question was prepared by a former employee for the former Assistant Superintendent of Systems and Support, K-12. We are unaware of the project timeline and whether or not the employee's evaluations of the accountability system were adopted. While we have some email communication regarding different versions of the draft memorandum in question, we are not aware of a final memorialized policy or procedures being adapted.

### 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*

OSSE stated 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 record and determined that OSSE properly invoked the privilege to withhold the requested memorandum.

The withheld record in this case fits squarely under the deliberative-process privilege because is both pre-decisional and deliberative. The record in question is a draft memorandum prepared by an employee opining on a proposed performance accountability system for District

schools and making recommendations about what metrics and standards to use. It is pre-decisional because, on its face, it directly discusses the District's "proposed accountability system" that had not yet been enacted; it was specifically an attempt to shape what the final version of that system would later look like. *See, e.g., Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992) ("[A] recommendation to a supervisor on how to proceed is predecisional by nature.") It is also "a direct part of the deliberative process in that it makes recommendations or expresses opinions on . . . policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). In particular, it assesses certain approaches to accountability and measuring school performance and advocates for the system to include the author's recommended measures.<sup>2</sup> A pre-decisional intra-agency memorandum from an employee providing policy advice and making recommendations to agency superiors is a textbook example of material that is protected by the deliberative-process privilege.

It is true, of course, that purely factual information is generally not exempt, but that principle is not applicable here. As an initial matter, the withheld memorandum does not include easily segregable factual information.<sup>3</sup> To be sure, the author intersperses arguments and recommendations with certain factual datapoints, but the selective and curated use of specific facts to support an argument is itself protected by the deliberative-process privilege. Attempting to segregate those facts and to redact the material around them would not only be practically challenging but would also "permit indirect inquiry into the mental processes" of the document's drafter, *Williams v. United States Dep't of Justice*, 556 F. Supp. 63, 65 (D.D.C. 1982), and thus reveal pre-decisional agency deliberations. Similarly, the interconnected nature of any factual information with the deliberative material is such that releasing any of the memorandum would expose or cause harm to the agency's deliberations. That is, in this case, the facts the author chose to cite for support of his recommendation could themselves reveal what his recommendations were. Disclosing that material would thus defeat the point of the privilege. *See Wolfe v. HHS*, 839 F.2d 768, 774-776 (D.C. Cir. 1988) (en banc).

In addition, there is no indication at all that the agency ever "adopted" this document as its own or chose to use it as an official source of agency guidance. In fact, its draft status strongly implies that is not the case.

Finally, the record is not simply a summary or a technical assessment, contrary to what you suggest. Rather, it is a set of the author's opinions, recommendations, and arguments that appear intended to advise agency decision-makers on a matter of policy. That is at the core of what the deliberative-process privilege protects.

## Conclusion

In sum, we agree with OSSE's decision to withhold the requested record based on the deliberative-process privilege. We therefore affirm the agency's decision and deny your appeal.

---

<sup>2</sup> Moreover, the document's status as a draft further underscores its deliberative nature. *See, e.g., City of Virginia Beach v. United States Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993).

<sup>3</sup> Contrary to what you speculate, it does not contain any sort of "factual . . . recital" section.

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: Mona Patel, FOIA Officer  
OSSE (via email)