

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2021-129**

April 7, 2022

**VIA ELECTRONIC MAIL**

Ms. Kara Bell

RE: FOIA Appeal 2021-129

Dear Ms. Bell:

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 February 17, 2021, you submitted a DC FOIA request to DDOT for “[r]ecords, including emails and text messages, between DDOT and the Executive Office of the Mayor about Black Lives Matter Plaza. Records, including emails and text messages, of DDOT employees about Black Lives Matter Plaza”, with a specified date range. On March 18, 2021, DDOT responded to your request and stated that it had located 513 pages of records responsive to your request, but that it was withholding 505 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 on March 22, 2021. In your appeal, you challenge DDOT’s assertion that the deliberative-process privilege applies. You argue that DDOT has not provided sufficient detail to determine whether the privilege is applicable and has “failed to demonstrate that all non- exempt information has been segregated.”

On April 7, 2021, DDOT responded to your appeal.<sup>1</sup> In that response, the agency explained:

With regards to the request for responsive e-mails, DDOT conducted an OCTO search to recover records to and/or from DDOT e-mails addresses with the search terms....

Often OCTO searches, with the same subject line search term, that do not include specific individual e-mail addresses, will result in

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

multiple copies of the same e-mail chain sent to multiple recipients....

We found that the with-held 505 pages of e-mails (BLM -1 through 10) included multiple internal e-mails between DDOT staff scheduling internal meetings and/or conference calls to discuss issues pertaining to the section of 16th Street NW between H and K Streets where the Black Lives Matter mural was located. For example, one document in BLM -10 was an advisory Memorandum from DDOT Director to the Deputy Mayor of Operations and Infrastructure. Also responsive were several file documents marked “Confidential Drafts” that were 30-page proposals that presented ideas from consultants for the proposed 16th Street design changes. Therefore, these documents were appropriate to withhold pursuant to the deliberative, pre-decisional exemption of D.C. Official Code § 2-534) (a)(4) (2012). (See Attachment BLM-8, and BLM-10)

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 a sample of the withheld records and determined that, although DDOT has properly withheld some records, many others are not exempt from disclosure. By their nature 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). DDOT has improperly withheld “scheduling efforts that resulted in duplicative e-mails.” These scheduling efforts are factual and do not disclose agency deliberations on proposed agency policy.

### Conclusion

We remand this matter to DDOT with instructions to produce the scheduling emails. However, we affirm DDOT’s decision to withhold 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)