

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-001**

February 1, 2023

VIA ELECTRONIC MAIL ONLY

Mr. Nicholas Marritz

RE: FOIA Appeal 2022-001

Dear Mr. Marritz:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the Metropolitan Police Department (“MPD”) to your DC FOIA request.

Background

On January 30, 2020, you submitted a DC FOIA request to MPD, identified as 2020-FOIA-02959, which sought the following:

1. All records that govern the relationship between MPD and Nextdoor, such as contracts or memoranda of understanding.
2. All guidance issued to MPD personnel regarding their use of Nextdoor or their use of data gathered via Nextdoor.
3. All communications between MPD and Nextdoor;
4. All other records related to MPD's use of Nextdoor. (Date Range for Record Search: From 01/01/2018 To 01/31/2020)

MPD responded to your request on September 14, 2021 as follows:

1. *All records that govern the relationship between MPD and Nextdoor, such as contracts or memoranda of understanding.*

Response: Please be advised, MPD does not have a contract or MOU with Nextdoor.

2. *All guidance issued to MPD personnel regarding their use of Nextdoor or their use of data gathered via Nextdoor.*

Response: Please be advised, the guidance issued to MPD personnel was from the information provided strictly to a law enforcement agency for its internal use. MPD conducted internal training and/or guidance via power points based off information received from Nextdoor.

3. *All communications between MPD and Nextdoor;*

Response: Please be advised, communications between MPD and Nextdoor were determined to be drafts, which are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(4)[("Exemption 4")].

4. *All other records related to MPD's use of Nextdoor.*

Response: Please be advised, there were no additional records located.

On October 4, 2021, you filed an appeal with this Office asserting that MPD should have released the guidance PowerPoints for the following reasons:

MPD failed to meet its burden of explaining why the Guidance Documents are exempt from disclosure. Under DC's FOIA law, an agency that denies a request has the burden of giving the requester enough information about the denial to make judicial or administrative review meaningfully possible. *Fraternal Order of Police v. District of Columbia*, 79 A. 3d 347, 355 (D.C. 2013). Here, MPD did not say what provision of DC's FOIA law justifies withholding the PowerPoints; it is left to me, the requester, to guess. MPD should be required to produce the PowerPoints for that reason alone.

MPD has not shown that the Guidance Documents fall under the Investigatory Records exemption. MPD may argue that the PowerPoints fall under D.C. Code § 2-534(a)(3), which exempts from disclosure "investigatory records compiled for law-enforcement purposes."... My request does not seek records related to any specific criminal acts, cases, investigations, or people—it just seeks general guidance documents about how MPD "partners with" DC residents via a private, widely-publicized social media site. MPD cannot simply issue a press release touting its new use of Nextdoor "partner with" DC residents, then provide no information about what that "partnership" looks like. Thus, the Investigatory Records exemption does not apply, and MPD should be required to release the PowerPoints and all related documents.

You also asserted that MPD should have produced its communications with Nextdoor for the following reasons:

First, Exemption 4 does not exempt "drafts." It exempts "Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated

or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body."

Second, even if Exemption 4 did exempt drafts, there is no reason to believe that communications between MPD and Nextdoor were in fact drafts. Drafts are usually understood as works-in-progress, not finished products. Why would MPD send a draft email to Nextdoor before it was finished? Why would Nextdoor send a draft email to MPD? It simply strains credulity to think that neither MPD nor Nextdoor ever sent the other a final version of anything, including a simple email.

Third, communications between MPD and Nextdoor do not fall under the "real" Exemption 4, because they are not inter-agency or intra-agency communications. Nextdoor is a private company. And Exemption 4 does not apply to communications between the government and private parties (other than private contractors, consultants, and advisors that the agency itself has retained). *Department of Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1 (2001) (interpreting Exemption 5 of the federal FOIA, on which Exemption 4 of the DC FOIA is based). Here, Nextdoor was not acting as MPD's contractor, consultant, or advisor—MPD's denial letter specifically says that there is no contract or memorandum of understanding between Nextdoor and MPD. Therefore, MPD must produce all of its communications with Nextdoor.

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).

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).

Inadequacy of the Response

MPD's response to your request does not conform to the requirements of DC FOIA. As previously discussed, DC FOIA mandates that any person has the right to inspect a record unless the record is exempt from disclosure for one of the reasons contained in D.C. Code § 2-534. If a record is exempt, pursuant to D.C. Code § 2-533(a), a District agency must issue a denial letter containing the following: "(1) The specific reasons for the denial, including citations to the particular exemption(s) under § 2-534 relied on as authority for the denial; (2)

The name(s) of the public official(s) or employee(s) responsible for the decision to deny the request; and (3) Notification to the requester of any administrative or judicial right to appeal under § 2-537.”

Here, in response to request number 2, MPD has failed to cite an applicable objection, and has alternatively referenced the use of identified materials for internal training purposes.

D.C. Code § 2-534(a)(4)(“*Exemption 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.*

Nextdoor is an entity outside of the District government. As such, it is unclear as to how the cited exemption applies, i.e. how do the purportedly exempt communications meet the threshold requirement of being an inter- or intra-agency communication. A notable exception to the inter- or intra-agency requirement is the consultant corollary exception, which applies when a party outside the government provides advice, effectively functioning as an agency employee. See *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10-11 (U.S. 2001) (noting that the deliberative process privilege may apply when documents provided by outside consultants “played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done”). However, MPD has not presented this assertion and this Office is unable verify such is the case given the record before it.

Conclusion

Based on the foregoing, we remand this matter back to MPD to cite the exemption relied upon in response to request number 2, further explain the applicability of D.C. Code § 2-534(a)(4) in the context of the relationship between MPD and Nextdoor, cite to another applicable exemption and/or produce a copy of any responsive records that are not exempt from disclosure.

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 Superior Court in accordance with D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Brandy Reaves, MPD FOIA Officer (via email only)