

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-027**

February 6, 2023

VIA ELECTRONIC MAIL ONLY

Fritz Mulhauser

RE: FOIA Appeal 2022-

027

This letter is in response to the administrative appeal that you have submitted to the Mayor pursuant to the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531, *et seq.* In your appeal, you have challenged the response of the Office of the City Administrator ("OCA") to your DC FOIA request.

Background

On August 31, 2021, you submitted a DC FOIA request to OCA, identified as 2021-FOIA-07709, which sought the following:

This is a request for records since January 1, 2021, related to the Building Blocks DC program. The website of the Office of the City Administrator describes the program this way:

Using 2020 crime data, the Bowser Administration has identified 151 blocks that represent about 2% of all blocks in the city, but were the site of 41% of all gunshot-related crimes last year. This place-based strategy is a data-driven approach that uses a comprehensive block-by-block analysis to pinpoint specific areas where gun violence is a constant reality and the sounds of gunshots are a regular event. Building Blocks DC analyzed this data based on violent offenses like homicides, robberies, and assaults where shots were fired and "sounds of gunshots" calls for service to 911. This resulted in the development of the 151 blocks in the city with the most amount of gun-related violence.

We request records as follows:

- any record showing the locations of the 151 blocks
- any record showing the 41-block subset of these blocks selected for initial targeting

- any record showing the data sources and criteria for selecting the 151 and 41 blocks

OCA responded to your request on September 23, 2021 by providing you with some information on the Building Blocks DC initiative but otherwise denying your request pursuant to D.C. Code § 2-534(a)(3), because,

[i]t is vital...that this sensitive information remain private until Building Blocks DC can begin to effectuate change. Publicly identifying the specific blocks would pose a public safety threat and undermine the work of Building Blocks DC.

In your appeal, you have asserted that OCA applied irrelevant and non-existent exemptions and has failed to segregate any non-exempt material. Moreover, you have rejected the application of D.C. Code § 2-534(a)(3), because you have not requested any “law enforcement investigatory records, only records showing city blocks and how they were chosen for targeted crime fighting expenditures.”

In response to your appeal, OCA has advised this Office that it provided you with, “an email describing the data used to identify potential BBDC blocks.” With respect to the identification of the 151 blocks, or any subset thereof, OCA stated your request was being denied pursuant to D.C. Code §§ 2-534(a)(3) and (a)(4). In further explaining its invocations, OCA stated:

The Building Blocks DC program anticipates that releasing the identified blocks with the methodology and ranking will lead to an increase in gun violence in these areas, and also create a risk of increased homicides, due to pinpointing the groups that are on these blocks. A lot of gun violence in DC comes from “crews” which are groups of people who join together based on a very specific location, thus making exact location crucial to their identity. Releasing the identified blocks with the methodology and ranking is anticipated to encourage competition among crews for the most dangerous reputation, leading to an increase in violent acts and endangering the public safety. Advertising the top blocks is anticipated to inflate the need for crews to maintain their status and fuel existing feuds. In essence, identifying the 151 blocks would also be promoting the rank in terms of danger of the groups that claim these blocks. The “community pride” of those bringing gun violence would be expected to encourage an increased level of violence and create an unsafe environment, endangering the public safety and the safety of law enforcement officers. [and]

In addition to the reasons described in the row above, the list of 151 blocks was beheld because it is deliberative. The list of 151 blocks constitutes a recommendation to agency management of the blocks that should be considered for inclusion in the BBDC program. Only certain of those blocks have been included in the BBDC program to date, and final decisions have not been made on the remainder of the blocks (i.e., the agency has not made decisions

regarding the inclusion of the remaining blocks). Therefore, the list of 151 blocks constitutes predecisional, recommendatory information covered by the deliberative process privilege.

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, 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. See *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. See *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

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).

To be properly withheld under Exemption 4, a record must be contained in an inter- or intra-agency document. Therefore, Exemption 4 is typically limited to documents transmitted within or among government agencies. See *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10-11 (U.S. 2001). To qualify for protection under the deliberative process privilege, information must be predecisional and deliberative. *Coastal States Gas Corp., v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional 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.* Exemption 4 covers,

...recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

Here, the stated purposes of the Building Blocks DC program include, but are not limited to, “address[ing] gun violence using a public health approach”, “coordinat[ing] violence prevention efforts currently lead by District agencies, nonprofit partners, and community-lead efforts,” and to some extent participating in “the distribution of grants to community members engaged in efforts aimed at reducing gun violence in those neighborhoods most affected.”¹ In the absence of a request that offers context as to a final agency decision, this Office is inclined to accept OCA’s representation that records identifying the location of blocks, for which the Building Blocks DC program intends to utilize in efforts to address the issue of neighborhood gun violence, are predecisional and deliberate. These locations do not necessarily represent a final agency decision, but rather a consideration into a decision that will ultimately be made.

Under D.C. Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). “‘Entire records are exempt from disclosure when it is shown that the exempt and nonexempt information are ‘inextricably intertwined,’ such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little information value.” *See D.C. v. Fraternal Ord. of Police Metro. Police Lab. Comm.*, 33 A.3d 332, 346 (D.C. 2011). To the extent your request seeks records identifying the location for which targeted action may occur, the disclosure of a portion of these records by-way-of redaction does not appear to be feasible.

Finally, the portion of the request seeking “any record showing the data sources and criteria for selecting the 151 and 41 blocks” is distinguished in that it is not seeking a factor or consideration in an imminent decision but rather the data sources and criteria utilized in their selection. Although, OCA has provided you some facet of this information by-way-of direct communication with you, it has not addressed the issue of whether there are any responsive records satisfying this request and the necessity for their production, if any, in the absence of a stated exemption.

Conclusion

Based on the foregoing OCA’s final determination is affirmed, in part, and remanded in part. Specifically, this decision affirms OCA’s withholding of any records showing the 151 blocks, or subset thereof, as requested. This matter is remanded back to OCA for the identification and production of any non-exempt “record[s] showing the data sources and criteria for selecting the 151 and 41 blocks”, if any. 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 DC FOIA.

Sincerely,

¹ <https://oca.dc.gov/page/building-blocks-dc>

Mayor's Office of Legal Counsel

cc: Barry Kreiswirth, OCA FOIA Officer (via email only)