

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-057**

February 6, 2023

**VIA ELECTRONIC MAIL ONLY**

Mr. Edward Daniels

RE: FOIA Appeal 2022-057

Dear Chairman Daniels:

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 District of Columbia Housing Authority (“DCHA”) to your DC FOIA request.

Background

On June 22, 2021, on behalf of ANC 6D, you submitted a DC FOIA request to DCHA, which sought the following:

[T]he technical proposals from the development teams selected as finalists in the RFP process, including their best-and-final offers, in order to understand the details of what plans were proposed for the redevelopment of the Greenleaf properties overall and how relocation of the Greenleaf residents was proposed to be handled.

DCHA denied your request in full on October 25, 2021 pursuant to D.C. Code § 2-534(a)(6)(“Exemption 6”)(“information specifically exempted from disclosure by statute...”) and, through uncited reference, D.C. Code § 2-534(a)(1)(“Exemption 1”)(“disclosure of the documents requested would reveal confidential commercial information of the responding parties...”). Specifically, DCHA asserted:

[T]he Request for Proposals (“RFP”) cited in your FOIA request pertains to an open, procurement process. DCHA has not finalized a master development agreement with the selected development team...To ensure the fairness and integrity of the procurement process, HUD statutes and regulations proscribe direct or indirect communication of certain information during the selection process by HUD or, in this case, DCHA employees to individuals who are not authorized to receive that information. [citations omitted].

You filed an appeal with this Office on December 28, 2021 challenging DCHA's determination that there is an open procurement and that your request for technical proposals includes proprietary or confidential commercial information. You also questioned DCHA's invocation of Exemption 6 noting the agency's October 25 response letter "references HUD statutes and regulations that proscribe communication of certain information during the selection process, and the DC Freedom of Information Act that exempts certain information from disclosure, but offers no further explanation of how disclosure of the requested information would violate federal or DC statute."

On January 24, 2022, we notified DCHA of your appeal and requested a response. DCHA responded on January 31, 2022 reiterating there is an open procurement and that the records requested are exempt from disclosure pursuant to Exemption 6 because of HUD statutes and regulations. DCHA also asserted that contrary to your assertion, "details of the technical proposals contain proprietary and confidential information about the bidders' development capabilities, both in general and specific to the Greenleaf site, as well as confidential plans, site design, and redevelopment proposals that could be exploited by competing developers in this or other projects with DCHA." Additionally, DCHA stated that "[t]here is little, if any, non-confidential or proprietary information submitted by the RFP bidders in their technical proposals that would be separable."

### Discussion

It is the public policy of the District of Columbia 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). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Code § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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 the local law. *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)(1) ("Exemption 1")*

Exemption 1 protects information that: (1) is a trade secret or commercial or financial information; (2) was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Code § 2-534(a)(1). The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms

“commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Exemption 1 has been “interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury.” *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *see also*, *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, “actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply.” *Essex Electro Eng’rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption “does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would ‘likely’ do so. [citations omitted]”).

Here, DCHA did not provide us the withheld records for an *in camera* review. However, DCHA has advised this Office that it has provided public access to the basic information regarding the Greenleaf Redevelopment Plan and otherwise affirmed:

The details of the technical proposals contain proprietary and confidential information about the bidders’ development capabilities, both in general and specific to the Greenleaf site, as well as confidential plans, site design, and redevelopment proposals that could be exploited by competing developers in this or other projects with DCHA. There is little, if any, non-confidential or proprietary information submitted by the RFP bidders in their technical proposals that would be separable.

Based on this representation, DCHA’s response to the request is affirmed. Any discussion of D.C. Code § 2-534(a)(6) is reserved at this time.

### Conclusion

Based on the foregoing, we affirm DCHA’s decision and hereby dismiss your appeal. 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 the Superior Court of the District of Columbia in accordance with DC FOIA.

Sincerely,

Mayor’s Office of Legal Counsel

cc: Kimberly J. August, DCHA FOIA Officer (via email only)