

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-070**

January 26, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Tracey Ann Langley

RE: FOIA Appeal 2022-070

Dear Ms. Langley:

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 Office of the State Superintendent of Education (“OSSE”) to your DC FOIA request.

Background

On December 20, 2021, you submitted a DC FOIA request to OSSE, identified as 2022-FOIA-02150, which sought the following:

Any and all records relating to the Director of Student Hearings recruitment for the most recent posting in July/August 2021, including, but not limited to: Any record of performance or supervisory evaluation for Tracey Langley not submitted by Tracey Langley used in selection considerations 2) whether Tracey Langley was eligible based on the minimum qualifications, including any selective placement factors for the position 3) the job requirements, scoring procedures used, and Tracey Langley’s final screening score, whether Tracey Langley was referred to the selection official, the name of the selection official and the name of the individual selected for the position of Director of Student Hearings

OSSE responded to your request on January 13, 2022 by providing you with the following records:

- 1) the job requirements outlined within the Job Posting for Job ID 13823 – OSSE: Director Student Hearings;
- 2) Staffing Panel Form for Job ID 13823; and
- 3) “13823 Interview Questions”, which is the Interview Rating and Ranking Schedule for Job ID 13823.

OSSE noted that it redacted applicant names in the Interview Rating and Ranking Schedule (request #3) pursuant to D.C. Code § 2-534(a)(2) (“Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy”). Further, OSSE explained that it did not have any responsive records to the first part of your request, i.e. “[a]ny record of performance or supervisory evaluation for Tracey Langley not submitted by Tracey Langley used in selection considerations.”

In your appeal, through a citation to the District of Columbia Department of Human Resources (“DCHR”) recruitment guide, you have asserted that you are entitled to the following information:

- Any record of performance or supervisory evaluation not submitted by the candidate used in selection considerations;
- Whether the applicant was eligible based on the minimum qualifications, including any selective placement factors for the position;
- The job requirements, scoring procedures used, and the applicants final screening score;
- Whether the applicant was referred to the selection official; and
- The name of the individual selected.

This Office notified OSSE of your appeal on February 24, 2022 and requested a response. OSSE responded on March 3, 2022 by reiterating that its redactions and withholding were proper pursuant to D.C. Code § 2-534(a)(2). Further, OSSE stated that it did not have any responsive records for the part of your request seeking “[a]ny record of performance or supervisory evaluation for Tracey Langley...” and the production of any additional records is precluded, as deliberate and confidential, because “there is a pending grievance, no final selection for the position has been made, the position remains in a state of abeyance and the matter is not closed.” Finally, OSSE distinguished between your right to records under DC FOIA and the provisions of the DCHR recruitment guide.

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 DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. D.C. Code § 2-534.

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 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)(2) (“Exemption 2”)

Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than

de minimis. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. See, e.g., *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994).

There is cognizable and sufficient privacy interests in information about an individual contained in employment applications and relating to the employment process. *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984); *Barvick v. Cisneros*, 941 F. Supp. 1015 (D. Kan. 1996).

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. See *Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. The “public interest” in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

This statutory purpose is furthered by disclosure of official information that “sheds light on an agency’s performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773; see also *Ray*, 112 S. Ct. at 549. Information that “reveals little or nothing about an agency’s own conduct” does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. See *Reporters Committee*, 489 U.S. at 773.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

In balancing the privacy interest of named individuals within the responsive records identified by OSSE, it is unclear how disclosing the requested information is relevant to OSSE’s conduct as a whole. Further, it is noted that courts have held that the public interest in resume and background information hinges on whether or not the individual supplying the information was accepted for the position or role for which the information was provided. *Core v. United States Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) (finding that there is sufficient public interest in the qualifications of successful applicants to require disclosure of resume information; however, disclosing resume information of unsuccessful applicants would be a clearly unwarranted invasion of personal privacy). As such, in the absence of any identified countervailing public interest, we hold that OSSE may withhold any names contained within the applicable records by-way-of redaction.

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, contemporary with your appeal, OSSE indicated “no final selection for the position has been made.” Based on this representations, any internal documents contemplating that decision would be exempt from disclosure.

Conclusion

Based on the foregoing, OSSE’s response to your request is affirmed. Additional information may be available, outside the context of FOIA, by pursuing a records request with DCHR pursuant to the applicable recruitment guide. 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,

Mayor’s Office of Legal Counsel

cc: Lee Hagy, OSSE FOIA Officer (via email only)