

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-089**

June 29, 2022

VIA ELECTRONIC MAIL

Ms. Emily Davies

RE: FOIA Appeal 2022-089

Dear Ms. Davies:

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 Department of Corrections (“DOC”) improperly withheld documents in response to your DC FOIA request for public records.

Background

On January 24, 2022, you submitted a DC FOIA request to DOC seeking “[a]ny documents from the U.S. Marshals Service [(“USMS”)]in possession of the Department of Corrections, documenting conditions in the jail, observations at the jail or any suggestions or recommendations for addressing or remediating conditions identified by [USMS].” On February 15, 2022, DOC responded to your request and stated that it “did receive a U.S. Marshals' draft report, an evaluative document which makes recommendations to assist the DOC in decision making regarding inmates in its custody. This record is a pre-decisional inter-agency document, which is exempt from disclosure by the deliberative process privilege and the D.C. Code §2-534 (a) (4) [(“Exemption 4”)].”

You filed an appeal with this Office on February 22, 2022. In your appeal, you challenged DOC’s assertion that the deliberative-process privilege is applicable to the requested report. Specifically, you argued that the report “was created by [an] outside agency and large po[r]tions of the document simply document events that occurred at the D.C. jail rather than deliberate any future decision.” You also asserted that “purely factually material cannot be withheld.” On March 8, 2022, we notified DOC of your appeal and requested a response. On March 24, 2022, DOC responded to your appeal.¹ In its response, DOC elaborated on its position that the deliberative-process privilege shields the requested report from disclosure. The agency explained that:

The draft material here is a report that 1) requires finalization, 2) contains opinions and factual inaccuracies which DOC must refute and 3) contemplates review by appropriate officials of the DOC. Both the report and agency's response to it are

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

part of discussions and deliberations to develop corrective action plan, as well as policy and procedure to effect needed changes in services provided to inmates in DOC facilities.

DOC also stated that “USMS inspections and reports consequently generated can only be understood as a contribution to [DOC’s] decision-making process” because “USMS ‘s authority for conducting the inspection is the USMS-DOC Intergovernmental Agreement Number 16-00-0016 in which DOC ‘agrees to allow periodic inspections of [its facilities] by [USMS],’ with the agreement further requiring that inspection findings be shared with the DOC ‘in order to promote improvements to facility operations, conditions of confinement, and levels of services.’” Subsequently, DOC provided a copy of the report to this Office for *in camera* review.

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. Official 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

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.*

The USMS is an entity outside of the District government. Accordingly, for the deliberative process privilege of Exemption 4 to apply to a report between USMS and DOC, an exception must exist to the threshold requirement that the records are “inter-agency or intra-agency” documents. 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”). The consultant corollary exception is not applicable when the outside party is acting in its own interest or seeking a government benefit at the expense of other applicants. *Id.* at 12. The District Court for the District of Columbia has held that “to be excluded from the exemption,” the outside party “must assume a position that is ‘necessarily adverse’ to the government.” *Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 45- 46 (D.D.C. 2012).

Under D.C. Official 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). “To demonstrate that it has disclosed all reasonably segregable material, ‘the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’” *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F. Supp. 2d 106, 120 (D.D.C. 2010)). In *Judicial Watch*, the court held that “[a]lthough purely factual information is generally not protected under the deliberative process privilege, such information can be withheld when ‘the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.’” *Id.* at 28. (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In these instances, factual information is protected when disclosing the information would reveal an agency’s decision-making process in a way that would have a chilling effect on discussion within the agency and inhibit the agency’s ability to perform its functions. *Id.*

Here, based on USMS-DOC Intergovernmental Agreement Number 16-00-0016, we find that the consultant corollary is applicable to the report. However, it is not clear that DOC thoroughly assessed whether the report contained any purely factual material that was segregable and could be released. For example, the agency should assess whether factual portions of the Executive Summary section, which describe past reviews of DOC, the Authority and Scope of Mission sections, which establish USMS’ inspection authority, and portions of the Overview of Facilities section, which describes the DC Jail, are segregable and could be released. Therefore, remand to the agency is appropriate.

Conclusion

Based on the foregoing, we remand this matter to DOC and direct it to promptly review the withheld report and disclose any non-exempt portions or provide an explanation of why there is no reasonably segregable material.

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: Oluwasegun Obebe, Records, Information & Privacy Officer
DOC (via email)