

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-103**

February 8, 2023

VIA ELECTRONIC MAIL

Ernest Johnson

RE: FOIA Appeal 2022-103

Dear Mr. Johnson:

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 Deputy Mayor for Planning and Economic Development ("DMPED") to your DC FOIA request.

Background

On February 17, 2022, you submitted a DC FOIA request to DMPED, which sought, "the annual lease payment history of \$25,000 with 5% increase after 5 years from 2012 to 2022... [and] the outstanding property and possessory taxes during same time period." While not specifically stated in the materials presented to this Office, based on a similar DC FOIA request you have made to the D.C. Office of Tax and Revenue ("OTR"), it is assumed this request is related to the leasing of the Howard Theater, located at 620-T Street, NW, in Washington, D.C.

DMPED responded on March 3, 2022 by advising you that any responsive records in its possession were exempt from disclosure pursuant to D.C. Code § 2-534 (a)(1)("[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained."). DMPED also advised you that it does not maintain any records related to property and possessory tax, and referred you to the Office and Tax Revenue ("OTR") for this portion of your request.

On March 21, 2022, you filed an appeal with this Office challenging DMPED's response for the following reasons:

The public has a right to know if taxpayer owned property is being maintain and develop[ed] to the highest and best use for residents of the District of Columbia. This includes but is not limited to payments for use and management of public owned property lease to private entities. [DMPED] misuses DC

Official [C]ode 2- 534(a)(1) to deny public access to late payment information that could add substantial proof of ground lease default or contrary that no such default exist.

Exemption from disclosure is clear that information of a personal nature would constitute an unwarranted invasion of privacy. Such as body worn camera recordings by MPD or inside a personal resident, domestic violence, or investigatory records. Etc.

It is not DMPED's role to conceal mismanagement, agreements default, fraud or abuse. We ask you to direct DMPED to provide payment history information as requested.

On March 24, 2022, we notified DMPED of your appeal and requested a response. DMPED responded on April 6, 2022 reiterating that it properly withheld "[d]ocuments containing payment history information" pursuant to Exemption 1 and it properly referred you to OTR for "the outstanding property and possessory taxes."

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. *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, we accept DMPED’s representation that the requested information, i.e. lease payments made between a managing and operating entity, are exempt from disclosure pursuant to D.C. Code § 2- 534(a)(1). This information would presumptively be obtained from outside of the government and its release would likely result in a harm to the competitive position of the entities involved.

As a result, we find that DMPED properly withheld records under Exemption 1.

Conclusion

Based on the foregoing, we affirm DMPED’s decision and hereby deny 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 in Superior Court in accordance with D.C. Code § 2-537.

Sincerely,

Mayor’s Office of Legal Counsel

cc: Erika Satterlee, DMPED FOIA Officer (via email only)