

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-117**

February 8, 2023

VIA ELECTRONIC MAIL ONLY

Mrs. Carrie Boulanger

RE: FOIA Appeal 2022-117

Dear Ms. Boulanger:

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 Department of Health (“DOH”) to your DC FOIA request.

Background

On March 10, 2022, you submitted a DC FOIA request to DOH, which sought the following:

Would you kindly provide the subpoena mentioned in the attached page 1 paragraph one. Also please produce on page 2 the "ATTACHED INFORMATION" which went with this letter. This is mentioned under the "Legal Compliance" paragraph.

DOH responded to your request on March 23, 2022 by providing the requested subpoena. DOH also notified you that the information submitted in response to the subpoena is “exempt from disclosure pursuant to D.C. Code §§ 2-534(a)(4)...because it is information that was received as part of the deliberative process undertaken by the Department in arriving at a final decision regarding this establishment and the health professionals working at this establishment.” Additionally, DOH stated that “certain of the information is exempt from disclosure either under

D.C. Official Code § 2- 534(a)(2), because it constitutes information of a personal nature, the disclosure of which would constitute an clearly unwarranted invasion of personal privacy, or D.C. Code § 2-534(a)(1), because it constitutes commercial information obtained from outside the government and disclosure would constitute harm to the competitive position of the person or entity from which the information was obtained.”

On March 28, 2022, you filed an appeal with this Office stating “[w]hile I thank you very much for the one response document I appealing the denial of the other public records.” You

also provided a list of the specific records you deemed missing from the responsive documents.

This Office notified DOH of your appeal on April 5, 2022 and requested a response. DOH responded on April 11, 2022 by reiterating the basis for its withholding and by providing the withheld documents to this Office for an *in-camera* review.

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. *See* 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).

Following a review of the documents withheld, they are generally described as service forms referencing medical procedures and various other information, insurance declaration pages, service agreements, internal policy manuals and nurse practitioner agreements.

D.C. Code § 2-534(a)(1) (“Exemption 1”)

D.C. Code § 2-534(a)(1) exempts from disclosure “trade 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.”

To defend withholding a document under Exemption 1, the withheld information: (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. Generally, records are “commercial” so long as the submitter has a “commercial interest” in them. *See Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006).

Here, the requested information was obtained from outside the government, the party from

which it was obtained faces actual competition and the disclosure of the documents would cause a competitive injury. As such, the service forms, insurance information, policy manuals, and practitioner agreements have been properly withheld.

As a result, we find that DOH properly withheld records under Exemption 1. A discussion of the other exemption cited by DOH, D.C. Code §§ 2-534(a)(2), (a)(4) and (e), is reserved at this time.

Conclusion

Based on the foregoing, we affirm DOH'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: Phillip Husband, DOH FOIA Officer (via email only)