

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeals: 2022-121 & 2022-122**

February 8, 2023

VIA ELECTRONIC MAIL ONLY

Dominique Mccoy

RE: FOIA Appeals 2022-121 & 2022-122

Dear Ms. McCoy:

This letter responds to the administrative appeals 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 appeals, you have challenged the responses of the Department of Health (“DOH”) to your DC FOIA requests.

Background

On March 28, 2022, you submitted two DC FOIA request to DOH, identified as 2022-FOIA-04833 and 2022-FOIA-04834, which sought the following:

[T]he response to the subpoena to Capital Women's Services pertaining to the following request: Transfer Agreements, Facility Policy and Procedure Manual(s), Procedure for the sterilization of equipment, Waste Disposal Agreements, Daily Session forms, [and] Contract for all service agreements.

On March 29, 2022, you submitted an additional DC FOIA request to DOH, identified as 2022- FOIA-04915, which sought the following:

[T]he response to the subpoena to Capital Women's Services pertaining to their Preventative Maintenance Agreements/Logs.

DOH denied your requests on March 28th and March 30th, because,

...the Department has determined that such information is exempt from disclosure pursuant to D.C. Official Code §§ 2-534(a)(4) and (e) because the information consists of predecisional deliberative documents that were obtained by the Department as part of the deliberative process undertaken by the Department in investigating and arriving at a final determination regarding this establishment and the health professionals working at this establishment. Moreover, the Department has determined 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. Official 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.

In your appeals you challenge DOH's response because, "the public needs to know what's happening behind the closed doors pertaining to the digital files and documents in the government's possession."

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. 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).

DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe 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")

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 document would cause a competitive injury.

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)