

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-138**

January 25, 2023

**VIA ELECTRONIC MAIL ONLY**

Daniel Maharaj

RE: FOIA Appeal 2022-138

Dear Mr. Maharaj:

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 Inspector General ("OIG") to your DC FOIA request.

Background

On April 4, 2022, you submitted a DC FOIA request to OIG which sought the following:

1. Provide a complete copy of Ms. Marie Hart's, Principal Deputy Inspector General (PDIG), employment contract and all hiring documents for the position she holds as PDIG, including all Qualifications and Professional Certifications in Auditing, and any prior experience immediately before joining the Office of Inspector General in 2014, redacted of any Personally Identifiable Information (PII).
2. Provide a complete copy of Mr. Fekede Gindaba's, Assistant Inspector General for Audits (AIGA), employment contract and all hiring documents for the position he holds as AIGA, including all Qualifications and Professional Certifications in Auditing, and any prior experience immediately before taking on the AIGA position, redacted of any Personally Identifiable Information (PII).
3. Provide any and all documents and correspondence regarding/relating to the outstanding performance cited as the reason for awarding the Van Steuben Award for the "Employee of the Year" to Mr. Fekede Gindaba (AIGA) at the most recent Awards distribution by Office of Inspector General.
4. Provide a complete copy of the transcript of the Reconsideration and Resolution Committee Performance Hearing held on March 23, 2022, under Chapter 14 of the DCHR Manual, pursuant to a Request for Review filed by Manoharan Govindaraj, an employee of the Office of Inspector General, for the

performance period 10/1/2020 to 9/30/2021. [and]

5. Provide any and all documents and correspondence regarding/relating to any document or record made by Ms. Dinell Arnold for evaluating Manoharan Govindaraj's Performance Appraisal for the period 10/1/2020 to 9/30/2021 that was submitted to Deputy Assistant Inspector General, Robert Binelli, including the date of its writing, and the identity of the officials who have had custody of this document from the date of its writing (chain of custody) until the date of this FOIA request.

On April 25, 2022, OIG responded to your request by granting it, in part, and denying it, in part.

You filed an appeal with this Office on May 9, 2022 challenging OIG's withholding of performance appraisal records pursuant to D.C. Code § 2-534(a)(4) ("Exemption 4"), "which exempts information that is pre-decisional and deliberative." Specifically, you assert "[t]he section of the code provided in the denial letter from the IG is not applicable to the information that was requested." You also stated that "the information sought by [your client] should be released as the documents requested will shed light on this Agency's performance in accordance with its statutory duties and responsibilities."

On May 13, 2022, we notified OIG of your appeal and requested a response. OIG responded on May 19, 2022 reiterating the withheld documents "pertain to information discussed by OIG Managers prior to the finalization of [your client's] Performance Evaluation" and are therefore exempt from disclosure pursuant to Exemption 4. Although it was not an issue central to your appeal, OIG also stated that it does not have an existing record responsive to your request for chain of custody.

### 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, 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, 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).

### *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). As OIG observes, 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.*

After reviewing the withheld documents *in camera*, this Office agrees with OIG’s determination. By their nature, draft proposals are generally treated as deliberative. See, e.g., *City of Virginia Beach v. United States Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993).

#### *No Creation of Records*

Under FOIA, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). “FOIA creates only a right of access to records, not a right to personal services.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). See also *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). Therefore, if a chain of custody record does not exist, OIG is not obligated to create one to fulfill your request.

#### Conclusion

Based on the foregoing, we conclude that OIG properly responded to your request and we therefore 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 government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: OIG FOIA Officer (via email only)