

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

December 31, 2013

BY EMAIL

Ayesha Abbasi, Esq.
Office of the Deputy Mayor for Planning and Economic Development
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Freedom of Information Act Appeal 2014-07

Dear Ms. Abbasi:

This letter responds to the request of the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) for reconsideration (the “Request”) of our decision, dated November 13, 2013 (the “Decision”), in response to the administrative appeal of Oliver Hall, on behalf of the Eastern Market Metro Community Association (“Appellant”), to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated October 10, 2013 (the “Appeal”).

On behalf of the Mayor, pursuant to D.C. Official Code § 2-537, this office decides appeals of the denial of requests for information under DC FOIA. Under law, an agency is required to comply with the terms of an order pursuant to D.C. Official Code § 2-537. However, the objective of this office is to render a decision which is correct based on the law and the facts and which takes into account the respective rights and interests of the parties. If there is law, or there are facts, which have not been taken into account in deciding an appeal, the appropriate procedure to obtain variance from the order is to request reconsideration of the order and, if the request merits reconsideration, we will provide an appellant with an opportunity to respond. It should be noted that, as a general matter, reconsideration of a prior decision is discretionary and we will not reconsider a decision if additional law or facts could or should have been raised in the initial response of the requesting party. We also note that we have agreed to reconsider a decision where the interests of a third party may be affected and such third party has not had an opportunity to have its interests reflected on the administrative record, e.g., the Office of the United States Attorney regarding the effect of disclosure on its interest in prosecution of criminal matters.

We set forth the foregoing in an email to DMPED and Appellant as a result of receiving email correspondence indicating that DMPED wished to request reconsideration of our decision and the objection of Appellant that such procedure is not permitted. In such email, we also stated:

Although there are no prescribed time limits for the filing of a request for reconsideration, we believe that final resolution of this matter should not be unduly delayed. We issued our decision on November 13. If DMPED wishes to request a reconsideration of this matter, it should do so on or before December 6. If the developer desires that the decision be reconsidered to have its interests reflected on the administrative record, its submission shall be included in the request for reconsideration. We caution DMPED and the developer that it should not provide a generalized request to review all the withheld records, but should detail the specific reasons why a particular record is exempt from disclosure.

The Request was sent on December 6, 2013, within the time period for filing the request for reconsideration as we set forth for the parties. The Request sets forth legal arguments with respect to the exemption under D.C. Official Code § 2-534(a)(1), which exempts from disclosure under DC FOIA “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.” The Request does not, however, set forth particular records as to which would be exempt under the exemption and for which we should reconsider our decision. Although we indicated that we would accept a submission from the developer, no such submission was made.

As we indicated above, a reconsideration of a decision is appropriate to provide an opportunity to consider law or facts which could not have been reasonably anticipated by the parties to an appeal at the time of the original submissions. As we also indicated above, the reconsideration will ordinarily not be appropriate if additional law or facts could or should have been raised in the initial response of the requesting party. We do not wish to have our decisions become discovery tools so that a party may determine the weaknesses in its arguments and use the request for reconsideration to express its final position. Here, DMPED has made legal arguments which could have reasonably be anticipated as a consequence of their claim of exemption.¹ Moreover, although we advised DMPED that it “should not provide a generalized

¹ Without addressing each argument specifically, we note that DMPED has not raised any legal issues of which we were not cognizant. However, there is one issue which DMPED has raised and which we will address briefly to provide guidance. DMPED asks us to reconsider specifically drafts of documents which were exchanged between the parties. First, we note that the so-called “trade secrets exemption” under the federal FOIA is slightly different from the parallel provision in DC FOIA, *see* Freedom of Information Act Appeal 2012-53, and DMPED provides a legal argument which relies, at least in part, on the federal component. Second, and more significantly, while there may be particular provisions within draft documents that may qualify as commercial information whose disclosure may result in the requisite substantial harm, draft documents, and particularly those which are drafted to carry out the terms of a contract, do not categorically qualify for exemption. *See, e.g., Piper & Marbury, L.L.P. v. United States Postal Serv.*, 2001 U.S. Dist. LEXIS 2492, 12-17 (D.D.C. 2001)(“As a threshold requirement,

request . . . , but should detail the specific reasons why a particular record is exempt from disclosure,” it has not identified particular records which should be considered as a result of its disclosure. In this regard, with respect to the issuance of the Decision, we note that we provided several opportunities to DMPED to submit all of the withheld records for our review, but it only elected to provide a “sample” of the withheld records.² Accordingly, your request for reconsideration of the Decision is not granted.

There are four exceptions to this conclusion. First, DMPED has indicated that there are two emails to which wiring instructions, including bank account information of the developer, are attached. DMPED claims that these wiring instructions are exempt from disclosure under D.C. Official Code § 2-534(a)(2), which exempts from disclosure information which would constitute a clearly unwarranted invasion of personal privacy. We note that D.C. Official Code § 2-534(a)(2) applies only to individuals, not to business entities. However, we believe that bank wiring instructions implicate the type of financial information whose disclosure could result in the requisite competitive harm under D.C. Official Code § 2-534(a)(1). Although we were not directed to this record in considering the Decision, nevertheless we do not wish to penalize the developer as this disclosure may result in competitive harm. In particular, misuse of this information by a third party could result in financial losses.

both the Postal Reorganization Act and FOIA Exemption 4 require that the material at issue qualify as ‘information’. Yet, the Postal Service is trying to withhold the entire agreement and not merely particular information in it. While a contract or agreement between the government and a private entity may qualify as an agency record, and therefore merits analysis under the framework of FOIA, I am hard pressed to see how a contract, in its entirety, qualifies as ‘information’. . . . That the exemptions at issue were meant to protect knowledge, figures or data, and not entire agreements, is supported by even a superficial reading of the exemptions themselves. . . . I have reviewed the contract and, understandably, it contains, for example, provisions as to indemnification, dispute resolution, governing law, consent to jurisdiction, prohibition on assignment, modification, waiver, severability, and the addressees of the persons to whom the parties are to give notice. While these provisions can be found in any form book in a law library, the Postal Service and the declarants claim that the disclosure of any of the provisions of the contract, including these innocuous ones, will competitively harm DHL and the Postal Service. That meritless contention comes perilously close to insulting the Court's intelligence.” *Cf.*, albeit in the context of the deliberative process privilege, *Fox News Network, LLC v. United States Dep't of the Treasury*, 739 F. Supp. 2d 515, 542 (S.D.N.Y. 2010)(“Of course, transactional document drafts that eventually were shared with AIG or Citigroup are not exempt.”)

² Subsequent to the issuance of the Decision, but prior to the submission of the Request, DMPED did provide to us approximately 378 emails, some with documents attached (and some which were duplicates), which were withheld.

Second, as we noted in footnote 2, subsequent to the issuance of the Decision, but prior to the submission of the Request, DMPED provided to us approximately 378 emails, some with documents attached (and some which were duplicates), which were withheld. As we stated in the Decision, “in light of the fact that potentially valuable third party information is involved, we invited DMPED to supplement its submission by providing all of the records withheld . . .” Despite the fact that we closed the administrative record for purposes of the Decision, the same consideration still applies, that is, it is possible that valuable third party information may be disclosed because DMPED has not specifically identified a relevant document. Moreover, it is not clear that the developer has been contacted. Therefore, we reviewed all of these additional records.³

In emails dated June 26 and July 9, documents are attached which provide information regarding insurance coverage. In particular, we believe that the insurance policy numbers are capable of being exploited. As was the case for wiring instructions and for similar reasons, misuse of this information by a third party could arguably result in financial losses.

The last exception does not concern the developer, but counsel to the developer. Attached to a June 21 email is a legal memorandum analyzing the alternative legal structures for a condominium portion of the project and making a recommendation as to the best alternative. While the knowledge set forth in the memorandum may not be unique to the writer, it is a sophisticated legal analysis which, we believe, is not generally known.⁴ If the memorandum is disclosed, the analysis set forth therein would be available to other developers and attorneys and it may diminish the opportunities for the writer to exploit such knowledge. Accordingly, this is commercial information whose disclosure may result in competitive harm.

Accordingly, in light of these considerations, we will reconsider the Decision as to the withholding of the wiring instructions and the legal memorandum and the redaction of the insurance policy numbers. As noted above, Appellant shall have an opportunity to respond to the request for reconsideration, a copy of which we are furnishing to Appellant with this letter.

³ Certain of the emails contained, in the later portions of the email trail, emails by and between employees of DMPED and/or other District agencies, but not including any outside parties. As we stated in the Decision, the pertinent portion of the FOIA Request sought emails and other similar correspondence between DMPED and outside entities. Therefore, consistent with the Decision, such later nonresponsive parts of such emails need not be produced.

⁴ We note that the writer was advising other attorneys in his law firm.

We believe that there is a reasonable likelihood that the Appellant was not seeking the wiring instructions. We are requesting that Appellant notify us if Appellant agrees with DMPED that such records need not be disclosed or if Appellant does not otherwise wish to submit a response. The same consideration applies to the insurance policy numbers and the legal memorandum. We are requesting that Appellant notify us if Appellant agrees with DMPED that such records need not be disclosed or if Appellant does not otherwise wish to submit a response. In addition, we suggest that DMPED contact Appellant to determine if there are other records of the same ilk and which do not represent information that Appellant is seeking.

Sincerely,

A handwritten signature in cursive script that reads "Donald S. Kaufman".

Donald S. Kaufman
Deputy General Counsel

cc: Oliver Hall, Esq.
Richard Nichols