

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

November 13, 2013

BY U.S. MAIL

Oliver Hall, Esq.
Law Office of Oliver B. Hall, P.A.
1835 16th Street, NW, Suite 5
Washington, D.C. 20009

Re: Freedom of Information Act Appeal 2014-07

Dear Mr. Hall:

This letter responds to your administrative appeal 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”). You, on behalf of the Eastern Market Metro Community Association (“Appellant”), assert that the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) improperly withheld records in response to your request for information under DC FOIA dated July 23, 2013 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the following:

1. The complete and final version of the Land Disposition and Development Agreement (“LDDA”) providing for the transfer of ownership or control of the real estate identified as Lot 801 in Square 901, on which the former Hine Junior High School is located, from the District of Columbia to Stanton-EastBanc, LLC, or any other individual or entity, including all exhibits or appendices attached thereto, and all covenants, easements, contracts or agreements cited therein, and any other document providing for the rights, interests or obligations of the parties to the LDDA or the public, including but not limited to any document designated as the “Term Sheet.”
2. If the terms of the LDDA are not final, the most recent version of that document, including all exhibits or appendices attached thereto, and all covenants, easements, contracts or agreements cited therein, and any other document providing for the rights, interests or obligations of the parties to the LDDA or the public, including but not limited to any document designated as the “Term Sheet.”

3. The complete and final version of any other document created or executed in July 2013, which provides for the lease or sale of the real estate identified as Lot 801 in Square 901, or any portion thereof, from the District of Columbia to Stanton-EastBanc, LLC, or any other individual or entity, including all exhibits or appendices attached thereto, and all covenants, easements, contracts or agreements cited therein, and any other document providing for the rights, interests or obligations of the parties or the public, including but not limited to any document designated as the "Term Sheet."

4. All correspondence, including email, letters, notes, memoranda and any other written communication, including documents attached thereto, between the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") or any employee or agent thereof, and Stanton-EastBanc, LLC, Stanton Development Corporation, EastBanc, Inc., Dantes Partners, AutoPark Inc., The Jarvis Company, LLC, L.S. Caldwell & Associates, or any employee or agent of the foregoing entities, which was sent or received by DMPED or its employees or agents, between May 1, 2013 and July 23, 2013, and which references the Hine Junior High School or the property on which it resides (Lot 801 in Square 901), a Planned Unit Development ("PUD") to be located on that property, any document providing for the lease or sale of that property, or any litigation concerning the District of Columbia Zoning Commission's approval of a PUD to be located on that property, including but not limited to any such correspondence sent or received by DMPED employee Corey Lee on July 9, 2013, and any correspondence relating thereto.

In response, by email dated August 30, 2013, DMPED provided 480 pages of responsive records. However, it withheld or redacted other records, stating that

the District objects to production of other documents and certain portions of documents because they contain 'commercial or financial information obtained from outside the government' that will 'result in substantial harm to the competitive position of the person from whom the information was obtained' or attorney-client communications and internal deliberations. These documents or portions of documents are exempt pursuant to D.C. Official Code §§ 2-534 (a)(1) and (4) respectively.

Thereafter, Appellant contacted DMPED, stating, among other things, that the response to the FOIA Request was insufficient. After an exchange of emails, by email dated September 20, 2013, DMPED supplemented its response to the FOIA Request, stating as follows:

The attached documents supplement Request #3 and Request #4. These documents are the final versions of the documents that are responsive to your request. In addition, the District objects to production of certain portions of the documents because they contain "commercial or financial information obtained from outside the government" that will "result in substantial harm to the competitive position of the person from whom the information was obtained". These portions of the responsive documents have been redacted and are exempt pursuant to D.C. Official Code §2-534 (a)(1). Finally, any additional documents that may be responsive to Request #3 and Request #4 are already available to the public through the Recorder of Deeds: <http://otr.cfo.dc.gov/service/otr-recorder-deeds>.

By email dated September 20, 2013, in response, Appellant stated DMPED “has failed to provide complete, unredacted documents responsive to our request,” most notably a lease for the subject property “which DMPED is required to make publicly available whether or not a request is filed.” In addition, Appellant stated that the records which DMPED indicated were available online could not be found. When DMPED indicated that its response was final, Appellant initiated the Appeal.

On Appeal, Appellant asserts the response of DMPED is incomplete and fails to justify the exemptions asserted. First, Appellant challenges the failure to produce responsive records. Appellant states that several emails produced “expressly refer to attached documents which DMPED failed to produce” and that “[o]ther responsive documents appear to be missing entirely.” In addition, Appellant asserts that the statement of DMPED that certain records are available on the website of the Recorder of Deeds (OCFO) “is not a valid basis for DMPED to withhold access to a public record.” Furthermore, Appellant states that “the Recorder of Deeds’ online database does not disclose any documents in response to a search for Lot 801 in Square 901” and that DMPED has taken no action when so informed.

Second, Appellant asserts that the “redaction of portions of public contracts violates D.C. [Official] Code §§ 2-534(b) and 2-536(a)(6).” In particular, the Second Amendment to Land Disposition and Development Agreement and the Ground Lease, which was executed on July 11, 2013, “appear to have multiple pages omitted, and both documents have several pages or portions of pages redacted.”

Third, Appellant asserts that the “failure to make public contracts available on its website violates D.C. [Official] Code § 2-536(a)(6).”

In its response, dated October 30, 2013, DMPED indicates that it will provide certain records which were withheld but otherwise reaffirms its position. DMPED notes that “it has produced the Land Disposition Agreement (‘LDA’) and the amendments to the LDA with redactions, 158 pages of emails and attached documents, and the ground lease.” With respect to the redactions on the Land Disposition Agreement and the ground lease, DMPED states:

All these redactions include commercial or financial plans and projections that were received by [sic] the development team. Production of this information would cause substantial competitive harm to the development team, and this information was withheld from disclosure under the exemption at D.C. Official Code § 2-534(a)(1).

DMPED also stated that it withheld 369 emails, as set forth on an accompanying privilege log. It states that it withheld certain of the emails based on the attorney-client privilege and the deliberative process privilege under D.C. Official Code § 2-534(a)(4). As to the other emails withheld, it states:

Other email chains were withheld under the exemption at D.C. Official Code § 2-534(a)(1) because they contain commercial or financial information received by [sic] the development team or they reflect the development team’s negotiation strategies around

the finalization of documents needed to transfer the District owned property to the private development team. The proprietary financial information provided by the development team and their back and forth negotiations with the District reflect financial and strategic information. Allowing this information to be available to the public will harm their ability to compete in the future if other development teams have access to either the financial information or the negotiation strategies employed.

In response to an invitation to submit a supplement clarifying the administrative record (including a chronology of the project, an identification of the parties mentioned in the FOIA Request, and the current status of the project, and to provide a copy of the withheld records, both in redacted and unredacted form, including the records identified in the privilege log, for in camera review), DMPED provided a timeline and description of the project, a list of the parties, and a sample of the records withheld.

Discussion

It is the public policy of the District of Columbia (the “District”) 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. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The 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), and 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).

The FOIA Request concerns the construction of a mixed-use residential, office, and retail project on the real property formerly occupied by Hine Junior High School. The school was closed in 2008 and the District, pursuant to the statutory process for the declaration and disposition of surplus property, conveyed the real property to the developer pursuant to a deed and ground lease, subject to various conditions and agreements regarding the redevelopment of the real property. While the real property has been conveyed to the developer, the commencement of the construction of the project is awaiting the resolution of an appeal of the planned unit development order of the Zoning Commission. The FOIA Request seeks records regarding the conveyance of the real property, including the various conditions and agreements regarding its redevelopment.

The main contention of Appellant is that DMPED withheld records, either by failing to produce them or by improperly referring Appellant to the website of the Recorder of Deeds (OCFO), or improperly redacted portions of records which it did provide to Appellant. The responsive records appear to fall into two categories: (1) agreements and other documents relating to the

conveyance and use of the real property; and (2) emails relating to the effectuation of the conveyance and use of the real property. We will analyze the arguments of Appellant with respect to each group.

As stated, the first group of records withheld or for which redactions are alleged to have been improperly made are agreements and other documents relating to the conveyance and use of the real property. The main contention of DMPED is that the records withheld or redacted are exempt from disclosure under D.C. Official Code § 2-534(a)(1). Appellant contends that these are “public contracts” which are required to be provided, without redaction, under D.C. Official Code § 2-536(a)(6).

D.C. Official Code § 2-536(a)(6) states:

(a) Without limiting the meaning of other sections of this subchapter, the following categories of information are specifically made public information, and do not require a written request for information: . . .

(6) Information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies.

While D.C. Official Code § 2-536(a)(6) provides that District contracts are “public information,” contrary to the assertion of Appellant, the exemptions under DC FOIA are still applicable. In considering a claim of exemption under D.C. Official Code § 2-534(a)(1) for records of the Public Service Commission, the District of Columbia Court of Appeals stated:

[S]ection 2-536 (a) does not mandate disclosure of data that satisfy the requirements of D.C. Code 2-534 (a). We base this conclusion on the introductory language of section 2-536 (a), which declares broad categories of information to be public ‘[w]ithout limiting the meaning of other sections of this subchapter.’ We construe that qualifying language to denote that information that is determined to be exempt from disclosure under section 2-534 (a) need not be treated as public information and made available pursuant to section 2-536.

Office of the People's Counsel v. PSC, 955 A.2d 169, 176 (D.C. 2008). Nevertheless, while the exemptions under DC FOIA may be applicable to provisions of a contract which falls under D.C. Official Code § 2-536(a)(6), an agency must still justify the claim of any such exemption. As stated, DMPED asserts that D.C. Official Code § 2-534(a)(1) provides the exemption from disclosure.

D.C. Official 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.” This 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 *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989), citing *CNA Financial Corp. v. Donovan*. 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 Engr's, 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]”).

As we have stated in prior decisions,¹ in Freedom of Information Act cases, “‘conclusory and generalized allegations of exemptions’ are unacceptable, *Found. Church of Scientology of Wash., D.C, Inc. v. Nat'l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 830 (D.C. Cir. 1979) (quoting *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820, 826 (1973)).” *In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007). Here, DMPED provides generalized characterizations as to the types of information provided by the developer, e.g., plans and projections, and makes a conclusory allegation that disclosure will result in substantive competitive harm. However, DMPED does not describe, with reasonable specificity, the information in question or explain how the disclosure of such information will result in competitive harm. Its conclusory statements are insufficient to justify its claim of exemption.

Nevertheless, 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, both in redacted and unredacted form, for in camera review. DMPED responded by providing a “sample,” but not all, of such records. To the extent that it provided unredacted records, it did not provide the unredacted form. Nonetheless, we reviewed the records which DMPED submitted.

Based on our review of the records, we have not found any information which would qualify for exemption under D.C. Official Code § 2-534(a)(1). The unredacted portions of the records which we reviewed contained provisions which were basic to real estate transactions and, to the extent that they were tailored to the specific transaction, were unremarkable. Two of the records provided, the Second Amendment to Land Disposition and Development Agreement and the Ground Lease, had redacted portions of the exhibits which were attached to the body of the agreements. While we were obviously not able to review the redacted portions of these documents, we reach the same conclusion based on the unredacted information in the other records.

For instance, Exhibit E on the Second Amendment to Land Disposition and Development Agreement is the “Milestone Schedule.” Another record provided in the sample has a Milestone Schedule which is unredacted. The unredacted schedule consists of events in the planned development of the real property, beginning with closing and ending with substantial completion of construction, with a “Target Date” and an “Outside Date.” The contents of this exhibit are typical of real estate construction projects and its disclosure would not result in substantial

¹ See Freedom of Information Act Appeal 2011-26, Freedom of Information Act Appeal 2012-05, Freedom of Information Act Appeal 2013-13, and Freedom of Information Act Appeal 2013-62.

competitive harm. Exhibit B of the Ground Lease is the Basic Ground Rent Calculation Model. Based on our reading of the documents, the Ground Lease provides for a partial abatement of rent in the initial years of the lease. While the amount of a rent holiday is usually expressed as a fixed amount, the amount of the abatement here is expressed as a formula. In government contract cases, while some of the components used by a bidder to derive the aggregate amount of the consideration to be paid under a contract may be exempt from disclosure, the aggregate amount of the consideration is not exempt from disclosure. See, e.g., Freedom of Information Act Appeal 2011-16. Here, the aggregate amount of the consideration is the basic monthly rent. While it is expressed as a formula rather than a fixed amount, as it is the payment amount, it is not exempt from disclosure. The disclosure of the amount which the District receives from the sale or lease of its assets is in the public interest.

Our conclusion that the disclosure of these records is not exempt under D.C. Official Code § 2-534(a)(1) is buttressed by the fact that the contracting entity is in the nature of a joint venture among three real estate companies. That all three companies are in possession of the same commercial and financial information suggests that such information is not unique and is known by many concerns within the real estate industry. If some of the information was originally in the possession of just one company, it seems unlikely that, in the highly competitive real estate industry, that the company would provide valuable, proprietary commercial and financial information to two other competitors to be able to participate in just one transaction.

As stated above, Appellant asserts that the statement of DMPED that certain records are available on the website of the Recorder of Deeds (OCFO) “is not a valid basis for DMPED to withhold access to a public record.” Furthermore, Appellant states that “the Recorder of Deeds’ online database does not disclose any documents in response to a search for Lot 801 in Square 901” and that DMPED has taken no action when so informed. As a general matter, Appellant is incorrect in its assertion that a referral to responsive records posted on the website of an agency does not satisfy DC FOIA as to such records. In our past decisions, we have stated:

It has been held that an agency was not obligated under FOIA to produce records when the information is publically accessible via its website or the Federal Register. *Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). See also *Crews v. Commissioner*, 85 A.F.T.R.2d 2169, 2000 U.S. Dist. LEXIS 21077 (C.D. Cal. 2000)(production satisfied for documents that are publicly available either in the agency’s reading room or on the Internet).

Freedom of Information Act Appeal 2013-04; Freedom of Information Act Appeal 2012-73; Freedom of Information Act Appeal 2012-63; Freedom of Information Act Appeal 2011-34; Freedom of Information Act Appeal 2011-31; Freedom of Information Act Appeal 2014-02.

Here, the responsive records were not posted on the website of DMPED but of another District agency. For the purposes of this decision, we will presume that the fact that the records are posted on the website of a sister agency is not, standing alone, insufficient. However, we do not believe that the response of DMPED in this case satisfies DC FOIA. In Freedom of Information Act Appeal 2012-73, we found that DCPS satisfied DC FOIA where it “posted the records online and provided the information necessary to allow Appellant to access the requested records.” In

this case, DMPED provided a link to the homepage of the website with no further instructions to facilitate access to the requested records. Moreover, when Appellant attempted to access the requested records and was unable to do so, DMPED made no further effort to assist Appellant in obtaining the records from the website. While an agency may satisfy DC FOIA by referring a requester to records posted on its website, such referral must enable an average constituent to locate the requested records. In this instance, the attorney for Appellant, trained in research methods, was unable to find the responsive records after attempting to do so.² Accordingly, the failure to provide sufficient instructions to locate the responsive records and the failure to cure such deficiency when requested to do so constitutes an insufficient response under DC FOIA.

Therefore, with respect to the first category of records, DMPED shall provide to Appellant all records which were withheld without redactions and all records which it alleges are available on the website of the Recorder of Deeds (OCFO). If not already produced, such records should include the Land Disposition and Development Agreement, all amendments thereto, the Ground Lease, and the exhibits to all those documents.

The second category of records consists of emails relating to the effectuation of the conveyance and use of the real property. The first grouping of this category involves approximately 100 emails by and between employees of DMPED and/or other District agencies. The pertinent portion of the FOIA Request, which is in paragraph 4, sought emails and other similar correspondence between DMPED and outside entities. Therefore, this first grouping, consisting of internal emails, is nonresponsive to the FOIA Request and need not be produced.³ Accordingly, it is unnecessary to consider the claims of exemption based on the attorney-client privilege and the deliberative process privilege under D.C. Official Code § 2-534(a)(4).

The balance of the emails are responsive to the FOIA Request, but DMPED claims that they are exempt from disclosure under D.C. Official Code § 2-534(a)(1). DMPED asserts that such emails reflect negotiation strategies and financial information both of which are proprietary.

With respect to negotiation strategies, there does not appear to be a record or records which set forth the negotiation strategy of the developer. Indeed, it would be foolish for the developer to state explicitly its negotiating strategy to DMPED via email or otherwise. Rather, as we interpret its argument, DMPED is seeking nondisclosure for the negotiation strategy which may be inferred from the contents of the emails. Furthermore, DMPED provides only a conclusory allegation that such negotiation strategy as may be inferred from the emails constitutes unknown, valuable commercial information. As we stated above, we cannot accept a conclusion alone to

² We have made no determination as to whether the responsive records are, in fact, located on the website.

³ The nonresponsive records are the following numbered items on the privilege log submitted by DMPED: 42, 43, 44, 45, 49, 54, 55, 58, 59, 67, 71, 74, 75, 76 77, 78, 79, 80, 81, 83, 84, 92, 93, 107, 108, 109, 110, 112, 114, 116, 117, 118, 121, 126, 127, 128, 133, 134, 135, 136, 137, 138, 139, 140, 145, 146, 148, 152, 154, 155, 158, 160, 161, 162, 163, 164, 165, 167, 168, 169, 170, 171, 177, 178, 183, 184, 185, 186, 189, 194, 195, 199, 200, 201, 202, 204, 205, 206, 207, 247, 249, 266, 269, 274, 298, 301, 302, 303, 304, 305, 307, 308, 309, 310, 313, 314, 317, 320, and 333.

justify a claim of exemption. Moreover, DMPED does not cite, and we are unaware of, any authority that negotiation strategies have been found to be protected commercial information under D.C. Official Code § 2-534(a)(1) or its federal equivalent. DMPED has provided two emails as samples of the withheld emails. These emails reflect the exchange of communications made in the ordinary course of finalizing documents for a real estate closing and do not provide a hint of negotiation strategy, much less strategies whose disclosure would result in substantial competitive harm.

DMPED also asserts that the mails contain “proprietary financial information,” but, again, fails to provide further specificity or explain the harm which would result from the disclosure. It appears that such information refers to the same information which was alleged to be exempt from disclosure in the real estate documents which we discussed above, but for which DMPED was unable to justify the claim of exemption.⁴ The same analysis applies here.

Accordingly, DMPED has not justified its claim of exemption and the emails which were withheld shall be provided to Appellant.

Appellant also states that some of the attachments to the emails which were already provided were missing. It does not appear that the missing attachments are in controversy. Such omissions may be a consequence of the electronic printing and retrieval of records. Consequently, it is not clear on the administrative record that DMPED is aware of which attachments are missing. Therefore, Appellant should provide a list of the missing attachments to DMPED. When DMPED receives the list from Appellant, it shall provide the missing attachments to Appellant.

Appellant asserts that the failure of DMPED to make its contracts available on its website violates D.C. Official Code § 2-536(a)(6) and requests that we order DMPED to make all its contracts, not simply those responsive to the FOIA Request, available on its website. As we have stated in our past decisions, and most recently in Freedom of Information Act Appeal 2014-04, as a general matter, we read our jurisdiction under D.C. Official Code § 2-537(a) to be limited to adjudicating whether or not a record may be withheld. The order which Appellant seeks is beyond the relief which we are authorized to provide under D.C. Official Code § 2-537(a) and we will not consider this issue.

Conclusion

Therefore, the decision of DMPED is reversed and remanded. DMPED shall provide to Appellant the withheld records. With respect to the missing attachments to the emails, when DMPED receives the list of missing attachments from Appellant, it shall provide the missing attachments to Appellant.

This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the response of DMPED pursuant to this order.

⁴ The sample emails contain no financial information.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald S. Kaufman". The signature is fluid and cursive, with the first name being the most prominent.

Donald S. Kaufman
Deputy General Counsel

cc: Ayesha Abbasi, Esq.