

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



VIA ELECTRONIC MAIL

January 7, 2018

Mr. Christopher G. Lipscombe
General Counsel
Public Service Commission
of the District of Columbia
1325 G Street, NW, Suite 800
Washington, D.C. 20005
E-mail: CLipscombe@psc.dc.gov

Re: OOG-0004_12.11.18_FOIA AO

Dear Mr. Lipscombe:

This correspondence responds to your December 11, 2018, request for an advisory opinion from the Board of Ethics and Government Accountability, Office of the Open Government (OOG) regarding whether the Public Service Commission of the District of Columbia (the “PSC” or “Commission”) may withhold records requested under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”) as exempt from disclosure, under D.C. Official Code § 2-534(e). The Commission contends that producing the records “will violate the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege” and requests an advisory opinion regarding whether the Commission may deny the DC FOIA request on this basis.

The succeeding advisory opinion is issued by OOG pursuant to section 205c(d) of the District of Columbia Government Accountability Establishment and Comprehensive Reform Amendment Act of 2011, effective October 30, 2016 (D.C. Law 22-168; D.C. Official Code § 1-1162.02c(d)) (Government Accountability Act). The Government Accountability Act empowers the OOG to issue advisory opinions on the implementation of Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 et seq.), the Freedom of Information Act of 1976.

I. BACKGROUND

On December 7, 2018, the Commission received from Representatives of the American Federation of Government Employees Local 1403¹ a DC FOIA request for the following records:

Request No. 1:

Please provide a copy of each document including (without limitation) invoices, billing statements, and memoranda, describing or otherwise revealing in any fashion the amounts charged by the Commission through December 7, 2018, for any expenses incurred in connection with labor negotiations between the Commission and Local 1403, including arbitration and all related administrative and civil litigation. Expenses, in this context, include all direct and indirect costs, such as court filing fees, messenger service costs, document duplication costs, attorney fees, paralegal costs, and costs bill by any outside service entity (including consultants).

Request No. 2:

Please provide a copy of each document including (without limitation) invoices, billing statements, and memoranda, describing or otherwise revealing in any fashion the amounts paid by the Commission through December 7, 2018, for any expenses incurred in connection with labor negotiations between the Commission and Local 1403 (other than the salary expenses of Commission employees), including arbitration and all related administrative and civil litigation. Expenses, in this context, include all direct and indirect costs, such as court filing fees, messenger service costs, document duplication costs, attorney fees, paralegal costs, and costs bill by any outside service entity (including consultants).

Request No. 3:

Please provide a copy of each document describing or otherwise revealing in any fashion the amount of funds the Commission estimates it will spend from December 7, 2018 through the

¹ The requesters are PSC employees and members of the American Federation of Government Employees Local 1403. The requesters and the Commission are currently in litigation concerning a collective bargaining agreement. The Arbitrator in this case provided for limited discovery, which has concluded.

conclusion of the labor negotiations between the Commission and Local 1403, including arbitration and all related administrative and civil litigation. Similarly, please provide a copy of each document describing or otherwise revealing in any fashion the amount of funds the Commission has budgeted, impounded or otherwise set aside or has on hand as of December 7, 2018, to pay for the costs it has incurred or may incur in the future to conclude these labor negotiations.²

On December 11, 2018, by electronic correspondence, the Commission's General Counsel requested that the OOG issue an advisory opinion on the applicability of the DC FOIA exemption set forth in D.C. Official Code § 2-534(e), to the request. According to the letter, the Commission is negotiating a collective bargaining agreement with the requester and the matter is currently in arbitration. The Commission contends that if it releases the requested information to the requester that the requester, the opposing party in the arbitration, could determine the Commission's theory and strategy of the case. The correspondence to OOG included the written DC FOIA request.³ The Commission did not provide a copy of its responsive records for OOG to review.

II. 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. Official Code § 2-531). Any person has the right of access to public records, and may inspect and obtain copies of public records, unless the requested records are subject to withholding as expressly provided under D.C. Official Code § 2-534 (D.C. Official Code § 2-532(a)). However, this right is not absolute. "[T]he right of public access is limited by statutory exceptions, which consistent with the public policy of access, must be read narrowly." *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (2005).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act⁴. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal FOIA are instructive and may be examined to construe the local law. *Doe v. District of Columbia Metro. Police Dep't*, 948 A.2d 1210, 1220 (D.C. 2008).

² The FOIA request also list Request No. 4. However, the PSC did not request legal advice from the OOG on the applicability of D.C. Official Code § 2-534(e) to this request.

³ The correspondence from the Commission to OOG and the DC FOIA request are attached to this advisory opinion.

⁴ *See* 5 U.S.C. § 552.

This advisory opinion will discuss each of the Commission's asserted exemptions in turn and provide advice regarding its application to the DC FOIA request at issue. The advisory opinion will discuss then information that must be proactively released to the public and how that requirement impacts the Commission's response. The advisory opinion will conclude with a discussion of recent case law relevant to this matter.

A. The Deliberative Process, Attorney Work Product, and Attorney-Client Privileges Under DC FOIA.

The Commission may withhold or redact portions of the requested records pursuant to the attorney-client, deliberative process, and attorney work product privileges in D.C. Official Code § 2-534(a)(4) and (e) ("Exception 4"), if warranted. Subsection (a)(4) "exempts from disclosure "inter-agency or intra-agency memorandums or letters...which would not be available by law to a party other than a public body in litigation with the public body." Subsection (e) states "[A]ll exemptions available under this section shall apply to the Council as well as agencies of the District government. The deliberative process privilege, the attorney work product privilege, and the attorney-client privilege are incorporated under the inter-agency memoranda exemption listed in subsection (a)(4) of this section, and these privileges, among other privileges that may be found by the court, shall extend to any public body that is subject to this subchapter." 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). Privileges in the civil discovery context include the attorney-client privilege to protect open and frank communication between counsel and client. *See Harrison v. BOP*, 681 F. Supp. 2d 76, 82 (D.D.C. 2010).

1. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an attorney and his client regarding a legal matter for which the client has sought legal counsel for advice. *Mead Data Cent. Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir 1977); *see also Rein v. U.S. Patent and Trademark Office*, 553 F.3d 353, 377 (4th Cir. 2009). The privilege also applies to facts divulged by a client to an attorney. *Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010). In addition, attorney-client privilege "encompasses opinions given by an attorney to his client based upon, and thus reflecting, those facts." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

The attorney-client privilege may apply to records in this matter, as discussed in detail in Section C, below.

2. Deliberative Process Privilege

The deliberative privilege protects from disclosure agency documents that are both pre-decisional and deliberative. *Costal Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it is generated prior to the final adoption of the policy by

the agency. *Id.* Documents are considered deliberative if it reflects the give and take of the consultative process. *Id.*

The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866.

Also note that “purely factual information is generally not protected under the deliberative process privilege” and this information may only be withheld when it “is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.” *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011).

In this matter, the requester seeks information in Request No. 3 that appears on its face to implicate the deliberative process privilege. The requester seeks “estimates” the Commission will spend as opposed to actual expenditures. These documents could be deliberative. To make this determination the Commission must determine if the responsive records concerning estimates are both pre-decisional and deliberative. Additional information regarding this privilege, in the context of records that must be released without a DC FOIA request, is below in Section B.

3. Attorney Work Product Privilege

The attorney work product privilege protects the “mental processes of [an] attorney.” *Klamath Water Users Protective Ass’n*, 532 U.S. at 8 (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)). These materials must have been prepared by attorneys “in anticipation of litigation.” *State of Maine v. U.S. Dep’t of Interior*, 298 F.3d 60, 66 (1st Cir 2002) (quoting Fed.R.Civ.P 26(b)(3)(A)). To qualify under the privilege, records must be prepared for litigation and there must be a correlation between the withheld documents and the litigation. *State of Maine*, 298 F.3d at 69-70. The documents must have been prepared for litigation and not in the ordinary course of business. *Id.*

This DC FOIA request seeks budgetary and financial records that are most likely prepared in the ordinary course of District of Columbia business. The attorney work product exemption would not apply to these records because such records are generally factual in nature and not prepared by attorneys. However, the requester also seeks “memoranda” concerning these records. To the extent that these records are prepared by attorneys in anticipation of litigation, the records may fall under the exemption and the Commission may exclude those records. The attorney work product privilege is also discussed in further detail in Section C, below.

Having provided a background to the FOIA exemptions which may be applicable to the instant request, a review of the law governing information that must be publicly provided without a DC FOIA request is in order.

B. A Portion of the DC FOIA Request Seeks Information that the Commission Must Make Publicly Available Without the Need of a Written Request.

Relevant to a determination in this matter are the provisions of D.C. Official § 2-536 that lists the categories of information that are specifically available to the public and which do not require a written request to obtain. D.C. Official Code § 2-536 (10)(b) requires public bodies to make records created on or after November 1, 2001, available to the public “on the Internet or, if a website has not been established by the public body, by other electronic means.”⁵ When compared with the instant DC FOIA request, most of the records requested are financial and budgetary in nature and fall within the provisions of D.C. Official § 2-536(6) and (6A) which respectively state:

(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;

(6A) Budget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions ...

DC FOIA “Request No. 1” and “Request No. 2” requests the following records: invoices, billing statements, memoranda, expenses, and direct and indirect costs related to labor negotiations and arbitration. This is generally the type of information that should be proactively

⁵ See Report on the Committee on Government Operations on Bill 13-829, the Freedom of Information Amendment Act of 2000, at page 2 (Council of the District of Columbia October 31, 2000), which states: “Sixth, the proposed amendments clarify that a written request for information is unnecessary when the information is required to be made public.”

released to the public without a FOIA request because they are records concerning expenditures of public funds. This may also include records requested in “Request No. 3,” budget estimates,⁶ if the applicable records or information consists of “[B]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions” (D.C. Official Code § 2-536(6A)). However, if the budget estimates do not meet the criteria of D.C. Official Code § 2-536(6A), the Commission may withhold the record pursuant to the deliberative process privilege, with one exception. Case law has held that where a record “is pre-decisional at the time it is prepared, it can lose that status if adopted, formally or informally, as the agency’s position on an issue or is used by the agency in its dealings with the public.”⁷ If the Commission has formally or informally adopted the budget estimates being requested or has utilized the information in dealings with the public it may not lawfully invoke the deliberative process privilege to withhold the record from release.

Below is an analysis of recent case law applying the attorney-client privilege to billing records, which is relevant to this matter.

C. Courts Limit Application of the Attorney-Client Privilege to Billing Records.

At issue is the applicability of the attorney-client privilege to the request for the Commission’s outside counsel billing records. While there is no District of Columbia law directly on point, a December 2018 decision of the Virginia’s Supreme Court resolves for that jurisdiction the issue of whether an agency may rely on the attorney-client privilege to withhold billing records. Although it is not binding on the District of Columbia, the decision in this case is factually indistinguishable from this matter and is the most recent persuasive authority on the topic.

In *Bergano v. City of Va. Beach*, 2018 Va. LEXIS 177, the requester asked for records of “all legal fees and expert invoices related to all of the [City’s] expenses in litigating against” the requester. The City responded to the request by providing “extensively redacted records” of invoices and payment documentation from its outside counsel. *Id.* at 178. To justify the redactions, the city invoked exemptions from disclosure based on attorney-client privilege and the attorney work product doctrine. The court’s holding on the issue is as follows:

⁶ However, there is precedent for seeking an agency’s budget estimate by submission of a FOIA request. See Opinion of the Mayor’s Office of Legal Counsel (FOIA Appeal 2012-36), where the requester sought the Budget Estimates for the DCPS for Fiscal Year 2013. The appeal became moot after the agencies provided to the requester a hyperlink to the page on its website where the records were located.

⁷*Ibid.*

“Typically, the attorney-client privilege does not extend to billing records and expense reports.” *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999). “The identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.” *Id.* (quoting *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992)). “However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.” *Id.* The Attorney General has similarly concluded in an official opinion that billing records generally do not fall within the attorney-client exception to disclosure under VFOIA, but that the exception does cover documents that “contain an attorney's analytical work product or legal advice, or . . . confidential communications from a government client to the attorney.” 1987-88 Op. Att. Gen. Va. 30 (Nov. 21, 1988). *Id.*

The *Bergano* court also concluded that “billing records may fall within the attorney-client and work product exceptions . . . if they reveal confidential information, including the motive of the client seeking representation, or if they reveal litigation strategy.” *Id.* at 185.

In addition, there is federal case law which supports the release of legal bills in civil discovery. In these decisions the courts have held “[T]he identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.”⁸

On the basis on these authorities, to the extent the responsive records, including outside counsel’s billing information, contains such the information discussed above, the Commission may redact the record to prevent disclosure of protected information prior to releasing the record to the requester. The Commission contends that revealing the information requested would

⁸See *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127,129 (1992).

“provide the opposing party the ability to understand the limits of Commission’s counsel in defending the case.” This suggests that the Commission does not want to reveal to the opposing party the amount it is spending on outside counsel. This reasoning does not fall under the attorney-client privilege stated above. The Commission may not withhold the billing records to conceal the amount it is spending on outside counsel. It may only withhold narrative information in the billing records that reveal legal strategy, advice, and the like.

III. CONCLUSION

The requester’s DC FOIA request seeks budget financial records that the Commission must make publicly available without making a written request because it falls within the provisions of D.C. Official Code § 2-536. The Commission should provide the requester with the records that must be made publicly available and does not require a FOIA request to obtain. To the extent that these records are not on the Commission’s website, OOG recommends that the Commission post the records. Records that fall into the category of mandatory release includes the Commission’s budget and financial information.

With respect to the requested records in “Request No. 3” that may be excluded under the deliberative process privilege, the Commission must analyze all records and determine whether the records concerning billing estimates are pre-decisional and deliberative prior to excluding records from release to the requester. Similarly, the Commission’s outside counsel’s billing records and related records are subject to DC FOIA, but the Commission may withhold the records under Exception 4. The following may be redacted from the Commission’s outside counsel’s billing records prior to release: “confidential information, including the motive of the client in seeking representation, or that reveals litigation strategy; records indicating the specific nature of the services provided, such as researching particular areas of law, may also fall within these exceptions when the disclosure would compromise legal strategy; disclosures that would reveal analytical work product or legal advice; strategies and motives in seeking representation.”

Prior to releasing any records to the requester, the Commission is advised to apply the legal analysis in this advisory opinion to determine if either the attorney-client, deliberative process, or attorney work product privileges are applicable respectively to its outside counsel’s billing records, budget estimates, and other records. OOG is available to assist the Commission in making such determinations.

Sincerely,

/s/

NIQUELLE M. ALLEN, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability