BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT

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VIA ELECTRONIC MAIL
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RE: OOG-003_3.2.16_AO

Dear Mr. Karim:

This advisory opinion responds to your question of whether the members of the Sustainable Energy Utility Advisory Board (Board) may enter into a closed session under the Open Meetings Act, (D.C. Official Code §§2-571 *et seq*. (2015)) (OMA), to review draft Sustainable Energy Utility[1] Requests for Proposals (RFP), analysis, and District Department of Energy and Environment (DOEE) consultant reports (*hereinafter*, RFP-related documents). Specifically, the Board seeks clarification on whether review of the RFP-related documents in a closed session would violate D.C. Official Code § 2-575(b). The foregoing binding opinion is issued pursuant to the authority of the Office of Open Government (OOG) as set forth in § 503(a)(4) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593 *et seq*. (2015).

Background

The thirteen-member Board[2] was established pursuant to Section 203 of the Clean and Affordable Energy Act of 2008, effective October 22, 2008 (D.C. Law 17-250; D.C. Official Code § 8-1774.03 (2015)) ("CAEA"). Pursuant to D.C. Official Code § 8-1774.03, the Board's purpose is to: "(1) [P]rovide advice, comments, and recommendations to the DOEE[3] and Council regarding the procurement and

[1] The SEU is the Sustainable Energy Utility, a private contractor which develops, coordinates, and provides programs for the purpose of promoting the sustainable use of energy in the District of Columbia. See Section 101(19) of the CAEA, D.C. Official Code§ 8-1773.01(19)).
[2] The Board is a "public body" as defined by the Open Meetings Act (D.C. Official Code § 2-574(3)). Section 204 (i) of the CAEA (D.C. Official Code § 8-1774.04(i)), states "meetings of the Board are subject to the opening meetings provisions contained in section 742 of the District of Columbia Home Rule Act, effective December 24, 1973 (87 Stat.831; D.C. Official Code §207.42)", properly known as the "Sunshine Act." Section 204(i) of the CAEA became law on October 22, 2008, and predates enactment of the Open Meetings Act of 2010, which became law on March 31, 2011.
[3] The CAEA refers to "DOEE" as "DDOE".

administration of the of the SEU contract; (2) advise the DOEE on the performance of the SEU under the SEU contract; and (3) monitor the performance of the SEU under the SEU contract." After completing its statutory requirement of reviewing the RFP-related documents, the CAEA requires the Board to provide comments for the DOEE's consideration in preparation of a draft RFP. The DOEE then prepares the final RFP which is used to solicit RFPs and to award the SEU contract. The Board is to hold official meetings monthly or as approved by a majority of its members.[4] To ensure confidentiality and ensure the District of Columbia (District) is not at a competitive disadvantage, the Board seeks to review the RFP-related documents in closed sessions.

Discussion

At issue is whether a closed Board session to review the RFP-related documents would violate the spirit and intent of the OMA to provide a full accounting of the actions taken by the Board as discussions of RFP-related documents are not specifically included among the categories of exceptions in the OMA.[5] Since the categories of exceptions in the OMA do not authorize a closed session under the scenario presented, this advisory opinion will review the District of Columbia Freedom of Information Act (DC FOIA), the federal FOIA (Federal FOIA), and the legislative record of the CAEA to determine if Board review of RFP-related documents may occur in closed sessions. What follows, is the analysis of these sources to establish how the Board must proceed when undertaking its review.

The Confidential Commercial Information Privilege

The same public policy that is the premise of the OMA (D.C. Official Code § 2-572) is the foundation of DC FOIA. D.C. Official Code § 2-531 states, "It is the public policy of the District 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." Further, District FOIA creates the right "to inspect…to copy any public record..." *Id*. at § 2- 532(a). The right to inspect is limited by exemptions expressly provided under § 2-534. Such exemptions may be used as a basis for denial, but will be narrowly construed in favor of disclosure. *Barry v. Washington Post Co*., 529 A.2d 319, 321 (D.C. 1987). The public's ability to inspect government records are similarly circumscribed under federal FOIA. In fact, federal case law addresses the very issue raised by the Board. Courts recognize the "Confidential Commercial Information Privilege" as an exemption under federal FOIA as a means to guard the public's view of material generated in the process of awarding a contract.

5 U.S.C. § 552 (b)(5) contains the federal FOIA deliberative process privilege commonly referred to as "Exemption 5". D.C. Official Code § 2-534(a)(4), mirrors this federal provision which, like DC FOIA, exempts "inter-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Courts apply this privilege to materials generated in the process of awarding a federal government contract. In *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800 (1979)("Merrill"), the U. S. Supreme Court for the first time recognized an Exemption 5 privilege for confidential commercial information generated in the process of awarding a federal government contract. In recognizing the privilege, the court held:

> We accordingly conclude that Exemption 5 incorporates a qualified privilege for commercial information, at least to the extent that this information is generated by the government itself in the process leading up to awarding a contract. *Id*. 359-360[6]

[4] SEU Advisory Board By-Laws, Article II, 2.4.

[5] D.C. Official Code §2-575(b).

[6] "This privilege protects the government when it enters the marketplace as an ordinary buyer or seller." *Government Land Bank v. GSA*, 671 F.2d 663, 665 (1982).

The *Merrill* court derived the confidential commercial information privilege from Federal Rule of Civil Procedure 26(c)(7), which provides that a district court may prevent or restrict discovery of trade secrets or other confidential research, development or commercial information.[7] Quoting from the legislative history of Exemption 5, the court added:

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it contemplates the process of awarding a contract, or issuing an order, decision, or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. *Id*., at 359, citing from H.R. Rep. 1497, 89th Cong., Session 10 (1996), n. 15 at 10.

DC FOIA remains consistent with Court interpretation of federal law and the application of Exemption 5. D.C. Official Code § 2-534(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." D.C. Official Code §2- 534(e) states that the inter –agency memoranda exemption in D.C. Official Code § 2-534(a)(4) includes the deliberative process exemption. The relevant provision of D.C. Official Code § 2-534(e) states:

> 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 the this subchapter.

Further, the plain meaning of D.C. Official Code § 2-534(a)(4) provides statutory authority necessary for a court to exempt from disclosure records generated in the process of awarding a District contract. The relevant permissive language mentioned *supra* states: "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 provision is clear and unambiguous. Therefore, the long established rules of statutory interpretation require accepting the language according to its plain meaning. The effect of a court acceptance of the plain meaning of the provision would be to recognize the Board's review of the RFP-related documents at a closed session as a confidential commercial information privilege exemption to DC FOIA, and not a violation of the OMA.[8]

A further analysis of *Merrill and* subsequent cases involving the confidential commercial information privilege will provide the criteria necessary for its application to the RFP-related documents and any narrowing of the rule providing for non-disclosure of these materials. "At the outset, the privilege requires the documents be kept confidential." *Hack v. Department of Energy,* 538 F. Supp. 1098, 1101. An additional requirement for application of the confidential commercial information privilege is, "confidentiality." Specifically, the requirement is for the information to remain confidential through the

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[7] D.C. Superior Court Rules of Civil Procedure, SCR 26(c)(1)(G) contains an analogous provision to Fed. R. Civ. P. 26(c)(7) for entry of a protective order to restrict discovery of trade secrets or other confidential research, development or commercial information.

[8] "In interpreting a statute, we are mindful of the maxim that we must look first to its language; if the words are clear and unambiguous, we must give effect to its plain meaning." *Office of People's Counsel v. Public Service Commission*, 477 A.2d 1079, 1083(D.C. 1984). Additional support for application of the confidential commercial information privilege to the RFP-related documents may be found in *Barry v. Washington Post*, *Co*., 529 A.2d 319, 321 (1987), where the court stated, "the DC FOIA was modeled on the corresponding federal Freedom of Information Act, and decisions construing the federal statute are instructive and may be examined to construe the local law."

process of awarding the contract. In *Hack*, the courts did not find the government's use of a consultant to constitute a waiver of confidentiality. This is relevant here as DOEE hires consultants to prepare some RFP-related documents. Likewise, based on the court's holding in *Hack*, DOEE's use of consultants to prepare draft-related materials should not constitute a waiver of confidentiality.

The *Merrill* decision also explains the differences in the Exemption 5 confidential commercial information privilege and the Exemption 5 deliberative process privilege, which are worth noting. In reference to these two privileges the court stated:[9]

> The purpose of the privilege for predecisional deliberations is to insure that a decisionmaker [*sic*] will receive the unimpeded advice of associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank . . . .
>
> The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. *Id*., at 360.

In narrowly construing exemptions under the federal FOIA, courts limit the period of non-disclosure for confidential commercial information until the process of awarding the contract concludes. "The purpose of the confidential commercial privilege is to protect the release of potentially damaging commercial information, but only while the opportunity to take unfair advantage of the government agency continues to exist." *Taylor Woodrow Internal LTD, et al., v. U.S. Department of the Navy,* NO. C88-429R (1989), at 8.[10] The *Woodrow* court also made clear in limited circumstances non-disclosure may continue even after awarding the contract:

> In the present action, the process of contracting has not ended. Normally, once the government awards a contract, all negotiations end and the contract price becomes fixed. In that instance, there would be no reason to continue to withhold the information. Here, however, the Navy faces a situation in which plaintiff TBR has already submitted change order proposals amounting to approximately one fourth of the total contract cost. If the court releases the cost estimate sheets, the plaintiffs could take unfair commercial advantage of the Navy. As a result, the policy behind applying the commercial confidential privilege in this particular instance is still very much alive even after the contract award. *Id*.

This OOG opinion reaches only the application of the confidential commercial information privilege to the RFP-related documents. In *Hack*, the defendant asserted both the commercial information privilege and the deliberative process privilege as legal justification for withholding documents for which disclosure was sought under the federal FOIA. In ruling the commercial information privilege was applicable, the court found the reports constituted privileged commercial information, thereby making it unnecessary to explore the deliberative process exemption theory. *Id*., at 1100. Upon finding the RFP-

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[9] The Merrill decision also explains the differences between the federal FOIA Exemption 4, and Exemption 5. "We are further convinced that recognition of an Exemption 5 privilege for confidential commercial information generated in the process of awarding a contract would not substantially duplicate any other FOIA exemption. The closest possibility is Exemption 4, which applies to trade secrets and commercial or financial information obtained from a person and privileged or confidential. Exemption 4, however, is limited to information obtained from a person, that is, to information obtained from outside the Government. The privilege for confidential information about Government contracts recognized by the House Report, in contrast, is necessarily confined to information generated by the Federal Government itself." *Id*., at 360 (internal quotations omitted).

[10] *Merrill*, at 360 and *Hack*, at 1104.

related documents exempt from DC FOIA as confidential commercial information, the OOG will not opine on whether the RFP-related documents in this matter are deliberative.

Conclusion

Where a public body is able to hold a closed session to discuss documents which are exempt under District FOIA or which meet an OMA exception, the entity must follow the public notice requirements pursuant to D.C. Code Official Code § 2-576. The commercial confidential information privilege shall limit the time frame for which materials are exempt to coincide with the award of the contract. This is so the Board may operate effectively its review of RFP-related documents in closed session to fully consider and analyze draft proposals prior to issuing a final RFP for bid.

Sincerely,

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TRACI L. HUGHES, ESQ.
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Board of Ethics and Government Accountability