

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

MEMORANDUM

TO: Fred P. Moosally
General Counsel
Alcoholic Beverage Regulation Administration

FROM: Wayne C. Witkowski
Deputy Attorney General
Legal Counsel Division

DATE: May 17, 2007

SUBJECT: Confidentiality of ABC Quarterly Statements
(AL-07-261) (MID 199859)

This memorandum responds to your memorandum of April 17, 2007, by which you requested legal advice regarding whether D.C. Official Code § 25-113(b)(2)(B) (ABC Code Provision) prohibits the Alcoholic Beverage Control Board (Board) from granting a request from the media or the public for copies of quarterly statements filed by Alcoholic Beverage Control Class “CR” and Class “DR” licensed restaurants (Restaurants), when the ABC Code Provision is read in conjunction with the District of Columbia’s Freedom of Information Act (District FOIA).

Conclusion

The District FOIA exempts disclosure of proprietary trade secrets, commercial or financial information obtained from outside the government to the extent that there would be substantial harm to the competitive position of the person providing the information. *See* D.C. Official Code § 2-532(a)(1) (District FOIA Business Information Exemption). We conclude that the quarterly reports are proprietary trade secret, commercial or financial information of the type intended to be covered by the District FOIA Business Information Exemption. In response to any District FOIA request to disclose the quarterly reports, the Board should not disclose those elements of the quarterly reports that contain information subject to the District FOIA Business Information Exemption to the media or the general public. In the event that a District FOIA review indicates that the entire report contains information subject to the District FOIA Business Information Exemption, then the entire report may be withheld. In addition, the information should not be disclosed to the media or the general public without a District FOIA request.

Analysis

The Board poses the question whether the ABC Code Provision, when read in conjunction with the District FOIA Business Information Exemption prohibits public disclosure of financial performance information reported to it by Restaurants on a quarterly basis. By statute, the quarterly reports may be disclosed to protestants of a license for the limited purpose of determining the gross annual receipts of a licensee under subsection (B) of the ABC Code Provision.

Other than the District FOIA Business Information Exemption, there is no specific guidance in the District of Columbia Official Code that allows or restricts disclosure of the quarterly reports to the media or the general public.¹ However, there is an arguably analogous provision in District of Columbia procurement law that prohibits disclosure of confidential or proprietary business information disclosed by a business in the course of responding to an invitation for bids, request for proposals, or competitive sealed proposal. *See* the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986, D.C. Law 6-85, D.C. Official Code § 2-303.17(d) (2006 Repl.).

The District FOIA is modeled after the Federal FOIA. *See Dunhill v. D.C. Department of Corrections*, 416 A.2d 244, 247 n.6 (D.C. 1980). It is useful to note that the District of Columbia Court of Appeals has adopted a rule of statutory construction which provides that when a local law is adapted from a federal statute, there is a presumption that judicial construction of the federal statute applies as well. *See Hughes v. District of Columbia Department of Employment Securities*, 498 A.2d 567, 571 n.8 (D.C. 1985). In addition, when a federal statute is substantially adopted by the District of Columbia Council, the Court also presumes that the Council intended to adopt the “known and settled” judicial interpretations of the statute as well. *Hartford Accident and Indemnities Company v. Hodge*, 66 App. D.C. 154, 156, 85 F.2d 411, 413 (1936); *Hughes*, 498 A.2d at 571 n.8. Federal FOIA Exemption 4 provides that a federal agency may withhold information if it constitutes “trade secrets and commercial or financial information obtained from a person, and is privileged or confidential.” *Id.* at § 552 (b) (4). Information is “confidential” for purposes of FOIA Exemption 4 if its release would cause “substantial harm” to the competitive position of Plaintiffs. *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 (D.C. Cir 1974) *cited in MCI Worldcom, Inc. v. General Services Administration*, 163 F. Supp. 2d 28, 35 (D.C. 2001). While the District FOIA does not expressly include the words “profits”, “sales” or “gross sales” in the District FOIA Business Information Exemption, it seems reasonable to conclude that the exemption would extend to disclosure of financial information of this nature in the Restaurant quarterly reports, based on the similarity of the District’s FOIA exemption to the Federal FOIA Exemption 4.

The District of Columbia Court of Appeals first articulated a widely-used two part test in *National Parks & Conservation Assoc. v. Morton*, 351 F. Supp. 404, *rev’d on other grounds* 498 F.2d 765 (D.C. Cir. 1974), holding that the applicable test to analyze whether documents are

¹ The District of Columbia Public Records Management Act of 1985, effective Sept. 5, 1985, 32 DCR 3590, D.C. Official Code § 2-1707(a) provides that “[a]ny public record made confidential by law shall be so treated.” This law underscores the need for confidentiality of protected records, but does not add guidance to our analysis of the scope of the District FOIA Business Information Exemption.

“confidential,” “commercial” or “financial” information subject to exemption under the Federal FOIA Exemption 4, is whether release of information contained in the subject documents is likely to either (1) impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information is obtained (two-part test).

When we apply the two-part test to the possible disclosure of detailed business information contained in the Restaurant quarterly reports, we find that the information assists the District in assessing the business operations of a Restaurant to gauge whether it is a bona fide eatery, but is not the type of data that is generally considered public information. In fact, most businesses, including Restaurants, closely guard their financial information, and disclose it only as required by law. Financial disclosure of Restaurant performance might provide competitors with information that may harm the business interests of the disclosing Restaurant. Therefore, we conclude that the information contained in the quarterly reports is precisely of the nature intended to be covered by the District FOIA Business Information Exemption.²

If you have any questions about this memorandum, please contact either Assistant Attorney General Anne R. Hollander at 724-5533, or me at 724-5524.

WCW/arh

² In the course of reviewing this question, we consulted with Thorn Pozen, Special Counsel and OAG FOIA Officer. Mr. Pozen advises that:

The public policy behind FOIA is to release as much information as possible, so if there is material in the quarterly reports which does not fit within this or any other exemption, then it should be released, with the exempted material redacted. Only if all material is covered by an exemption or if it is just not possible to redact the exempt material can the whole document be withheld under FOIA.

E-Mail from Thorn Pozen, Special Counsel and OAG FOIA Officer to Anne R. Hollander, Assistant Attorney General, Legal Counsel Division dated April 23, 2007.

In addition, we consulted with Cynthia L. Gross, Assistant General Counsel., Office of the Chief Financial Officer, by telephone and E-mail exchange on May 15 - 16, 2007 about the conclusions we reach in this memorandum. Ms. Gross stated that the OCFO concurs with our analysis.