GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR

Freedom of Information Act Appeal: 2011-03

February 4, 2011

Peter J. Brand

Dear Mr. Brand:

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) ("DC FOIA"), dated December 21, 2010 (the "Appeal").[1] The present action asserts that the District of Columbia Department of Health ("DOH") improperly withheld records in response to your request for information under FOIA dated October 19, 2010 ("FOIA Request").

Background

Appellant's FOIA Request sought "any documents pertaining to Case No. 09-149, in re Farid Gharagozloo, M.D." (hereinafter "physician") In response, DOH released five (5) separate documents to Appellant but withheld eleven (11) others citing specific exemptions in the DC FOIA. On Appeal, Appellant challenges DOH's withholding of two (2) documents described as:

> "A May 17, 2010 letter (including attachments) from Alissa A. Watts, a private attorney, to Jacqueline A. Watson, executive director for the D.C. Board of Medicine…concern[ing] the discipline on [sic] a licensed health professional that was deemed 'non-public [and a] May 10, 2010 order form the Board of Medicine that is classified as 'non-public."

Email dated December 21, 2010 from Peter J. Brand to Phillip Husband, FOIA Officer, DOH.

We forwarded the Appeal to DOH with a request for a response. DOH responded in an electronic letter dated January 5, 2011 ("DOH Response").

Discussion

[1] Talib I. Karim, Esq., Acting Special Counsel with the Office of General Counsel, participated in the preparation of this decision.

It is the public policy of the District of Columbia ("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 § 2-537 (a). In aid of that policy, the 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 the 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, dated January 3, 2100, Transparency and Open Government Policy. Nonetheless, that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

DOH indicated the first document withheld was a May 17, 2010 letter (including attachments), that was actually written by Dr. Jacqueline Watson, Executive Director of the D.C. Board of Medicine, to Alissa A. Watts, a private attorney. The second document is a copy of a "private consent order" involving the physician. According to DOH, these documents pertain to a non-public "private consent order between a physician practicing in the District of Columbia and the District of Columbia Board of Medicine," and that withholding these documents is authorized by Exemption 2 of the DC FOIA.

Exemption 2 of the DC FOIA ("Exemption 2") allows an agency to withhold "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." D.C. Official Code § 2-534(a) (2).[2] This exemption's requirement that disclosure be "clearly unwarranted" requires one to "tilt the balance (of disclosure interests against privacy interests) in favor of disclosure." *See Morley v. C.I.A.*, 508 F.3d 1108, 1127 (D.C. 2007). This exemption creates a "heavy burden" of presumption in favor of disclosure. *Id*. When engaging in this analysis, it is important to remember that the Court of Appeals for the District of Columbia Circuit has declared that "under [the personal privacy exemption], the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Multi AG Media v. Department of Agriculture*, 515 F.3d 1224, 1227 (D.C.Cir.2008) (*quoting Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)).

The records at issue here qualify as "information of a personal nature" within the meaning of DC FOIA Exemption 2. *See, e.g., Judicial Watch v. Export-Import Bank*, 108 F. Supp.2d. 19, 36 (D.D.C. 2000) ("The first criterion of [the FOIA privacy exemption] is met if the information applies to a particular individual"); *Kurdyukov v. United States Coast Guard*, 657 F. Supp. 2d 248, 255 (D.D.C. 2009) ("[FOIA's personal privacy exemptions] are designed to protect the personal privacy interests of individuals named or identified in government records."). Therefore, the question to consider is whether, as DOH claims, the disclosure of responsive records would constitute a clearly unwarranted invasion of personal privacy within the meaning of DC FOIA Exemption 2. *See, United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1981) ("When disclosure of information which applies to a particular individual is sought from Government records, [it] must [be] determined whether

[2] This provision mirrors federal FOIA statute "Exemption 6," found at 5 U.S.C. § 552(b)(6). Thus, because "[M]any of the provisions of our [DC] FOIA parallel those in the federal statute," we can look to federal case law interpreting this provision as "instructive authority."

release of the information would constitute a clearly unwarranted invasion of that person's privacy.").

To make this determination, courts "must balance the public interest in disclosure against the interest Congress intended the exemption to protect." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989). Applying the legal principles enunciated by the court in *Reporters Committee* to the instant matter, it is necessary to balance the individual privacy interests of the physician, against the extent to which the public disclosure of the requested information "would 'shed light on [DOH's] performance of its statutory duties' or otherwise let citizens know 'what [DOH] is up to.'" *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) (*quoting Reporters Committee, supra*, at 773).

One of the records withheld by DOH at issue in this case, the private consent order, is a final order of the Board of Medicine. D.C. Official Code § 2-536 (a) (3), requires that "[f]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases" are specifically made public information. [3] This Office has previously decided personal privacy cases on that basis alone, however, that is not the end of the inquiry. The D.C. Court of Appeals has held that section 2-536 (a) does not mandate the disclosure of information that satisfies the requirements of section 2-534 (a). The Court based 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*." *Office of the People's Counsel v. PSC*, 955 A.2d 169, 176 (D.C. 2008) (Emphasis added). The Court construed that qualifying language to denote that information 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.

According to DOH, Exemption 2's personal privacy protection has "traditionally been interpreted to cover 'Non-Public Consent Orders' issued by health professional licensure boards." However, DOH has failed to provide this office with any citations for such interpretations. In support of its position, DOH suggests that release of the order in question could create an undesired precedent and result in the public release of all future final orders of D.C. health professional licensure boards. Such release of purported private information, DOH contends, would permit "the public to take a fishing expedition…to obtain titillating or embarrassing information," harm the physician because "only his non-public consent order would be made public," and that a party to the agreed upon consent order "might seek relief for violation of the agreement leading to the consent order." Further, DOH believes that the "public would be no better informed or protected by such disclosures and might be easily confused."

It is important to note that the Supreme Court has declared that the privacy interest inherent in [federal Exemption 6] "belongs to the individual, not the agency holding the information." *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-65 (1989) (emphasizing that privacy interest belongs to individual, not agency holding information pertaining to individual); *Amuso v. DOJ*, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) ("The privacy

[3] D.C. Official Code § 2-502 (19), states that the term "adjudication" means the "agency process, other than rulemaking, for the formulation, issuance, and enforcement of an order."

interest at stake belongs to the individual, not the agency."). Thus, it is the interest of the physician, and not that of the agency against which the public interest in disclosure must be weighed.

The fact that the order contains language stating that it "is non-public and shall not be disclosed or distributed" does heighten the expectation of privacy of the physician, nevertheless, an agency's agreement to refrain from disclosing public records does not trump the FOIA law. While it is very clear that a court may enter into nondisclosure orders without reference to a FOIA exemption,[4] I have not found, nor been directed to, a reported case that permitted an administrative agency to adopt a consent order that superseded FOIA.[5]

In *Teich v. FDA*, 751 F. Supp. 243, 246 (D.D.C. 1990), the Food and Drug Administration denied Dr. Teich's information request and he sued the agency under FOIA. In justifying its denial, the agency acknowledged that it had received the studies but maintained that it held the material "confidentially and separately" and "not . . . as part of FDA files."[6] Since the studies were not part of FDA files, the agency argued, they were not subject to public disclosure requirements. The FDA was able to make this argument because it had a "presubmission review" procedure. Through this mechanism, a submitter of data, like Dow Corning, could withdraw the data if the agency concluded that some or all of it could not be protected from public dissemination. The FDA admitted that this procedure was adopted specifically to circumvent public disclosures of the sort the FOIA requires. [7] The court, finding that presubmission review "cannot be used to forge a Northwest passage around the FOIA," held the procedure invalid and ordered the FDA to give Dr. Teich the studies he requested.

In considering the relationship between judicial settlements, confidentiality orders and FOIA, the 3rd Circuit wrote:

> We acknowledge the important role that court-aided settlement plays in our overburdened court system, and we realize that a strong presumption against confidentiality orders when freedom of information laws are implicated may interfere with the ability of courts to successfully encourage the settlement of cases. *However, we believe that a strong presumption against entering or maintaining confidentiality orders strikes the appropriate balance by recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its*

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[4] *See, Wagar v. United States Dep't of Justice*, 846 F.2d 1040, 1047 (6th Cir. Ky. 1988); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) ("We reject the argument that the District Court below should have limited its seal to those documents not available to individuals under the exemptions to the FOIA.").

[5] *Maricopa Audubon Soc'y v. United States Forest Serv*., 923 F. Supp. 1436, 1442 (D.N.M. 1995) ("proposed confidentiality agreement should not restrict the government from disclosing the management territory maps to others who may submit proper requests under the FOIA."); 50 Ohio St. L.J. 1307, 1315 (Even if the agency, pursuant to a presubmission confidentiality agreement, was to classify the submitter's information as confidential, courts have held that such a promise is not of itself sufficient to defeat subsequent agency disclosure.).

[6] *Id*. (quoting 21 C.F.R. § 20.44(b), (c) (1991)).

[7] *Teich*, 751 F. Supp. at 243.

> *citizens*. Neither the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws. (Emphasis added)

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 792 (3d Cir. Pa. 1994) (reversing District Court's ruling upholding confidentiality order).

The Board of Medicine currently publishes certain consent orders, among the other disciplinary orders that it publishes, see, e.g., *In Re: Michael Fitzgerald, M.D* (3/11/10); *In Re: Kerr, Paul B. (M.D)* (5/10/10), and *In Re: Richards, John M. (M.D.)* (2/25/09).[8] These reported decisions include cases involving offenses and sanctions substantially similar to the subject of this one. Thus, as structured, the Board exercises the discretion to determine which final orders imposing disciplinary actions will be made public and which will not. The DC FOIA, like the federal FOIA upon which it was modeled, was enacted to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the receipt of a request for information. In this regard, the DC FOIA was "designed to promote the disclosure of information, not inhibit it." *Id*. All FOIA exemptions are "to be read narrowly in light of the dominant disclosure motif expressed in the statute." *Washington Post Co. v. U.S. HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989) (citations omitted).

A balancing of the interests in this case appears to weigh in favor of disclosure of the documents at issue, at least in part. Specifically, DOH acknowledges that the disciplinary action at issue involved a minor sanction. A physician's failure to report and disclose a prior reprimand on his online profile is not just of interest to Appellant but to the public at large. While isolated incidents involving minor violations may not seem important, there may be a pattern of minor violations that if revealed would be of significance to the public. Disclosure of the disciplinary action at issue may protect the public at large by arming them with information concerning a physician's past professional conduct. Knowledge of a physician's professional conduct is an important element of a patient's right to being informed prior to consenting to medical procedures and serves an important public interest, such as protecting consumers from physicians who move between states without disclosing their disciplinary actions. Moreover, as discussed above, the fact that DOH currently publishes unredacted disciplinary opinions on its website in recognition of the public interest diminishes the privacy interest of the physician.

To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. D.C. Official Code §2-534 (b). *Rose v. Dep't of the Air Force*, 495 F.2d 261, 268, n.17 (2d Cir. N.Y. 1974) ("This section, which requires, inter alia, publication of final opinions, statements of policy and administrative staff manuals, contemplates agency deletion of identifying details "to the extent required to prevent a clearly unwarranted invasion of personal privacy. . . ."). This practice also eliminates the fear of a public fishing expedition. [9]

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[8] An index of published Board decisions is found at: http://hpla.doh.dc.gov/hpla/cwp/view,A,1195,Q,498214.asp

[9] DOH is not required to publish non-precedential orders, and the release of such orders should be governed by the D.C. Official Code § 2-534(a)(2) analysis. *See Smith v. NTSB*, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (stating that the purpose of the requirement to make public final orders "is obviously to give the public notice of what the law is

I am mindful that in a case such as this, redactions may be a futile effort. *Mueller v. U.S. Dep't of the Air Force*, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, "deleting [the] name from the disclosed documents, when it is known that [he or she] was the subject of the investigation, would be pointless"); *Schonberger v. Nat'l Transp. Safety Bd.*, 508 F. Supp. 941, 945 (D.D.C. 1981) (stating that no segregation was possible when request was for one employee's file), *aff'd*, 672 F.2d 896 (D.C. Cir. 1981) (unpublished table decision). However, if the Board believes that redacting personally identifiable information from the order would serve to protect the physician's privacy, it may redact such information.

This office is persuaded that the copy of the check, which is attached to the order in question, does contain private and personal information that is protected by Exemption 2 and may be withheld. *See Hines v. Board of Parole*, 567 A.2d 909 (D.C. 1989). Furthermore, in light of the Mayor's new policy on Transparency and Open Government noted above, this decision should serve as notice that DOH's past practice of designating physician disciplinary actions as "Non-Public" shall no longer be considered as meeting the requirements of DC FOIA without additional legal and public policy support.

Conclusion

Accordingly, DOH's decision is UPHELD in part and REVERSED and REMANDED in part, and DOH is hereby ordered to RELEASE the correspondence between Dr. Watson and Ms. Watts and the D.C. Board of Medicine's Final Order, with the exception of the check that is attached to the order, within five (5) days of this decision.

This constitutes the final decision of this office. 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,

Brian K. Flowers
General Counsel to the Mayor

cc: Phillip Husband, Esq., DOH

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so that each individual can act accordingly"); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 15 (June 1967) (advising that keeping "orders available . . . [that] have no precedential value, often would be impracticable and would serve no useful purpose").