

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

Freedom of Information Act Appeal: 2011-07

February 11, 2011

Bernard S. Grimm, Esq.
Cozen O'Connor
1627 I Street, N.W.
Suite 1100
Washington, D.C. 20004

Re: Freedom of Information Act Appeal 2011-07

Dear Mr. Grimm:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) (the “DC FOIA”), dated January 21, 2010 (the “Appeal”). The present action asserts that the D.C. Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under FOIA dated December 21, 2010 (“FOIA Request”).

Background

Appellant’s FOIA Request sought, with respect to four named officers, information regarding disciplinary actions or investigations, including citizen complaint forms, investigative reports, and records relating to the same. In response, by letter dated January 11, 2011, MPD provided records to the Appellant, but redacted portions of certain documents pursuant to exemptions for privacy interests under D.C. Official Code § 2-531(a)(2) and (3) and withheld other documents pursuant to exemptions for privacy interests, investigatory records, and deliberative process privilege under D.C. Official Code § 2-531(a)(2), (3), and (4).

On Appeal, Appellant challenges the denial, in part, of the FOIA Request for the following items:

1. The redaction of the name of the complainants on each of the complaints provided by MPD. Appellant contends that, by filing a complaint, a complainant subjects himself or herself to public disclosure, which would not be an unwarranted invasion of public policy.
2. Withholding of open or pending complaints against named officers. Appellant contends that such disclosure would not interfere with any pending investigation, deprive a

person of a right to a fair trial or an impartial adjudication, or constitute an unwarranted invasion of personal privacy.

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 § 2-537(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, 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 may be examined to construe the local law.

The first challenge of the Appellant is to the redaction of the name of the complainants on each of the complaints provided by MPD.

District of Columbia Official Code § 2-534(a)(3)(C) (“Exemption (3)(C)”) provides an exemption for disclosure for “[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy.” It should be noted that the privacy language in this exemption is broader than in the comparable exemption in District of Columbia Official Code § 2-534(a)(2) (“Exemption (2)”). While Exemption (2) requires that the invasion of privacy be “clearly unwarranted,” the adverb “clearly” is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption (2). *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *Id.*

An individual privacy interest is present when an individual makes a complaint which could result in serious criminal or civil sanctions. Even in the case of a privacy analysis under Exemption (2), in *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122 (7th Cir. Ill. 2003), the Court found a sufficient privacy interest in the names of complainants to the Federal Trade

Commission. This would apply with stronger force in the case of a law enforcement matter. The D.C. Circuit has stated:

[I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)[Exemption (3)(C) under DC FOIA]. ‘The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators.’ *Bast*, 665 F.2d at 1254.

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984). In the case of the Appeal, there is a sufficient individual privacy interest for the purposes of Exemption (3)(C).

As stated above, an analysis under Exemption (3)(C) must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the purpose of FOIA, which is

‘to open agency action to the light of public scrutiny.’” *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of ‘full agency disclosure unless information is exempted under clearly delineated statutory language,’ *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773 (1989).

In the case of the Appeal, there does not appear to be, nor does Appellant suggest, anything which would be revealed about the nature of MPD performance by the disclosure of the names of the complainants. See *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122 (7th Cir. Ill. 2003)(concluding that disclosure of FTC complainants would not further the core purpose of FOIA). Indeed, the Court of Appeals for the District of Columbia Circuit has held that “unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.” *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). Therefore, the redactions of the names of the complainants was proper. In light of this conclusion, it is unnecessary to address the other grounds offered by MPD for redacting this record.

The second challenge of the Appellant is to the withholding of open or pending complaints against named officers. Exemption 3(C) is again involved with respect to this challenge.

We find that there is a sufficient individual privacy interest for a person who is simply being investigated for wrongdoing based on allegations. “[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under 7(C) [as noted above, Exemption (3)(C) under DC FOIA].” *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). The D.C. Circuit has also stated that nondisclosure is justified for documents that reveal allegations of wrongdoing by suspects who never were prosecuted. *See Bast v. U. S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). As set forth above, the D.C. Circuit in the *Stern* case stated that individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity and that protection of this privacy interest is a primary purpose of the exemption in question. The complaints sought here are mere allegations of wrongdoing, the disclosure of which, prior to the completion of the investigations and final action, can have a stigmatizing effect without regard to the accuracy of the allegations.

As stated above, an analysis under Exemption (3)(C) must examine whether the public interest in disclosure is outweighed by the individual privacy interest. We cannot find that there is a public interest in disclosure of mere allegations of wrongdoing by lower-level employees which outweighs their individual privacy interests in nondisclosure. The mere disclosure that a complaint has been filed against a lower-level employee will not materially, if at all, inform one about an agency's performance of its statutory duties. *See, e.g., Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). The Appellant has not advanced a public interest which would outweigh the privacy interest. Therefore, the withholding of the complaints was proper. In light of this conclusion, it is unnecessary to address the other grounds offered by MPD for withholding these records.

Conclusion

Therefore, we uphold MPD's decision, as set forth above, to redact portions of certain documents and withheld other documents. This appeal is hereby DISMISSED.

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,

Donald S. Kaufman
Deputy General Counsel

cc: Ron Harris, Esq., MPD