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

Freedom of Information Act Appeal: 2011-11

March 2, 2011

Mr. James Trainum

Dear Mr. Trainum:

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) ("DC FOIA"), dated February 15, 2011 (the "Appeal"). You ("Appellant") assert that the Metropolitan Police Department ("MPD") improperly redacted records and withheld attachments to other records in response to your request for information under DC FOIA dated January 12, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought an investigative report, and any supporting documentation therefor, made as a result of a memorandum which Appellant, a member of MPD, submitted to the Internal Affairs Division of MPD.

In response, by letter dated February 1, 2011, MPD stated that the FOIA Request was granted in part and that a portion the record furnished, i.e., the Investigative Report, was redacted to protect the identity of the witnesses, and personal identifying information regarding the witnesses, pursuant to the exemption from disclosure under D.C. Official Code § 2-534(a)(2).

On Appeal, Appellant challenges the denial, in part, of the FOIA Request. First, Appellant contends that MPD redacted more portions of the Investigative Report than was necessary. Appellant contends that the redactions included police officers and such redactions should be limited to private citizens. In addition, substantial redactions were made to the text of the Investigative Report, which redactions appear not to be necessary for the purposes cited and are made without explanation. Second, Appellant contends that there is no reason given for the withholding of attachments which are otherwise identified in the Investigative Report.

In its response, dated February 25, 2010, MPD stated that, in reviewing the Appeal and the original request and response, it determined that some of the redactions to the Investigative Report were inappropriate. In its place, it has proffered a revised, redacted Investigative Report for review of its sufficiency under DC FOIA. The redactions, made pursuant to D.C. Official Code § 2-534(a)(2), were limited to names of MPD members who are targets of the investigation

or are witnesses, as well as one member of the U.S. Attorney's Office. It also stated that the targets of the investigation are subject to discipline.

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 are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Appellant's first contention was that MPD redacted more portions of the Investigative Report than were necessary. In light of the proffer of a revised, redacted Investigative Report, the issue is moot except to the extent of the remaining redactions. As stated above, names of MPD members who are targets of the investigation or are witnesses, as well as one member of the U.S. Attorney's Office, were redacted.

District of Columbia Official Code § 2-534(a)(2) ("Exemption (2)") provides for an exemption from disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." By contrast, 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 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). In this case, despite the fact that this matter concerns the closure of a criminal case and that it implicates investigatory records for law enforcement purposes, MPD has treated this as an internal investigatory matter under Exemption 2. As this would appear to be an internal monitoring of MPD employees rather than an investigation of illegal acts which could lead to criminal or civil sanctions, see *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984), this would appear to be appropriate and this matter would be judged by the standard for Exemption (2).

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. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether there is a sufficient privacy interest present. Appellant suggests, based on his prior experience as a member of MPD, that the names of government employees are not to be treated in the same manner as non-government employees. However, with respect to the subjects of the investigation, an employee has a privacy interest in his employment history and the results of a job performance evaluation. *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984). Moreover, it has been recognized that "while the privacy interests of public officials are 'somewhat reduced' when compared to those of private citizens, 'individuals do not waive all privacy interests . . . simply by taking an oath of public office.'[citation omitted.]" *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008). It has also been recognized that "government investigative personnel may be subject to harassment or embarrassment if their identities are disclosed." *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005). Thus, there is a sufficient privacy interest present.

As stated above, the second part of a privacy analysis 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).

While there may be a public interest in revealing the identity of a high-level government official involved in wrongdoing, there is generally not such an interest when lower-level employees are involved, particularly when they are the subjects of an investigation. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). In this case, we note that the name of the principal investigator, i.e., the principal decision-maker, was disclosed. Only the names of the subjects of the investigation, and witnesses, are being withheld. The Investigative Report details the manner in which the investigation was undertaken, the evaluation of the evidence obtained, and the reasons for the conclusions made. The disclosure of the names of the subjects of the investigation, and witnesses, would add little, if anything, to the understanding of how the agency conducted the investigation and how it is discharging its mission. *See Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005) ("[R]evealing the identities of the investigators assigned to the case would add little to the public's understanding of how the FBI's OPR performed its duties given that the existence of the internal investigation and its outcome has been disclosed. . . . the public's interest in knowing the

identities of the employees assigned to investigate the agents for purposes of administrative discipline is minimal at best and is insufficient to overcome the employees' interest in preventing the public disclosure of their names." *Id*. at 89-90.) The names withheld would not help Appellant, in the words of the Appeal, "understand the wisdom of the decision regarding the issues that I brought to their attention." In cases such as this, the consequence may be that such persons may be contacted and questioned about their involvement. Accordingly, the public interest in disclosure here is not outweighed by the individual privacy interest.

Appellant states that all persons involved in this matter are known to him. However, disclosure is not evaluated based on the identity of the requester or the use for which the information is intended. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004). Moreover, for the reasons stated, there does not appear to be a public interest in the attribution of statements made.

Appellant's second contention was that there is no reason given for the withholding of attachments which are otherwise identified in Investigative Report. MPD's response does not address these attachments or forward to us, for review, these attachments. As these attachments are part of the Investigative Report, and in light of MPD's review of its prior production, and its modification of the Investigative Report to withhold only the names of the subjects of the investigations and witnesses, there does not appear to be anything which would warrant an exemption from disclosure, save the redactions of the applicable names on the attachments. The attachments should be produced.

Conclusion

Therefore, the decision of MPD, as modified by the proffer of revised, redacted Investigative Report, is UPHELD in part and REVERSED and REMANDED in part. In addition to the revised, redacted Investigative Report, MPD is ordered to release the attachments which are part of the Investigative Report, with redactions of names consistent with those in the underlying Investigative Report, within ten (10) 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,

Donald S. Kaufman
Deputy General Counsel

cc: Ronald B. Harris, Esq.
Natasha Cenatus