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

Freedom of Information Act Appeal: 2011-15

March 15, 2011

Mr. Kyle Prall

Dear Mr. Prall:

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 D.C. Department of Corrections ("DOC") has failed to respond to your request for information under DC FOIA dated January 12, 2011 (the "FOIA Request") and has thereby denied your FOIA Request.

Background

Appellant's FOIA Request sought the following information:

> …Booking Photos/Mugshots on every individual booked into the DC Jail from December 4, 2010 to December 7, 2010 and…the jail/arrest log for the same time period (i.e. the list of people booked into the DC Jail during the time period which includes basic information about the inmate including the name, date of birth, sex, arrest charges, arrest date, etc.), and I would like the jail/arrest log in electronic format.

By email dated December 12, 2010, Appellant made the same FOIA request to the Metropolitan Police Department's ("MPD"). MPD initially denied the request for such records and an appeal was filed. As is reflected by the decision in Freedom of Information Act Appeal 2011-01, with respect to the jail/arrest log, MPD reconsidered its position and furnished the information. However, as is also reflected by that decision, with respect to the booking photos/mugshots ('mugshots"), the denial by MPD was upheld because DOC is the custodian of those records. By email dated January 11, 2011, Appellant renewed his request by filing the FOIA Request, this time directed to DOC. Unfortunately, the email, directed to an email address furnished in the decision, was sent to the former DOC FOIA officer who is no longer with the agency. Thus, Appellant received no response and filed the Appeal.

On Appeal, Appellant states that DOC did not furnish requested records although, as our decision in Freedom of Information Act Appeal 2011-01 indicates, DOC is custodian of the records. In addition, Appellant attached a document which he identifies as "a recent Federal

court ruling where the court has clearly indicated that the release of Federal mugshots is not considered an invasion of privacy that would allow the records to be withheld."

In response, by letter dated March 3, 2011, DOC notes the problem with the filing of the FOIA Request as set forth above, but, in light of the good faith attempt of Appellant, and with obvious regard for the efficiency of considering the matter at this time, nonetheless responds to the merits of the request at this juncture. DOC contends that furnishing the requested records would constitute a clearly unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2). It states that the agency houses various classes of inmates, including inmates awaiting adjudication of charged offenses, and that the requested records are used for identification in both detainment and further prosecution. It contends that the release of the records without a properly obtained consent would be an invasion of privacy. In addition, it maintains that the privacy rights of inmates outweigh the personal interests of Appellant.

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).

At the outset, we note that the FOIA Request addressed to DOC is the same as the initial FOIA Request addressed to MPD. As the jail/arrest log was furnished to Appellant, that part of the Appeal is moot and this decision need only address the furnishing of the mugshots.

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 DOC cites Exemption (2) as the basis for the withholding of the records, the mugshots are investigatory records compiled for law enforcement purposes and this matter would be judged by the standard for Exemption (3)(C).

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. 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).

Several courts have considered the issue of the disclosure of mugshots under FOIA. Although there is not unanimity, the majority view is that mugshots are exempt from disclosure under the federal counterpart of Exemption 3(C). In *Times Picayune Publ'g. Corp. v. United States DOJ*, 37 F. Supp. 2d 472 (E.D. La. 1999), it was held that furnishing the mugshot of a well-known businessman would be an unwarranted invasion of personal privacy which was not outweighed by any public interest.

> Mug shots in general are notorious for their visual association of the person with criminal activity. Whether because of the unpleasant circumstances of the event or because of the equipment used, mug shots generally disclose unflattering facial expressions. They include front and profile shots, a backdrop with lines showing height, and, arguably most humiliating of all, a sign under the accused's face with a unique Marshals Service criminal identification number.
>
> As in the cliche, a picture is worth a thousand words. For that reason, a mug shot's stigmatizing effect can last well beyond the actual criminal proceedings. Furthermore, just because somebody has conceded guilt does not negate that person's interest in nondisclosure of the mug shot. *Halloran*, 874 F.2d at 322 ("that otherwise-private information may have been at one time or in some way in the 'public' domain does not

> mean that a person irretrievably loses his or her privacy interests in it"). [footnote omitted]. A mug shot preserves, in its unique and visually powerful way, the subject individual's brush with the law for posterity. It would be reasonable for a criminal defendant, even one who has already been convicted and sentenced, to object to the public disclosure of his or her mug shot.
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> Moreover, mug shots contain information that is intended for the use of a particular group or class of persons. They are taken for law enforcement purposes, and they are not routinely made available to the public. This is precisely the Webster's definition of privacy adopted by the United States Supreme Court in Reporters Committee . . .

Id. at 477-478.

The Court stated that the celebrity status of the businessman did not eviscerate his privacy interest and celebrity alone was not a factor in evaluating the public interest. The *Times Picayune* decision has been cited with approval in the District of Columbia Circuit. *Showing Animals Respect & Kindness v. United States DOI*, 730 F. Supp. 2d 180, 193 (D.D.C. 2010).

As stated above, Appellant submitted a document which he identifies as "a recent Federal court ruling where the court has clearly indicated that the release of Federal mugshots is not considered an invasion of privacy that would allow the records to be withheld." In fact, the document submitted was not a court ruling, but an appellate brief arguing for reversal in the appeal of a decision. Contrary to the characterization of Appellant, in the underlying case, *Karantsalis v. United States DOJ*, 2009 U.S. Dist. LEXIS 126576 (S.D. Fla. 2009), the Court upheld the denial of the release of mugshots under federal counterpart of Exemption (3)(C). With regard to the privacy interests involved, the Court stated:

> A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties. Finally, as explained in the Bordley affidavit, booking photographs taken by the Marshals Service are generally not available for public dissemination; an attribute which suggests the information implicates a personal privacy interest.

Id. at 11-12. With respect to the public interest in the disclosure, the Court stated that the accused "has a substantial personal privacy interest in preventing public dissemination of his non-public booking photographs. On the other hand, the public obtains no discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities." *Id*. at 15. The arguments in the appellate brief furnished by Appellant are essentially the same ones which were rejected by the trial court and do not seem likely to prevail on appeal.

However, in *Detroit Free Press v. DOJ*, 73 F.3d 93 (6th Cir. 1996), the Court held that mugshots did not implicate a privacy interest, and could be released, "in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants

themselves have already appeared in open court . . ." *Id*. at 97. It declined to address situations involving "dismissed charges, acquittals, or completed criminal proceedings." *Id*. Furthermore, even if there was a privacy interest, it found that it was outweighed by the public interest in subjecting the government to public oversight, such as the possibility of revealing the arrest of the wrong person or the circumstances surrounding an arrest and initial incarceration.

Despite the view of the Sixth Circuit, we agree with other courts finding that the release of mugshots would be an unwarranted invasion of privacy not outweighed by the public interest. First, there is a clear privacy interest present. Much like the disclosure of rap sheets found to implicate privacy interests by the Supreme Court in *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), the contents of which rap sheets may already be known to the public, mugshots do indeed tend to have a stigmatizing effect. This effect may occur regardless of the guilt or innocence of the charges or the degree of severity of the charges. Second, the disclosure of mugshots reveals little or nothing about the conduct of the duties of an agency. Accordingly, there is no real public interest in disclosure.

In its response, DOC maintained that the privacy rights of inmates outweigh the personal interests of Appellant. 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). As articulated in case law, the public interest concerns information that sheds light on an agency's performance of its duties and that is the standard which is applied here.

Conclusion

Therefore, the decision of DOC is UPHELD and the Appeal is DISMISSED.

This constitutes the final decision of this office. If you are dissatisfied with the decision, you are free under 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: Karen Devalera