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

**Freedom of Information Act Appeal: 2011-17**

April 19, 2011

Mr. Alan Suderman

Dear Mr. Suderman:

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 March 22, 2011 (the "Appeal"). You ("Appellant") assert that the Executive Office of the Mayor ("EOM") improperly withheld records in response to your requests for information under DC FOIA dated March 4, 2011 (the "FOIA Requests").

Background

Appellant has filed the Appeal with respect to two FOIA Requests. Appellant's first FOIA Request sought "copies of all emails between the addresses 'Talib.Karim@dc.gov' and 'Gerri.Hall@dc.gov' from January 3, 2011 to March 4, 2011." Appellant's second FOIA Request sought "copies of all emails from the account 'Gerri.Hall@dc.gov' between January 3, 2011 and March 3, 2011 that contain the word 'Sulaimon'." Gerri Hall is the former Chief of Staff for EOM. Talib Karim was Special Counsel in EOM until January 31, 2011 and Chief of Staff for the Department of Healthcare Finance thereafter. "Sulaimon" is Sulaimon Brown, a former Mayoral candidate and subsequent employee of the Department of Healthcare Finance.

In response, by separate letters dated March 15, 2011, EOM denied the FOIA Requests under D.C. Official Code § 2-531(a)(3) pursuant to an exemption for investigatory records compiled for law enforcement purposes because of investigations by the Office of Campaign Finance and the Office of the United States Attorney.

On Appeal, Appellant challenges the denial of the FOIA Requests. Appellant contends that while EOM states that the materials may be part of an investigation, the release would not, and EOM does not show that the release will, interfere with any investigations. In addition, Appellant contends that the Office of Campaign Finance is not a law enforcement agency. Finally, Appellant contends that the activities of the Office of the United States Attorney do not constitute an investigation.

In its response, dated March 29, 2011, EOM reaffirmed and amplified its prior position. First, it contends that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(3)

pursuant to an exemption for investigatory records compiled for law enforcement purposes with respect to three different, sufficient conditions, i.e., enumerated harms, thereunder. Moreover, in addition to the investigations by the Office of the United States Attorney and the Office of Campaign Finance, it adds that additional investigations have been undertaken by the Council of the District of Columbia ("Council") and Congress. Second, it contends that certain of the emails are exempt as attorney-client communications pursuant to D.C. Official Code § 2-531(a)(4). EOM maintains that emails between Talib Karim and Gerri Hall for the period that Mr. Karim was Special Counsel in EOM are subject to the attorney-client privilege.

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, 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 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).

As an initial matter, we will address the contention of EOM that emails between Talib Karim and Gerri Hall for the period that Mr. Karim was Special Counsel in EOM are subject to the attorney-client privilege.

The attorney-client privilege protects confidential communications between clients and their attorneys made for the purpose of providing or securing legal advice or services. D.C. Official Code § 2-531(a)(4) exempts from disclosure documents to which privilege would apply in litigation, including the attorney-client privilege. *See also* D.C. Official Code § 2-531(a)(4). The attorney-client privilege applies to confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 78-79 (D.D.C. 2008); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862-863 (D.C. Cir. 1980). However, "[n]ot all communications between attorney and client are privileged." *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). EOM indicates that, at least in part, the emails between Mr. Karim and Ms. Hall were requests "for contact and meetings," EOM Response at 2, as well as discussions regarding the hiring of Mr. Brown. The requests for such "contact and meetings" do not appear on their face to involve the furnishing of legal advice. The discussions regarding the hiring of Mr. Brown, while possibly occurring during the period that Mr. Karim was Special Counsel in EOM, may have occurred in anticipation of Mr. Karim becoming Chief of Staff for the

Department of Healthcare Finance, but may not have occurred in the context of the attorney-client relationship. Nevertheless, it is possible that some of the emails are attorney-client communications. Accordingly, we direct EOM to examine the emails to determine whether such emails were made for the purpose of providing or securing legal advice or services. To the extent that such emails were not made for the purpose of providing or securing legal advice or services or are not otherwise exempt in accordance with the later portions of this decision, such records shall be provided to Appellant.

The main contention of EOM is that the records are exempt from disclosure with under D.C. Official Code § 2-531(a)(3) pursuant to an exemption for investigatory records compiled for law enforcement purposes with respect to three different provisions thereunder. D.C. Official Code § 2-531(a)(3) provides, in pertinent part, for an exemption from disclosure for:

> Investigatory records compiled for law-enforcement purposes, including the records of Council investigations . . ., but only to the extent that the production of such records would:
>
> (A) Interfere with:
>
> (i) Enforcement proceedings;
>
> (ii) Council investigations; or . . .
>
> (B) Deprive a person of a right to a fair trial or an impartial adjudication;
>
> (C) Constitute an unwarranted invasion of personal privacy; . . .

In the present case, the agency which created, and which is still in possession of, the records requested is EOM. EOM correctly notes that records incorporated into investigatory files will qualify as compiled for law enforcement purposes even if the records were not created originally for law enforcement purposes. However, the case which it cites for this proposition, *Hayes v. U.S. Dep't of Labor*, No. 96-1149, 1998 U.S. Dist. LEXIS 14120 (S.D. Ala. 1998), was a situation where the agency creating the record was also the agency which converted it to a law enforcement use. We have been unable to find a case where the record is maintained by both a non-enforcement agency and a law enforcement agency. However, there is one case which provides some guidance.

In *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), a defense contractor sought from the Defense Contract Audit Agency ("DCAA"), the accounting branch of the Department of Defense, documents generated by audit. The contractor was the subject of an investigation by the Office of the United States Attorney into possible fraudulent practices by the contractor. When the United States Attorney learned of the request, he advised DCCA to deny the request and transfer the documents to the Federal Bureau of Investigation. The issue before the Court was whether documents gathered for a law enforcement purpose, but not originally created for such a purpose, are "compiled" for law enforcement purposes under the Freedom of Information Act. The Court held that "documents need only to have been compiled when the response to the

FOIA request must be made. [footnote omitted].” *Id.* at 155. The footnote to the quoted holding stated that “it is not clear when compilation took place. The record does disclose that the documents were transferred from the DCAA to the FBI shortly after the DCAA denied the FOIA request. The timing of the transfer, however, was not stressed by the Court of Appeals or treated by that court as dispositive.” *Id.*, fn. 6. Thus, as Justice Brennan noted in the concurrence, the question of when the documents must be compiled is not addressed. However, we note the following facts in the decision. The records in question were created by a non-enforcement agency. After the request, the records were transferred to a law enforcement agency and such transfer was sufficient to cause the records to be compiled for purposes of the law enforcement exemption.

In the foregoing case, the records requested were no longer in the possession of the non-enforcement agency. We do not think that this will be held to be material. The Supreme Court noted: “‘Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,’ and therefore provided the ‘specific exemptions under which disclosure could be refused.’” *Id.* at 152 (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)). If one of the enumerated harms regarding the investigation would occur, nondisclosure is warranted without regard to the retention of the records by the non-enforcement agency. Whether or not the non-enforcement agency is in possession, if the records have otherwise been transferred, or requested for transfer, to a law enforcement agency which meets the requirements of the exemption, the records will be exempt from disclosure.

There is no indication on the administrative record whether any of the records requested from EOM have been furnished to Office of the United States Attorney, the Office of Campaign Finance, the Council of the District of Columbia, and Congress, the agencies which are undertaking the investigations. However, to the extent that records requested in this case have been provided, or have been requested to be provided, to one or more of the foregoing agencies and the agency otherwise meets the requirements of the exemption, the records will be exempt from disclosure. To the extent that the records remain in the sole possession of EOM, they will not have been “compiled for law-enforcement purposes” and must be produced. In assessing the exemption from disclosure, we will address whether the Office of the United States Attorney, the Office of Campaign Finance, the Council, or Congress qualify hereunder as law enforcement agencies conducting an investigation and whether one of the enumerated harms is implicated.

<u>The Council</u>

The Council would not ordinarily be considered a law enforcement agency. For the purposes of DC FOIA, law enforcement agencies conduct investigations which focus on acts which could, if proved, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). The exemption “applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.” *Rugiero v. United States DOJ*, 257 F.3d 534, 550 (6th Cir. 2001). Legislative power encompasses the power of the body to make laws, including the power, in its discretion, to determine the interests of the public and the public policies of the state; to create remedies for civil wrongs; and to conduct investigations in the aid of prospective legislation and for the purpose of securing information requisite to the discharge of its functions. It does not include adjudicative

functions. However, the case law focusing on the power of the agency to impose civil or criminal sanctions is not material in this instance. The Committee on Government Operations and the Environment, by resolution pursuant to the District of Columbia Home Rule Act, officially convened an investigation into hiring practices within EOM and alleged payments and promises of future employment to Sulaimon Brown in exchange for his continued candidacy for Mayor. *See* Committee Print, the Committee on Government Operations and the Environment Executive Personnel Investigation Authorization Resolution of 2011, Committee on Government Operations and the Environment, dated March 23, 2011. D.C. Official Code § 2-534(a)(3) specifically includes "the records of Council investigations." Thus, the Council is deemed to be a law enforcement agency with respect to the investigation. The remaining question is whether any of the enumerated harms are implicated.

D.C. Official Code § 2-531(a)(3)(A) provides that the exemption will apply if the disclosure will interfere with enforcement proceedings or the Council investigation. EOM maintains that the records contain direct information about the investigation, or provides information which, when combined with other facts, may tend to reveal the scope and path of the investigation, thus potentially compromising the investigation. We believe that this is credible and establishes the necessary interference with Council investigations as well as other enforcement proceedings. Thus, to the extent that EOM has provided the records requested to the Council, or the Council has requested such records, pursuant to the exercise of its authority under the investigation, such records are exempt from disclosure.

In light of our finding of that the exemption will apply, it is not necessary to examine the contentions of EOM that disclosure of the records would result in the deprivation of a right to a fair trial or an impartial adjudication or constitute an unwarranted invasion of personal privacy.

Congress

EOM also claims that the records are exempt from disclosure pursuant to the exemption for investigatory records compiled for law enforcement purposes with respect to the investigation undertaken by Congress. Like the Council, Congress is a legislative body. However, unlike the Council, Congress is not specifically named as a public body whose investigatory records are included in the exemption under D.C. Official Code § 2-534(a)(3). The question is whether records of Congressional investigations are included for the purposes of this exemption under DC FOIA.

It should be noted that the exemption for the records of a Council investigation is not set forth in the law as a separate category of exempt records, but is only specified as a type of record which is included in the general category of investigatory records compiled for law-enforcement purposes (", including the records of Council investigations . . ."). To state it differently, it is illustrative of the type of records which fall within this class, but is not exclusive. The committee report for the Committee on Government Operations on the act adding the reference to the Council states that the purpose of the amendment was to "clarify that the Freedom of Information Act law enforcement or investigatory records exemption applies equally to the Council of the District of Columbia's investigatory proceedings." Committee Report for Bill 15-483, the Freedom of Information Legislative Records Clarification Amendment Act of 2004,

Committee on Government Operations, dated August 27, 2004, at 1. While investigations of the Council were in the immediate contemplation of the Council, it would apply to all records of a legislative investigation and there does not appear to be any reason that a clarification of what would constitute investigatory records would include one legislative body, the Council, but exclude another, Congress. Accordingly, we find that the records of an investigation of Congress fall within the exemption for investigatory records compiled for law enforcement purposes.

As stated above, EOM maintains that the records contain direct information about the investigation, or provides information which, when combined with other facts, may tend to reveal the scope and path of the investigation, thus potentially compromising the investigation. As stated above, we believe that this establishes the necessary interference with the existing enforcement proceedings, including that of Congress. Thus, to the extent that EOM has provided the records requested to Congress, or Congress has requested such records, pursuant to the exercise of its authority under the investigation, such records are exempt from disclosure.

Office of Campaign Finance

As stated above, law enforcement agencies conduct investigations which focus on acts which could, if proved, result in civil or criminal sanctions. Under the District of Columbia Finance Reform and Conflict of Interest Act, codified in Chapter 11 of Title 1 of the District of Columbia Official Code, the Office of Campaign Finance is authorized to investigate violations of election laws and laws governing the financing of elections. Violations of these laws could result in the imposition of civil or criminal penalties. The Office of Campaign Finance is clearly a law enforcement agency. For the reasons stated above, the disclosure of the investigatory records compiled by the Office of Campaign Finance would result in the interference with the existing enforcement proceedings, one of the enumerated statutory harms. Thus, to the extent that EOM has provided the records requested to the Office of Campaign Finance, or the Office of Campaign Finance has requested such records, pursuant to the exercise of its authority under the investigation, such records are exempt from disclosure.

The Office of the United States Attorney

The Office of the United States Attorney prosecutes most local crimes occurring within the District of Columbia. It is not in dispute that it is a law enforcement agency. Appellant disputes the statement of EOM that the Office of the United States Attorney has begun an investigation. The Committee on Government Operations and the Environment of the Council, in authorizing its investigation, stated that the Office of the United States Attorney has begun an investigation. Committee Print, the Committee on Government Operations and the Environment Executive Personnel Investigation Authorization Resolution of 2011, Committee on Government Operations and the Environment, dated March 23, 2011 at 2. We accept this third party finding as resolving the issue. For the reasons stated above, the disclosure of the investigatory records compiled by the Office of the United States Attorney would result in the interference with the existing enforcement proceedings, one of the enumerated statutory harms. Thus, to the extent that EOM has provided the records requested to the Office of the United States Attorney, or the

Office of the United States Attorney has requested such records, pursuant to the exercise of its authority under the investigation, such records are exempt from disclosure.

It should be noted that this matter involves highly unusual circumstances. A former Mayoral candidate was hired, and then fired, by the new administration of the victorious candidate. The former candidate has made allegations of wrongdoing both in the conduct of the Mayoral campaign and in his subsequent employment, which matters may or may not be related to other personnel practices of the new administration. These events and allegations are being investigated by not one, but four separate, public bodies. Thus, the disclosure of the requested records affects not one, but four separate, enforcement proceedings.

Conclusion

Therefore, we REMAND this matter to EOM for disposition in accordance with this decision. EOM shall provide the requested records to Appellant, except for the following records:

1. Emails between Talib Karim and Gerri Hall made for the purpose of providing or securing legal advice or services.

2. Records that EOM has provided to the Council, or records that the Council has requested, pursuant to the exercise of its authority under its investigation.

3. Records that EOM has provided to Congress, or records that Congress has requested, pursuant to the exercise of its authority under its investigation.

4. Records that EOM has provided to the Office of Campaign Finance, or records that the Office of Campaign Finance has requested, pursuant to the exercise of its authority under its investigation.

5. Records that EOM has provided to the Office of the United States Attorney, or records that the Office of the United States Attorney has requested, pursuant to the exercise of its authority under its investigation.

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: Mikelle L. DeVillier, Esq.