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

Freedom of Information Act Appeal: 2011-24

May 27, 2011

Mr. Ronald Lewis

Dear Mr. Lewis:

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 April 29, 2011 (the "Appeal"). You ("Appellant") assert that the Department of Mental Health ("DMH") improperly withheld records in response to your request for information under DC FOIA dated March 18, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought the following information with respect to DMH employees:

1. Employees terminated due to a reduction in force from the Community Service Agency on July 31, 2009/August 1, 2009, including former job title and identification number, date of hire, and grade and step.

2. Employees terminated due to a reduction in force from the Community Service Agency on July 31, 2009/August 1, 2009 who are now reemployed by DMH or the District government, including current job title and identification number, date of hire, grade and step, date of opening and closing of the job vacancies (presumably vacancy announcements), job vacancy announcements, job descriptions, and their age, race, and sex.

In response, by letter dated April 25, 2011, DMH stated that the names of the employees who were subject to a reduction in force are exempt from disclosure under the exemption for personal privacy. In addition, DMH stated that the names of the employees hired since July 2009 will be available on the DMH website "once it is posted" pursuant to request of its Office of the General Counsel.

On Appeal, Appellant challenges the denial of the FOIA Request as lacking in legal basis or being nonresponsive.

In its response, dated May 24, 2011, DMH reaffirmed its position. It stated that disclosure of the names and identification numbers of the employees affected by the reduction in force would be an unwarranted invasion of privacy under D.C. Official Code § 1-631.03 and DCMR § 6-B3105 through 6-B3116. It also stated that separation from employment as a result of a reduction in force can be traumatic and would be exacerbated by disclosure. However, as an accommodation, it proffered, in its response, to Appellant a list of abolished positions, with series and grade, but with redactions for name and identification number.[1] It also updated its response, dated April 25, 2011, by noting that the list of current employees on the DMH website has now been updated.

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).

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, because it involves personnel, not investigatory records compiled for law-enforcement purposes, the matter would be judged by the standard for Exemption (2).

[1] It also noted that DMH does not track reemployed individuals by age or gender.

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.

> [A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. See *Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976); *Simpson v. Vance*, 208 U.S. App. D.C. 270, 648 F.2d 10, 14 (D.C. Cir. 1980); *Sims v. CIA*, 206 U.S. App. D.C. 157, 642 F.2d 562, 575 (D.C. Cir. 1980). That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. See *Simpson*, 648 F.2d at 14. But it also reflects the employee's more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has obtained and kept in the employee's personnel file.

Stern v. FBI, 737 F.2d 84, 91 (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). A disclosure that the employment of a person has been terminated due to a reduction in force may be, at the least, embarrassing and may result in further contact and questioning by third parties. 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).

The FOIA Request sought records identifying employees involved in a reduction in force. A reduction in force is typically a top-level agency decision and the public interest in agency performance is in the policy embodied in such decision and the manner of execution of the policy. These matters would involve the upper-level management employees of an agency. Knowing the names of the individual, lower-level employees affected by the policy, here, the reduction in force, would provide minimal, if any, public insight into the adoption and execution of the policy and how the agency is discharging its mission. Accordingly, the public interest in disclosure here is not outweighed by the individual privacy interest.

The main purpose of the FOIA Request was to obtain the names of employees, with other information ancillary thereto. It would appear that the provision of the ancillary information would not fulfill the purpose of the FOIA Request and ordering disclosure of the records with redaction of names and other identifying information would not serve that purpose. However, as an accommodation, DMH has proffered a list of abolished positions, with series and grade, but with redactions for name and identification number. If Appellant wishes to obtain the list, Appellant should contact DMH.

Conclusion

Therefore, the decision of DMH is upheld. The Appeal is hereby DISMISSED.

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: Deon C. Merene, Esq.
Matthew W. Caspari, Esq.