

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

Freedom of Information Act Appeal: 2011-30

June 16, 2011

Ronald G. Harris

Dear Mr. Harris:

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 May 17, 2011 (the “Appeal”). You (“Appellant”) assert that the District Department of Transportation (“DDOT”) improperly withheld records in response to your request for information under DC FOIA dated January 31, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the certified payroll records for all workers for the 11th Street Bridge Project. The FOIA Request stated that it was not seeking the names, street addresses, and cities of workers, but it was seeking zip codes, wages, and benefits. Appellant stated that he was seeking the information in connection with a noncommercial “study of the geographic benefits of DC City spending.”

In its formal response, by letter dated March 16, 2011,¹ DDOT provided records to the Appellant, but redacted portions of the records with respect to personal information pursuant to the exemption for privacy under D.C. Official Code § 2-531(a)(2).

On Appeal, Appellant challenges the denial, in part, of the FOIA Request with respect to the redaction of home zip codes and the benefits information contained in the payroll records. Appellant asserts that no court has ever found a privacy interest in the zip code of a person standing alone and that a zip code cannot be used to identify any individual. Appellant further asserts that the payment of benefits is the same for privacy purposes as the disclosure already made for wages. Furthermore, Appellant asserts that there is a substantial public interest in the disclosure of the records. Appellant states that the 11th Street Bridge Project is the largest bridge

¹ By email dated March 9, 2011, DDOT indicated that some records, redacted for personal information, would be available, and that disclosure of all records would be forthcoming. The final response stated that all production would be completed on or before March 30, 2011.

project in the history of the District. The disclosure of home zip codes will inform the public about the government enforcement, and contractor compliance with, the First Source Employment Agreement Act of 1984, which promotes the hiring of District residents on District development projects and provides for agreements to hire District residents. The disclosure of benefits information will inform the public about compliance with, and enforcement of, the Davis-Bacon Act regarding compensation requirements.

In its response, dated June 10, 2011, DDOT modified its position based upon its review of the Appeal and the original request and response. With respect to the disclosure of benefits information contained in the payroll records, DDOT stated that it would make the records available to Appellant. With respect to the disclosure of home zip codes, DDOT proffered to provide the state of residence to Appellant in lieu of the zip codes as it would accomplish the purposes of Appellant. However, it affirms its position with respect to the disclosure of the zip codes. “Considering the relatively small size of the District of Columbia and the corresponding zip codes, DDOT contends that release of the home zip codes in conjunction with personal financial information of the employees working on the project would amount to a clearly 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, 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 may be examined to construe the local law.

As there is no longer an issue regarding benefits information contained in the payroll records as DDOT stated that it would make the records available to the Appellant, the only issue for our consideration is whether the disclosure of home zip codes of workers on the 11th Street Bridge Project is exempt pursuant to the privacy exemption under District of Columbia Official Code § 2-534(a)(2).

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 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.* The first part of the analysis is to determine whether there is a sufficient privacy interest present.

A privacy interest is cognizable under DC FOIA if it is substantial, that is, anything greater than de minimis. *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

DDOT argues that there is a substantial privacy interest in personal identifying information, especially when combined with financial information. However, the cases which it identifies as supporting the application of this principle to the present case concerned the disclosure of names and addresses, *Painting & Drywall Work Preservation Fund v. Department of Housing & Urban Dev.*, 936 F.2d 1300, 1302 (D.C. Cir. 1991); *Hopkins v. United States Dep’t of Housing & Urban Dev.*, 929 F.2d 81 (2d Cir. 1991); *Painting Indus. of Haw. Mkt. Recovery Fund v. United States Dep’t of the Air Force*, 26 F.3d 1479 (9th Cir. 1994); *Sheet Metal Workers Int’l Ass’n, Local No. 9 v. United States Air Force*, 63 F.3d 994 (10th Cir. 1995), but did not consider the disclosure of home zip codes without name, home address, social security number, or similar identifying information.

We have found that the disclosure of zip codes without other identifying information has not been problematical in other cases. In *Sun-Sentinel Co. v. United States Dep’t of Homeland Sec.*, 274 F. Supp. 2d 1323 (S.D. Fla. 2006), the Federal Emergency Management Agency, without objection, provided the requester with 9,000 pages of eligibility and inspection spreadsheets, which provided a breakdown by zip codes of individual assistance applications and payouts for Hurricane Frances for Miami-Dade County. In *Heights Community Congress v. Veterans Admin.*, 732 F.2d 526 (6th Cir. 1984), the Veterans Administration provided the data for the four zip codes which together included all of Cleveland Heights, but which also encompassed portions of surrounding cities.

In dicta, in considering the Internal Revenue Code provision regarding secrecy of concerns, the D.C. Circuit considered the disclosure of zip codes with respect to personal privacy under FOIA. In *Church of Scientology v. IRS*, 792 F.2d 153 (D.C. Cir. 1986), the Court stated:

Consider, for example, a FOIA request for the amounts and beneficiaries of all charitable deductions claimed by taxpayers within a particular postal ZIP code area during a

particular tax year. That information would normally not identify the charitable gift of any particular taxpayer; but it would do so if the requester had been told by his neighbor that the latter made a charitable gift last year of \$2,775.

Id. at 158.

We note as well that under federal law regarding the use of certain personal information from state motor vehicle records, the definition of “personal information” under 18 USCS § 2725 excludes zip codes.²

It is clear that disclosure of zip codes alone is not within the items that are normally considered personal identifying information. Existing authority does not state or suggest otherwise. It is unclear how the disclosure of zip codes, when combined with information regarding compensation, would lead to the identification of individual workers. The D.C. Circuit noted that a zip code and a payment amount would not “normally” identify an individual, but would depend on the fortuity of a casual conversation. The risk of such disclosure would be de minimis, but not substantial. We do not believe that the risk in the present circumstances is any more than de minimis. Accordingly, DDOT has failed to identify a substantial privacy interest.

There is one case which would suggest a contrary conclusion. In *Campaign for Family Farms v. Veneman*, No. 99-1165, 2001 WL 1631459 (D. Minn. July 19, 2001), the court found, without further explanation, that disclosure of zip codes and dates of signatures could identify signers of petition. However, given the absence of an explanation as to the manner in which the identification would take place and the fact that this is an unreported case without precedential authority, this case would not change our conclusion.

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. As we have found that there is no substantial privacy interest, the second part of the analysis is unnecessary.

Accordingly, we find that the exemption for privacy under D.C. Official Code § 2-531(a)(2) does not apply. DDOT shall provide the records to Appellant without redaction for home zip codes.

Our decision in this matter is constrained by the law and the facts. However, we also believe that the proffer of DDOT to provide the state of residence of each worker to Appellant in lieu of the zip codes was reasonable and would accomplish the purposes of Appellant. Notwithstanding our decision in this matter, we encourage Appellant to consider and accept this proffer.

Conclusion

² 18 USCS § 2725(3) provides: “(3) “personal information” means information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.”

Therefore, we reverse and remand the decision, as revised, of DDOT. DDOT is ordered to provide the records to Appellant without redaction for home zip codes.

If you are dissatisfied with this 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: Angela Addison Freeman, Esq.