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

Freedom of Information Act Appeal: 2011-32

June 22, 2011

Denise L. Wiktor, Esq.

Dear Ms. Wiktor:

This letter responds to your consolidated 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 23, 2011 (the "Appeal"). You, on behalf of Gustavo Viteri ("Appellant"), assert that the District Department of Transportation ("DDOT") improperly withheld records in response to your request for information under DC FOIA dated February 15, 2011 (the "DDOT FOIA Request") and that the Office of Unified Communications ("OUC") improperly withheld records in response to your request for information under DC FOIA dated February 15, 2011 (the "OUC FOIA Request").

Background

Appellant's DDOT FOIA Request sought the following:

1. Emails of Tierney Viteri (email address: Tierney.Viteri@dc.gov) sent to or received from Curtis Edwards (email address: Curtis.Edwards@dc.gov or bethesdaorg@yahoo.com) between August 15, 2010, and February 15, 2011.

2. Emails received by and sent from Tierney.Viteri@dc.gov, between August 15, 2010, and February 15, 2011, containing:

(A) In either the body or the subject line of the email, the following terms: Tierney; Motorola System; Parking Meter Stats; Meter Pilot; 311 Pilot; Thx C; or affair; and

(B) In the subject line: Hey Baby!; Curtis?; ?; !; .; :; *); *?; *; or [blank, i.e., no subject].

Appellant's OUC FOIA Request sought the following:

1. Emails of Curtis Edwards (email address: Curtis.Edwards@dc.gov) sent to or received from Tierney Viteri (email address: Tierney.Viteri@dc.gov or Tierney@viteri.net) between August 15, 2010, and February 15, 2011.

2. Emails received by and sent from Curtis.Edwards@dc.gov, between August 15, 2010, and February 15, 2011, containing:

(A) In either the body or the subject line of the email, the following terms: Tierney; Motorola System; Parking Meter Stats; Meter Pilot; 311 Pilot; Thx C; or affair; and

(B) In the subject line: Hey Baby!; Curtis?; ?; !; .; :; *); *?; *; or [blank, i.e., no subject].

In response to the DDOT FOIA Request, by letter dated March 17, 2011, DDOT, citing District of Columbia Official Code § 2-534(a)(2) and (3), stated that it was withholding all of the responsive records because "an invasion of personal privacy and interference with law enforcement would occur."

Similarly, in response to the OUC FOIA Request, by letter dated April 11, 2011, OUC, citing District of Columbia Official Code § 2-534(a)(2) and (3), stated that it was withholding all of the responsive records because "an invasion of personal privacy and interference with law enforcement would occur."[1]

On Appeal, Appellant challenges the denial of the FOIA Requests. The reasons given are nearly the same, as noted below.

With respect to the DDOT FOIA Request, the argument of Appellant is in three main parts:

1. As a general matter, Appellant maintains that a "blanket exemption" for all emails is not proper, stating that there are over 1,000 emails and not all fit either exemption. As an example, Appellant cites one email, responding to a question about the nature of the day, stating "tough. How was yours." Appellant adds an inference from this that not all emails were reviewed.

2. With respect to the exemption for investigatory records compiled for law enforcement purposes, except possibly for a few "meter issues," Appellant maintains that they are not investigatory records created in the course of investigation, but "personal correspondence between two parties."

3. With respect to the exemption for an unwarranted invasion of personal privacy, Appellant maintains that four circumstances constitute a waiver of privacy by Tierney Viteri:

[1] The OUC response also referenced a FOIA Request by Appellant dated April 1, 2011. As Appellant has neither provided such original request nor challenged the response with respect to the latter request, it has not been set forth in this decision.

A. Appellant and Ms. Viteri shared passwords as part of joint counseling and Appellant obtained emails as a result.

B. Ms. Viteri had delegated email rights to another co-worker.

C. Ms. Viteri often left her computer unattended or allowed others to use it during snow emergencies. Appellant adds that e-mails were printed and circulated through the agency as a result.

D. Ms. Viteri was asked about the emails referred to in subparagraph (C) by the acting director of DDOT and she asserted that these were created by Appellant hacking into her system. She also implied that someone broke into her office and created the e-mails. Appellant maintains that this charge against Appellant, still outstanding, is a misrepresentation based on the dates involved.

In addition, Appellant asserts that personal emails created on a government computer meant for government documents are not government records, arguing further that it would constitute condoning significant amounts of the work day on such matters.

With respect to the OUC request, Appellant makes essentially the same argument, except with respect to subparagraph (D) above.

Appellant adds that the documents are needed for the separation and custody proceedings of Mr. Viteri and to protect Mr. Viteri against false accusations.

In their consolidated response, dated June 15, 2011, DDOT and OUC (the "Agencies") reaffirmed their position. First, the Agencies stated that DDOT provided documents, including a portion of the records withheld in this matter, to the Office of the Inspector General "due to a possible misuse of government property associated with the documents." They state that there is an ongoing investigation which could result in civil or criminal charges. Consequently, they assert that the exemption for investigatory records compiled for law enforcement purposes applies because the records are part of an investigatory file of the Office of the Inspector General and disclosure of these records could interfere with enforcement proceedings. Second, the Agencies assert the exemption from disclosure of information which would constitute a clearly unwarranted invasion of personal privacy because the contents of the records are extremely personal in nature and could cause significant embarrassment to the parties involved and the disclosure of the records would not provide the public with any insight into the operations of the Agencies.

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).

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). The exemption in this matter is asserted under, and 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. The Agencies state that the records are "extremely personal in nature, where, if disclosed, could cause significant embarrassment to the parties involved." Appellant characterizes the records as personal as well, i.e., "personal correspondence between two parties." This is clear. The notion advanced by Appellant that that these are not government documents flies in the face of Appellant's request under DC FOIA, which is premised on the disclosure of government documents. Although it was in the context of a non-FOIA case, without deciding the extent of that interest, the Supreme Court has indicated that there is a privacy interest in personal messages sent or received on government communications devices. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010). "[I]t is particularly important to safeguard "a public employee's expectation of privacy in the workplace" in light of the "reality of work in modern time," . . . which lacks "tidy distinctions" between workplace and private activities [citations omitted] . . ." *Id*. at 2633 (Stevens, concurring).

Appellant maintains, without citation of legal authority, that there has been a waiver of personal privacy. A waiver can occur by individual or agency action. An individual does not have an expectation of privacy in information which he or she has made public. *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). Likewise, an agency may not assert an exemption with respect to information which has been officially acknowledged or is in the public domain. See, e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992). In this case, the "waivers" alleged by Appellant do not meet the standard of information placed in the public domain by individual or official agency action. Sharing a password with a spouse clearly does not place information in the public domain. The other waivers asserted amount to permitting access to computer records to co-workers (or discussing them with a superior), intra-office matters that reflect the realities and practicalities of the workplace.

There is clearly a personal privacy interest in the records in this matter.

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).

In this case, as indicated above, Appellant characterizes the records as personal. This is an acknowledgement that the records do not concern the conduct of government business. Nevertheless, it would appear that Appellant would contend that this involves a misuse of government resources. However, 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. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). In this case, the records are sought from low to mid-level employees who are not policy makers and whose actions appear to be isolated instances of misconduct (if misconduct in fact occurred). The disclosure of the records will not contribute significantly to public understanding of the operations or activities of the government. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Accordingly, the public interest in disclosure here does not outweigh the individual privacy interest.

Appellant states that the documents are needed for the separation and custody proceedings of Mr. Viteri and to protect Mr. Viteri against false accusations. 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); *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989).

Therefore, the withholding of the records was proper. In light of this conclusion, it is unnecessary to address the other grounds offered by the Agencies for withholding these records.

Conclusion

Therefore, the decision of the Agencies 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: Angela Addison Freeman, Esq.
Frank Seales, Esq.
Yvonne McManus