

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

Freedom of Information Act Appeal: 2011-33

June 8, 2011

Nikki Lotze, Esq.

Dear Ms. Lotze:

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 20, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of Police Complaints (“OPC”) improperly withheld records in response to your request for information under DC FOIA dated April 13, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought, with respect to two named officers, information regarding disciplinary actions or investigations, including citizen complaint forms, investigative reports, and records relating to the same.

In response, by letter dated May 12, 2011, OPC provided records to the Appellant, but redacted portions of certain documents relating to closed complaints pursuant to exemptions for privacy interests under D.C. Official Code § 2-531(a)(2) and (3)(C) and withheld other documents pursuant to exemptions for investigatory records and deliberative process privilege under D.C. Official Code § 2-531(a)(3) and (4). As to the exemption for investigatory records, OPC stated that “the disclosure of this information would reveal investigative techniques used by OPC that are confidential and not otherwise known to the public.” As to the exemption for deliberative process privilege, OPC stated that “these records would reveal information about the agency’s internal deliberative process before it was completed and a final decision was reached. Making this information available to the public would inhibit frank and honest discussion of matters being considered by OPC and would disseminate records that suggest reasons or rationales for actions that were not in fact the ultimate or actual reasons for the agency’s actions.”

On Appeal, Appellant challenges the denial, in part, of the FOIA Request with respect to the withholding of the open OPC complaints against one of the named officers. Appellant asserts that she is entitled to a copy of the complaint because she represents a man charged with assaulting the officer and that, because of the open investigations, the testimony of the officer

may be colored because the officer may wish to curry favor with the District government. Appellant states that her client's criminal trial scheduled to begin June 14, 2011.

In its response, dated June 6, 2011, OPC reaffirmed and amplified its position. In addition to the exemptions cited in its response to the FOIA Request, OPC cites three other exemptions under D.C. Official Code § 2-534(a)(3)(A)(iii), (B), and (C) in support of its decision. D.C. Official Code § 2-534(a)(3) provides, in pertinent part, exemptions for:

(3) Investigatory records compiled for law-enforcement purposes, including . . . investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would:

(A) Interfere with:

. . . (iii) Office of Police Complaints ongoing investigations;

(B) Deprive a person of a right to a fair trial or an impartial adjudication; or

(C) Constitute an unwarranted invasion of personal privacy.

With respect to the exemption for privacy under D.C. Official Code § 2-534(a)(3)(C), OPC states that this exemption was found to apply in similar circumstances in a previous DC FOIA appeal.

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.

The challenge of the Appellant is to the withholding of open or pending complaints against one of the named officers.

We agree that that privacy exemption under District of Columbia Official Code § 2-534(a)(3)(C) applies, as we found in a previous appeal.

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.*

We find that there is a sufficient individual privacy interest for a person who is simply being investigated for wrongdoing based on allegations. “[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under 7(C) [as noted above, Exemption (3)(C) under DC FOIA].” *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). The D.C. Circuit has also stated that nondisclosure is justified for documents that reveal allegations of wrongdoing by suspects who never were prosecuted. *See Bast v. U. S. Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). As set forth above, the D.C. Circuit in the *Stern* case stated that individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity and that protection of this privacy interest is a primary purpose of the exemption in question. The complaints sought here are mere allegations of wrongdoing, the disclosure of which, prior to the completion of the investigations and final action, can have a stigmatizing effect without regard to the accuracy of the allegations.

As stated above, an analysis under Exemption (3)(C) 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).

We cannot find that there is a public interest in disclosure of mere allegations of wrongdoing by lower-level employees which outweighs their individual privacy interests in nondisclosure. The mere disclosure that a complaint has been filed against a lower-level employee will not

materially, if at all, inform one about an agency's performance of its statutory duties. See, e.g., *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). Appellant has not advanced a public interest which would outweigh the privacy interest. Therefore, the withholding of the complaints was proper.

The facts in this case with respect to the withholding of the complaints are substantially similar to the facts in Freedom of Information Act Appeal 2011-07, where we upheld the withholding of the documents by OPC with respect to open complaints.

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

Appellant asserts that she is entitled to a copy of the complaint because she represents a man charged with assaulting the officer and that, because of the open investigations, the testimony of the officer may be colored because the officer may wish to curry favor with the District government. However, the availability of an exemption from 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).

Conclusion

Therefore, we uphold the decision of OPC. This appeal is hereby DISMISSED.

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: Nykisha Cleveland
Christian J. Klossner