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

Freedom of Information Act Appeal: 2011-36

June 28, 2011

Mr. Earnest Durant, Jr.

Dear Mr. Durant:

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 24, 2011 (the "Appeal"). You ("Appellant") assert that the Department of Human Resources ("DCHR") and the Department of Corrections ("DOC")(collectively, the "Agencies") improperly withheld records in response to your requests for information under DC FOIA dated June 9, 2009 (the "First FOIA Request"), November 27, 2009 (the "Second FOIA Request"), and January 26 and 27, 2010 (the "Third FOIA Request").

Background

Appellant's First FOIA Request sought the selection certificate relating to a vacancy announcement for a Supervisory Criminal Investigator in DOC.

Appellant's Second FOIA Request sought the following:

1. The name and qualifications of the government official who ranked Appellant as not qualified to be placed on the selection certificate relating to two job vacancy announcements.

2. The reasons that Appellant did not meet the basic qualifications for the positions, including rejection of the 10-point veteran's preference.

3. The selection certificates relating to two job vacancy announcements, including the names of the persons that were selected for both job vacancies.

Appellant's Third FOIA Request sought the results of the final agency decision on his appeal, dated January 7, 2008, for an upgrade of his job classification (or "desk audit," as Appellant described it in his request to DOC).

The Agencies denied the First FOIA Request on the ground that the disclosure is prohibited by 6 DCMR § 3112.8 (personnel rules).

The Agencies did not provide a response to the Second and Third FOIA Requests. However, as to the selection certificate for one of the vacancy announcements, DOC provided the selection certificate, with redaction for names, rating, and action taken, to Appellant.

On Appeal, Appellant generally challenges the denials of the FOIA Requests as "unlawful."

In its response, dated June 17, 2011, DOC responded as follows:

1. With respect to the First FOIA Request, DOC reaffirms its prior position. DOC notes that the merit staffing plan which Appellant cited as providing for disclosure requires an authorization for access.

2. With respect to the Second FOIA Request, DOC responded as follows. With respect to the name and qualifications of the selecting government official, after stating that it has never received the request, it states that disclosure of this information is exempt under the deliberative process privilege under District of Columbia Official Code § 2-534(a)(4). With respect to the reasons that Appellant did not meet the basic qualifications for the positions, it states that an agency is not required to answer questions, create documents, or provide legal opinions. With respect to the selection certificate relating to two job vacancy announcements, it states that District personnel rules do not permit disclosure of the selection certificates. Nevertheless, it confirms that provision of one of the selection certificates, with redactions, pursuant to a prior, duplicative request was correct.

3. With respect to the Third FOIA Request, DOC stated that the desk audit had been provided to Appellant as evidenced in documents provided with the Appeal. As stated above, DOC notes that the merit staffing plan which Appellant cited as providing for disclosure requires an authorization for access.

In its response, dated June 20, 2011, DCHR first asserted that the appeal was untimely because requesters have a 10-day period to file an appeal. With respect to the First FOIA Request and the Third FOIA Request, DCHR stated that it does not have any responsive records in its position. With respect to the Second FOIA Request, DCHR reaffirmed its prior position that that District personnel rules do not permit disclosure of the selection certificates.

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 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).

Although not noted above, Appellant states that, in addition to challenging the denials of his FOIA Requests, the Appeal "constitutes a formal protest" against the Agencies and the District government for alleged illegal personnel practices. However, this office does not have authority to adjudicate matters other than the appeals of denials regarding requests under DC FOIA.

In response to the filing of the Appeal, DCHR contends that the appeal rights of Appellant request have expired. However, as we noted in Freedom of Information Act Appeal 2011-26, DC FOIA provides no limitation on the filing of an appeal. At most, the doctrine of laches could be asserted. For the purposes of deciding the Appeal, laches does not apply.

The First FOIA Request

The First FOIA Request requests a selection certificate relating to a vacancy announcement for a Supervisory Criminal Investigator in DOC.

DCHR states that it does not have this record in its possession. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Based on its declaration, we are satisfied that DCHR has satisfied its statutory obligation with respect to this request.

DOC, as was the case for both Agencies in their initial response, contends that selection certificates are not permitted to be disclosed under 6 DCMR § 3112.8 (personnel rules). Accordingly, the contention of DOC is that disclosure is exempt under District of Columbia Official Code § 2-534(a)(6), which provides an exemption for information specifically exempt from disclosure by statute if the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. In this instance, DOC cites a rule under the District of Columbia Municipal Regulations for which there is no statutory counterpart. Accordingly, it is dubious that a personnel rule alone can support an exemption which requires statutory authority. However, that is not the end of the inquiry. The rule cited by DOC is rooted in personal privacy considerations, which considerations are addressed by exemptions under DC FOIA.

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 records, not investigatory records compiled for law-enforcement purposes, the matter 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.

There is cognizable and sufficient privacy interests in information about an individual contained in employment applications and relating to the employment process. *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984); *Barvick v. Cisneros*, 941 F. Supp. 1015 (D. Kan. 1996). A selection certificate is a document prepared in the course of a hiring process which identifies suitable candidates, with rankings, culled from a broader pool of applicants, for submission to a selecting official for a hiring decision. There is an individual privacy interest in the names and information on a selection certificate.

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 it has been found that there is a public interest in disclosure of information by successful job applicants of information relating to name, present and past job titles, present and past

grades, present and past salary, present and past duty stations, and present and past salary, which public interest would result in disclosure, there is not a public interest in similar information contained in applications of unsuccessful job applicants. *Core v. United States Postal Service,* 730 F.2d 946 (4th Cir. 1984); *Barvick v. Cisneros*, 941 F. Supp. 1015 (D. Kan. 1996). These latter applicants have a substantial privacy interest in their anonymity as the disclosure of such information could reveal their identities and that knowledge of their nonselection could lead to embarrassment or adversely affect future employment or promotion prospects. *Id*. In this case, most—if not all, as there is no evidence on the administrative record as to whether an offer was extended—of the names on the list were unsuccessful candidates. For the reasons inherent in the decision to adopt 6 DCMR § 3112.8, we find that the selection certificate is generally exempt from disclosure under Exemption (2). However, to the extent that the name of the successful applicant is known and appears on the selection certificate, the selection certificate, with redaction for other personal information other than the identification of an individual selected for position, shall be disclosed by DOC. We note that one of these selection certificates, with redactions, including, possibly, the name of the successful applicant, has already been provided to Appellant pursuant to another FOIA request.

Second FOIA Request

Appellant's Second FOIA Request was divided into three parts.

The first request was for the name and qualifications of the government official who ranked Appellant as not qualified to be placed on the selection certificate relating to two job vacancy announcements. Based upon the responses of the Agencies, it is not clear to what extent responsive records exist. Nevertheless, to the extent that responsive records exist, disclosure is exempt under Exemption (2) because the public interest in disclosure does not outweigh the individual privacy interest.

> [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 a person was involved in conducting an underlying investigation prior to decision may result in

further contact and questioning by third parties. See *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005); *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008). In addition, the qualifications of a rating employee implicates personal information. 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. In assessing the public interest, courts have found a lesser public interest in disclosing the identities of lower-level employees as opposed to high-level agency employees. In *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005), in a law enforcement context, the names of investigators were not required to be revealed. However, the identities of the decision makers who were presented with the results of the investigations were disclosed pursuant to lower court action (although such disclosure had mooted the issue by the time that it reached the appeals court). See *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008)(regarding privacy interests of investigators). In this case, the rating of prospective employees appears to be a function more akin to that of an investigator rather than a decision maker. The public interest in the disclosure of the identity of the rating employee does not outweigh the risk of further contact and questioning by third parties. Accordingly, we find the name of this employee need not be disclosed.

Regarding the qualifications, there is no evidence on the administrative record as to the extent to which such records exist. Although, as discussed above, the qualifications of a successful job applicant is not subject to exemption, the employment history contained in the personnel file of an employee, including evaluations, has been held to be sufficiently private as to outweigh a public interest. Indeed, "disclosure of even favorable information may well embarrass an individual or incite jealousy in his or her co-workers." *Ripskis v. Department of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Here the qualifications of the subject employee would encompass both prior employment history and agency employment history. Moreover, disclosure of this information may allow a person to discover the identity of the employee by putting this information together with other available information. There are no special circumstances here indicating a public interest disclosure which would outweigh the individual privacy interest of the rating employee in personnel details in his or her current file. While Appellant has alleged generally that there are illegal personnel practices of DOC, "[i]mplied suspicions as to the qualifications" of the rating employee do not create a sufficient public interest. *Harrison v. Fed. Bureau of Prisons*, 611 F. Supp. 2d 54, 66 (D.D.C. 2009)

The second request is for a request for the reasons that Appellant did not meet the basic qualifications for the positions, including rejection of the 10-point veteran's preference. Under the law, an agency "has no duty either to answer questions unrelated to document requests or to create documents." *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers

to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). Subsection 1-402.4 of the District of Columbia Municipal Regulations provides: "A request shall reasonably describe the desired record(s)." This request does not seek a document which was

generated as a result of the application process, but calls for the creation of a new document. As DOC correctly asserts, Appellant has not made a proper request under DC FOIA.

The third request is a request for the selection certificates relating to two job vacancy announcements, including the names of the persons that were selected for both job vacancies. One of these selection certificates was requested in the First FOIA Request. This portion of the request simply expands the disclosure sought in the First FOIA Request. Our discussion with respect to the First FOIA Request and the disclosure ordered in connection therewith apply to this request as well. It is unclear whether or not DCHR possesses the selection certificate. However, as Appellant filed a consolidated appeal, this disclosure will be satisfied so long as one of the Agencies provides the record.

Third FOIA Request

Appellant's Third FOIA Request sought the results of his "desk audit."

As set forth above, DOC stated that the desk audit had been provided to Appellant as evidenced in documents provided with the Appeal and, quoting the Appeal submitted by Appellant, pursuant to "a series of meetings with [a DCHR employee], where I completed a series of questionnaires." We have examined the documents submitted by Appellant. The meetings to which Appellant refers and which are mentioned in emails are meetings which were a part of the desk audit process. There is no indication that Appellant ever received a copy of the record reflecting the results of the completed desk audit. The misunderstanding of DCHR here is understandable. The events surrounding the desk audit occurred approximately two years ago and prior to the date that the current FOIA officer for DOC assumed her duties. Nevertheless, we do not see any reason why the record reflecting the results of the desk audit relating to Appellant should not be provided to him. Therefore, DOC should search its records and provide the results of the record reflecting the results of the desk audit if it is still in the possession of DOC. However, after the passage of approximately two years, it may not have retained this record.

DCHR states that it does not have this record in its possession. As stated, DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Based on its declaration, we are satisfied that DCHR has satisfied its statutory obligation with respect to this request.

Conclusion

Therefore, the decision of DOC and DCHR is upheld in part and reversed in part. DOC shall provide, to the extent that the name of the successful applicant is known and appears on the selection certificate, the selection certificate identified in the First and Second FOIA Request, with redaction for other personal information other than the identification of an individual selected for position (with DCHR to do so to the extent that DOC does not do so and the

selection certificate is in the possession of DOC). DOC shall provide the desk audit identified in the Third FOIA Request if it is still in the possession of DOC.

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: Erica Taylor McKinley, Esq.
Karen Devalera