

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

Freedom of Information Act Appeal: 2011-37

June 16, 2011

Ms. Jessica Gresko

Dear Ms. Gresko:

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 Department of Health Care Finance (“DHCF”) improperly withheld records in response to your request for information under DC FOIA dated April 21, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought the following information:

1. The number of abortions paid for by the city under D.C. Medicaid beginning in 2009.
2. The date of each procedure.
3. The location of each procedure.
4. The cost of each procedure.

Appellant stated that she was not seeking “any identifying information as to the women who obtained abortions under Medicaid or any information that would reveal any private medical information, only aggregate statistics and general information.”

In response, by email dated May 9, 2011, DHCF provided records to the Appellant, but withheld the location of the procedures. DCHF stated that because of the sensitive and private nature of an individual's decision to have an abortion, the disclosure of the locations where the abortion procedures were performed constitutes a clearly unwarranted invasion of personal privacy and is exempt under District of Columbia Official Code § 2-534(a)(2).

On Appeal, Appellant challenges the denial, in part, of the FOIA Request. Appellant asserts that an individual cannot be identified based upon the location for a procedure. Appellant notes that the contracts of the District with abortion providers are already public. In the FOIA Request, Appellant had stated that there is a public interest in the disclosure of the information requested “because it will contribute significantly to the public understanding of Congress’ decision to stop D.C. from providing abortions under Medicaid.”

In its response, dated June 10, 2011, DCHF reaffirmed its position that the disclosure of the locations where the abortion procedures were performed would be a clearly unwarranted invasion of personal privacy by revealing the decisions of the persons who chose to seek abortion services. In support of its position, it has submitted the affidavit of the Associate Director of the Office of Managed Care of DCHF. The affidavit states, in part:

[B]ecause of the stigma associated with abortions, individuals visiting abortion clinics being taunted, and providers of abortion care being threatened and assaulted, the disclosure of the locations of these abortions can adversely affect the individuals who visit these facilities and the health care professionals who provide care in these facilities.

...

The disclosure of the locations of the abortions will associate the locations with abortion services and violate the privacy rights of individuals visiting those locations for abortion services.

Contrary to the contention of Appellant that disclosure of the locations will not reveal the name or identifying information of the persons who sought abortions, DCHF asserts that “the disclosure of the locations associate the locations with abortion services and essentially discloses to the public that the individuals visiting these locations are seeking abortion services.” As to the contention of Appellant that the contracts of the District with abortion providers are already public, DCHF states that the District contracts for services with managed care organizations and that the managed care organizations contracts for services with abortions providers, which latter contracts are not in the possession of DCHF.

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). In this case, because it implicates personal medical history, 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.

A privacy interest cognizable for FOIA purposes generally exists with respect to medical history. *Nat'l Sec. News Serv. v. United States Dep't of the Navy*, 584 F. Supp. 2d 94 (D.D.C. 2008) (“The patients listed in the requested hospital admission records have a substantial privacy interest in avoiding disclosure of the fact that they sought medical treatment. . . . Records. . . . indicating that individuals sought medical treatment at a hospital are particularly sensitive.” *Id.* at 96.); *United States Dep't of State v. Wash. Post Co.*, 456 U.S. 595 (1982) (“Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet respondent does not disagree that such information, if contained in a “personnel” or “medical” file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy.” *Id.* at 600.)

In the case of the FOIA Request, Appellant does not seek, as stated in the Appeal, “any identifying information as to the women who obtained abortions under Medicaid” and the identification of the locations of abortion providers does not directly identify any individuals. However, redaction of personal details, such as names and identifying numbers, will not be sufficient if a knowledgeable reader can otherwise identify patients from the unredacted material. *Whitehouse v. United States DOL*, 997 F. Supp. 172 (D. Mass. 1998). DCHF has established the link between the disclosure of the location of abortion providers and the identification of

individuals who seek abortion services, that is, that the individuals can be identified when they visit the facilities at these locations. 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).

DCHF asserts that there is a "weak" public interest in the disclosure of the locations as it "does not specifically relate to the affairs of the government or the official acts of government employees." Further, it maintains that it does not further the public interest stated by appellant, that is, the public understanding of Congress' decision to prohibit the funding of abortions by the District. We think that understates the public interest in the disclosure. The location of the facilities where abortion services are provided can enhance the public understanding of the availability of these services in the number of facilities which the District funds and the geographic distribution of these facilities relative to the residency of the persons who are perceived to need the availability of such services. The records sought are part of the mosaic indicating what services the government provides and the possible effect of a decision not provide them. These matters do reflect on policy decisions made by the government and are not insubstantial.

Nevertheless, the individual privacy interest must be weighed against this public interest. There has been an ample history reflected in the news, in FOIA case law, and other case law resulting from the provision of abortions. In a non-FOIA case regarding the subpoena of medical records of individuals who obtained late-term abortions, the court observed:

Reflecting the fierce emotions that the long-running controversy over the morality and legality of abortion has made combustible, the Partial-Birth Abortion Ban Act and the litigation challenging its constitutionality--and even more so the rash of suits around the country in which the Department of Justice has been seeking the hospital records of abortion patients--have generated enormous publicity. These women must know that, and doubtless they are also aware that hostility to abortion has at times erupted into violence, including criminal obstruction of entry into abortion clinics, the firebombing of clinics, and the assassination of physicians who perform abortions.

Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 929 (7th Cir. 2004).

In *Hill v. Colo.*, 530 U.S. 703 (2000), the Supreme Court upheld a restriction on protests near abortion clinics. The Court found that “[p]ersons who are attempting to enter health care facilities -- for any purpose -- are often in particularly vulnerable physical and emotional conditions” and that the state had a “substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults . . .” *Id.* at 729.

In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), the Court found a strong privacy interest in avoiding abortion-related violence. “We have previously held that individuals have a ‘privacy interest in the nondisclosure of their names and addresses in connection with financial information,’ surely a weaker interest than avoiding physical danger. [citation omitted].” *Id.* at 153.

We note that there is authority which would suggest a more minimal privacy interest. *See Family Life League v. Department of Pub. Aid*, 112 Ill. 2d 449, 458 (Ill. 1986) (citing two case from other jurisdictions, stating that “disclosure of the names of physicians who receive public funds for abortion services does not infringe upon any right of privacy.”)

The controversy over abortion has continued unabated to the present day and, to paraphrase the 7th Circuit, fierce emotions remain combustible. There can be no assurances that the tactics of the past will not be employed in the future. While we have identified a clear and not insubstantial public interest in the disclosure sought in the Appeal, it is outweighed by the very real possibility of confrontation and threats, emotional trauma, and even physical violence. These outcomes are not certain, but the risks attendant to the disclosure cannot be ignored. To borrow terminology from economics, the expected marginal utility of the disclosure with respect to the public interest is less than the expected marginal costs with respect to the impact on individual privacy interests.

Conclusion

Therefore, the decision of DHCF 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: Irene Hui, Esq.