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

Freedom of Information Act Appeal: 2011-54

August 17, 2011

Mr. Christopher Wade

Dear Mr. Wade:

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 July 20, 2011 (the "Appeal"). You ("Appellant") assert that Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated April 26, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought all emails dated August 13 and 14, 2009, between two MPD Assistant Chiefs relating to an Internal Affairs Division investigation and referencing Appellant.

In response, by letter dated June 17, 2011, MPD withheld the emails under D.C. Official Code § 2-531(a)(2) and (3)(C) pursuant to exemptions for disclosures which would constitute invasions of privacy, possibly subjecting the author to unwanted attention, embarrassment, retaliation or even harm. The privilege log accompanying the letter indicated that the author of the emails was a private citizen.

On Appeal, Appellant challenges the denial of the FOIA Request. As context for the FOIA Request, Appellant states that, on August 5, 2009, he emailed a request for a meeting with the Mayor to his Chief of Staff. He also states that he met with one of the Assistant Chiefs, who asked why he wanted to meet with the Mayor and showed Appellant a reply of the other Assistant Chief to the email of Appellant. Appellant contends that he is the "private citizen" referred to in the privilege log. First, Appellant contends that he is the author of the withheld email, implying that he is not in need of protection of his personal privacy. Second, he indicates that D.C. Official Code § 2-536(a)(3) and (5), requiring disclosure of final opinions and orders in the adjudication of cases and disclosure of correspondence and materials by and with a public body where the public body states, or is asked to state, an opinion on certain rights, requires the disclosure.

In its response, dated August 10, 2011, and supplemented, at our invitation, to indicate which of the emails had been withheld and which had been released, MPD reaffirmed its prior position. MPD stated Appellant was not the author of the email and that the author is no longer in government service and is a private citizen. MPD maintains that "release of the subject email would constitute an invasion of privacy of the person who wrote it as it reflects this person's frank thought processes. The department believes that this person's privacy interest outweighs any public interest in the identity or content of the subject email." It provided both the withheld and the released email for review. MPD states that it has released one of the emails.

The responsive emails are in an email trail. Two of the messages in the trail have been withheld. The other responsive messages have been released. Contrary to the belief of Appellant, he is not the author of the emails. The withheld emails reflect personal observations and reflections on the correspondents' interactions in the situation presented.

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).

D.C. 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, D.C. 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 both exemptions. As the records in

question stem from a complaint alleging misconduct and investigated by the Internal Affairs Division of MPD, we will evaluate this under standards of Exemption (3)(C).

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. While the author of the email messages is now a private citizen, he was a government employee at the time that they were written. Nevertheless, 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). It has also been recognized that "government investigative personnel may be subject to harassment or embarrassment if their identities are disclosed." *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005). See also *Lesar v. United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980) ("agents have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives. [footnote omitted]." *Id*. at 487). On the other hand, high-level or supervisory officials have been found to have a diminished privacy interest. See, e.g., *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). Nevertheless, even such officials do not forfeit all personal privacy. *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 864 (D.C. Cir. 1981). Moreover, under case law, the significance of the position of the official is primarily reflected in the next step in the privacy analysis, the evaluation of the public interest in disclosure. Therefore, we find that the official in this case has at least a minimal privacy interest.

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).

We have examined the withheld emails. In this case, as indicated above, the withheld emails reflect personal observations and reflections on the correspondents' interactions in the situation presented. The disclosure of the records will not contribute anything to public understanding of the operations or activities of the government or the performance of MPD. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989).

> In the usual case, we would first have identified the privacy interests at stake and then weighed them against the public interest in disclosure. See *Ray*, 112 S. Ct. at 548-50; *Dunkelberger*, 906 F.2d at 781. In this case, however, where we find that the request implicates no public interest at all, "we need not linger over the balance; something … outweighs nothing every time." *National Ass'n of Retired Fed'l Employees v. Horner*, 279 U.S. App. D.C. 27, 879 F.2d 873, 879 (D.C. Cir. 1989); see also *Davis*, 968 F.2d at 1282; *Fitzgibbon v. CIA*, 286 U.S. App. D.C. 13, 911 F.2d 755, 768 (D.C. Cir. 1990).

Beck v. Department of Justice, 997 F.2d 1489, 1494 (D.C. Cir. 1993).

Accordingly, the public interest in disclosure here does not outweigh the individual privacy interest.

Finally, the withheld email messages are not records which are identified in the mandatory disclosure provisions of D.C. Official Code § 2-536(a)(3) and (5).

Conclusion

Therefore, we uphold the decision of MPD. The Appeal is 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: Ronald B. Harris, Esq.
Natasha Cenatus