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

Freedom of Information Act Appeal: 2011-61

September 16, 2011

Mr. Josh Margolin

Dear Mr. Margolin:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) ("DC FOIA"), as amended, dated September 2, 2011 (the "Appeal"). You, on behalf of the New York Post ("Appellant"), assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated September 1, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request, by email dated September 1, 2011, following an oral conversation, sought records pertaining to a specified complaint and arrest which occurred on July 30, 2011, "specifically . . . any and all notes made by the officers/supervisors involved with the matter as well as any and all recordings and transcripts of the associated 911 calls and radio transmissions."

In response, by letter dated September 1, 2011, sent by email, MPD provided an "Incident-Based Event Report" and an "Event Chronology," with redactions on the Event Chronology for certain personal identifying information, but withheld the 911 audiotape as it was not able to redact the identity of the 911 caller. By email on the same date, MPD clarified its response. As to the argument of Appellant that the identity of the 911 caller was disclosed on the Incident-Based Event Report, it stated that the 911 audiotape and the report are separate records, DC FOIA is applied to each record separately, and the 911 audiotape was withheld because it could not be redacted due to technical limitations. As to a proffer of Appellant not to publicly reveal the privileged portion, in consideration of the caller's "privacy as a private citizen and safety as a crime victim," it declined to provide the 911 audiotape without the consent of the caller.

On Appeal, Appellant challenges the withholding of the 911 audiotape. Appellant argues that redaction serves no purpose "because the caller's identity has already been revealed both in the

police report released to us and in an interview with the caller as discussed in our article [hyperlink provided]." In addition, Appellant proffers "in writing that, if asked, we will delete the identity of the caller in order to protect her privacy . . ."

In response, dated September 15, 2011, MPD reaffirmed its position. MPD maintains that the release of the identity of the person, a possible victim, on the 911 tape would clearly violate her personal privacy and Appellant has not articulated a public interest which outweighs the privacy interest. It asserts that the existence of a privacy interest is not precluded because the identity of the caller is reflected in the event chronology. In addition, MPD states that the 911 tapes are not public records and typically contain personal information not limited to the incident, but, in any event, the 911 tape is non-segregable as MPD does not have the technical capability to redact audiotapes.

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 § 2-531. 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). As the record has been maintained for law-enforcement purposes, the exemption in this matter is asserted under, and would be judged by, the standard for, 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). An individual who is a victim or the subject of an alleged criminal infraction has a privacy interest in personal information which is in a government record. Disclosure may lead to unwanted contact and harassment. *Kishore v. United States DOJ*, 575 F. Supp. 2d 243, 256 (D.D.C. 2008); *Blackwell v. FBI*, 680 F. Supp. 2d 79, 93 (D.D.C. 2010). The same principle applies to, among others, witnesses. See *Lahr v. NTSB*, 569 F.3d 964 (9th Cir. 2009)(privacy interest found for witnesses regarding airplane accident); *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1023 (9th Cir. 2008)(privacy interest found for government employees who were cooperating witnesses regarding wildfire); *Lloyd v. Marshall*, 526 F. Supp. 485 (M.D. Fla. 1981) ("privacy interest of the witnesses [to industrial accident] and employees is substantial . . ." *Id.* at 487); *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984)(privacy interest found for witnesses regarding industrial accident); *Codrington v. Anheuser-Busch, Inc.*, 1999 U.S. Dist. LEXIS 19505 (M.D. Fla. 1999) (privacy interest found for witnesses regarding discrimination charges).

The usual case involving a privacy interest is one in which the identity of an individual in a government record is not known. In the case of the Appeal, as Appellant points out, the identity of the caller is known. It was known when the Appellant made the request. Indeed, the Incident-Based Event Report which MPD provided to Appellant states the name of the individual, albeit as the "Complainant," and provides details of the 911 call. Moreover, the individual was identified by name in a newspaper article which Appellant published and was made a part of the administrative record by hyperlink. Consequently, the question is whether a privacy interest exists any longer in light of these circumstances.

Appellant argues that there is no longer a privacy interest because, as noted, the identity of the caller was revealed by MPD along with the details of the 911 call. In addition, the caller was interviewed by Appellant, statements from which were quoted in the newspaper article of Appellant.

The fact that the name of the caller is known is not dispositive. An individual does not lose his privacy interest because his or her identity as a witness may be discovered through other means. *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984); *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 501 (1994). ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.")

> [T]he fact that 'names of several persons have already been identified' in the media (Pl.'s Opp. at 35) does not lessen their privacy interest or 'defeat the exemption,' for prior disclosure of personal information does not eliminate an individual's privacy interest in avoiding subsequent disclosure by the government. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762–63, 770, 109 S.Ct. 1468 (just because 'an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information'). Moreover, 'publicity in the popular media cannot vitiate the FOIA privacy exemption.' *Bast v. United States Dep't of Justice*, 665 F.2d

1251, 1255 (D.C.Cir.1981); see also *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C.Cir.1998) (official's statement to the press that he was investigated and disciplined did not waive his privacy interests for FOIA purposes).

Edmonds v. F.B.I. 272 F.Supp.2d 35, 53 (D.D.C. 2003). See also *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984) ("An individual does not lose his privacy interest under 7(C) [the federal FOIA equivalent of Exemption (3)(C)] because his identity as a witness may be discovered through other means. The employee-witnesses in this case have a substantial privacy interest in this case as disclosure would lead to the type of harm, embarrassment and possible retaliation that 7(C) was created to prevent. [citations, footnote omitted]. Then too, the courts have long been aware of the effects of disclosure upon the availability of information to the government.")

Nevertheless, as stated above, the caller was interviewed by Appellant, statements from which were quoted in the newspaper article of Appellant. While the "government cannot waive individuals' privacy interests under FOIA . . . [a]n individual can waive his privacy interests under FOIA when he affirmatively places information of a private nature into the public realm." *Prison Legal News v. Exec. Office for United States Attys.*, 628 F.3d 1243, 1249 (10th Cir. 2011). *Prison Legal News v. Exec. Office for United States Attys.* involved video and audio of the aftermath of a murder of a prison inmate in his cell, including the mutilation of the body of the deceased. The video and audio were used at trial. Nevertheless, in consideration of the privacy interests of the family members, the court stated that no affirmative steps were taken by the family members to place the material in the public domain. While the privacy interest may have been weakened, it was not negated. The court contrasted this case to *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885 (D.C. Cir. 1995). In that case, Ross Perot was found to have waived his privacy interest when he made public statements concerning his offer to assist government agencies with certain law enforcement matters. In the same vein is *Showing Animals Respect & Kindness v. United States DOI*, 730 F. Supp. 2d 180 (D.D.C. 2010). In that case, two individuals arranged for the filming of a staged bear chase and killing with the intent to use some of the footage for a music video or for presentation on television. The individuals became subjects of a criminal investigation and the requester sought the video footage. Although the court stated that there was some privacy interest in the inculpatory video footage with their images, such privacy interest was minimal as "the videos at issue here were created by [the individuals] expressly for distribution to the public. . . . Under these circumstances, neither [of the individuals] could have expected that their appearances on these videos would remain private." *Id*. at 193.

Insofar as the statements to the press are concerned, we think that this case is closer to *Kimberlin v. Department of Justice*, 139 F.3d 944 (D.C. Cir. 1998). In that case, the requester sought a report of the Office of Professional Responsibility, which investigated a staff-level government lawyer for a possible unauthorized and illegal release of information to the press. It was argued that the lawyer waived his privacy interest of when he admitted to the press that he was investigated and disciplined for releasing certain files. However, the court "did not, merely by acknowledging the investigation and making a vague reference to its conclusion, waive all his interest in keeping the contents of the OPR file confidential." *Id*. at 949. In this case, the statements to the press by the caller were more than simple acknowledgments and admissions, but the circumstances would support an inference that the caller was responding to the persistent

inquiries of the press. It does not appear that the caller, like Mr. Perot in *Nation Magazine v. U.S. Customs Serv.*, or the individuals in *Showing Animals Respect & Kindness*, sought out the press or the public. While the responses may have diminished the expectation of privacy of the caller, such responses do not defeat it. We find that the caller did not waive her privacy interest.

Nevertheless, in light of the knowledge of the identity of the caller and the written description of the contents of the call, insofar as the existence of a privacy interest is concerned, the inquiry is whether there is any additional information in the call which is not already public knowledge and to which the privacy interest would attach. Stated differently, the issue is "whether, as a practical matter, the extent of prior public disclosure has eliminated any expectation in privacy." *Prison Legal News v. Exec. Office for United States Attys.*, 628 F.3d 1243, 1249 (10th Cir. 2011). As set forth above, that case involved video and audio of the aftermath of a murder of a prison inmate. As also stated, while the privacy interest may have been weakened by prior public disclosures, it was not negated. The court stated: "Although descriptive information about what the images contain may now be widely available, there is a distinct privacy interest in the images themselves. [citation omitted]." *Id*. at 1249. There is a privacy interest in seeking "'refuge from a sensation-seeking culture.'" *Id*. (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004)).

In the Appeal, we have not listened to the 911 tape as it is not part of the administrative record. However, 911 calls made by victims or potential victims are generally made at a time of great fear and vulnerability. The tenor of one's voice, the words chosen, and the manner of delivery of the words at a time of such vulnerability pose a substantial likelihood of presenting one in an embarrassing or even humiliating light. To be sure, the description of certain of those words on a written page poses some of the same risks, but the audio gives a graphic life to those words which amplifies the emotion and the potential for embarrassment and humiliation. We believe that this case presents similar considerations to those in *Prison Legal News*. Thus, we find that there is a remaining and sufficient privacy interest which extends beyond what has already been revealed.

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).

"To obtain disclosure, a FOIA plaintiff 'must produce evidence that would warrant a belief by a reasonable person that [an] alleged Government impropriety might have occurred.' *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004). Otherwise, the balancing requirement simply does not come into play. *Id.* at 175." *Blackwell v. FBI*, 680 F. Supp. 2d 79, 93-94 (D.D.C. 2010).

> Information about individuals that does not directly reveal the operations or activities of the government -- which is the focus of FOIA – 'falls outside the ambit of the public interest that the FOIA was enacted to serve' and may be protected under Exemption 7(C). *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). . . . To obtain disclosure, Mr. Kishore may not rests [sic] on 'a bare suspicion' . . .

Kishore v. United States DOJ, 575 F. Supp. 2d 243, 256-257 (D.D.C. 2008).

In this case, Appellant has only offered that this matter involves "a significant arrest that relates to high-profile person." However, it appears that the arrest is significant only because it applies to a person characterized as high-profile. Celebrity alone does not establish a public interest. Here, 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). Thus, as this is not a case involving the efficiency or propriety of agency action, there is no public interest involved.

> 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).

Based on the foregoing, the issue of segregability, as well as the corresponding issue of the technical capability of MPD to redact audiotapes, is moot.[1]

Conclusion

Therefore, the decision of MPD is upheld. The Appeal is hereby DISMISSED.

[1] We note that in prior decisions, Freedom of Information Act Appeal 2010-08 and Freedom of Information Act Appeal 2011-11 (Reconsideration), the Office of Unified Communications and MPD, respectively, were found not to have the capability to modify an audiotape and disclosure was not required.

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