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

**Freedom of Information Act Appeal: 2011-62**

October 3, 2011

Ms. Abigail Padou

Dear Ms. Padou:

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"), dated September 8, 2011 (the "Appeal"). You ("Appellant") assert that the Office of the Attorney ("OAG") improperly withheld records in response to your request for information under DC FOIA dated July 25, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought the following documents related to Councilmember Harry Thomas, Jr.:

1. The reports filled out by Mr. Thomas' staff regarding the claimed accomplishments of "Langston 21."

2. The bank records of Mr. Thomas' for-profit company, which Appellant believes was named "HLT."

3. The settlement agreement between Mr. Thomas and OAG in reference to an action filed by OAG.

In response, by email dated August 5, 2011, MPD stated that it was providing the requested records to Appellant with respect to the first and third requests, but was withholding the bank records, which were the subject of the second request, pending further review. By email dated August 25, 2011, OAG stated that, after consultation with the Office of the United States Attorney, it was withholding the records "because their disclosure could interfere with a law enforcement investigation."

On Appeal, Appellant challenges the partial denial of the FOIA Request. Appellant asserts that "OAG has not articulated any harm that will follow from disclosure of the requested documents, but has simply invoked the exemption in a conclusory manner." Appellant contends that no harm will occur because Mr. Thomas, the target of the investigation, already has access to the requested records as a principal of the company.

In its response, dated June 14, 2011, OAG reaffirmed its position. By way of background, OAG states that the investigation and the civil enforcement action which generated the records involved allegations that Mr. Thomas unlawfully diverted charitable funds and District of Columbia grant funds and transferred a substantial portion of those funds to HLT Development, a company controlled by Mr. Thomas and his wife. While the civil enforcement action filed by OAG against Mr. Thomas was resolved by consent order, the Office of the United States Attorney and the Federal Bureau of Investigation ("FBI") are actively pursuing a criminal investigation of the activities giving rise to the civil enforcement action maintained by OAG. Most of the records of OAG pertaining to the investigation and civil enforcement action have been copied by the FBI and provided to the Office of the United States Attorney. The requested records were obtained by administrative subpoena and "show, among other things, payments into the account, payments out of the account, and account balances." After reiterating that the Office of the United States Attorney has requested that, if possible, it not make further disclosures, OAG states:

> The above-referenced bank records are *non-public*, and the U.S. Attorney's Office or the FBI may need to interview the suspected sources and recipients of diverted funds without the interviewees knowing beforehand what the bank records show. I have therefore concluded that disclosure of the above-referenced bank records could interfere with the criminal investigation being conducted by the U.S. Attorney's Office and the FBI.

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.

OAG contends that the records are exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A) pursuant to an exemption for investigatory records compiled for law enforcement purposes. D.C. Official Code § 2-531(a)(3) provides, in pertinent part, for an exemption from disclosure for:

> Investigatory records compiled for law-enforcement purposes, including the records of Council investigations . . ., but only to the extent that the production of such records would:
>
> > (A) Interfere with:
> >
> > > (i) Enforcement proceedings; . . .

(C) Constitute an unwarranted invasion of personal privacy; . . .

In the Appeal, there is no dispute that the records have been compiled for law enforcement purposes. The only dispute is whether the disclosure would interfere with enforcement proceedings.

Disclosure of records would, among other things, interfere with enforcement proceedings where such disclosure would reveal the size, scope and direction of the investigation, see, e.g., *Alyeska Pipeline Service Co. v. U.S. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988), allow the targets of an investigation to avoid arrest and prosecution and provide them information that would allow them to change their operations to avoid detection, see, e.g., *Boyd v. Crim. Div. of the United States DOJ*, 475 F.3d 381, 386 (D.C. Cir. 2007), and expose the legal thinking, strategy, and weaknesses in the government's evidence, see, e.g., *Mapother v. Department of Justice*, 3 F.3d 1533, 1542-1543 (D.C. Cir. 1993).[1] See also Freedom of Information Act Appeal 2011-47, where we upheld the exemption based on the statement of the agency, supported by affidavit, that "disclosure of records at this time may expose witnesses to danger, alert potential criminal suspects to the ongoing investigation, and reveal the direction of the investigation, thus potentially compromising the investigation." Nevertheless, the exemption has been held not to apply when the target of the investigation has possession of, or has submitted, the requested records. See, e.g., *Lion Raisins v. USDA*, 354 F.3d 1072, 1085 (9th Cir. 2004); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 174 (C.D. Cal. 2002).

In the Appeal, OAG does not rely on the effect of the disclosures on the presumed target of the investigation, Mr. Thomas. Instead, it premises its claim on the interference with the sources and recipients of funds who may be witnesses. However, while these potential interviewees are not targets of the investigation who have possession of, or have submitted, the requested records, they are similarly situated. The persons who are sources of payments or who have received payments know that they have made or received payments with or without knowledge of the contents of the bank records. Disclosure of the bank records would reveal little, if anything, material to each payor or payee that such person does not already know. The bank records do not involve a selective compilation by the government of documents, statements, or other evidence or any evaluations made in connection therewith. The detailed complaint in the civil enforcement action which OAG maintained and to which it refers is already public knowledge. We do not see how the disclosure of the bank records would compromise any interviews or otherwise interfere with subsequent proceedings. Indeed, while D.C. Official Code § 2-531(a)(3)(A) requires that disclosure "would" interfere with enforcement proceedings, OAG, in

[1] As stated herein, the standard for establishing the exemption is that the disclosure would interfere with enforcement proceedings. This was formerly the standard under the federal Freedom of Information Act. However, in 1986, the federal Freedom of Information Act was amended and the exemption is established thereunder if the disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Nevertheless, although the current federal standard is less demanding than the prior standard, the examples cited would establish the requisite interference under either standard.

admirable candor, has offered only that it “could” interfere with such proceedings. Moreover, the Office of the United States Attorney has requested nondisclosure “if possible,” suggesting that nondisclosure is preferable but not necessary.

Based on the foregoing, we find that the bank records should be released to the Appellant. Nonetheless, although the issue was not raised by OAG, we will consider, sua sponte, the extent to which disclosure affects the privacy interests of individuals identified in the bank records.

As indicated above, 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.*

The identification of a privacy interest in the present circumstances is not difficult. Under well-recognized principles, the individuals identified in the bank records have a sufficient privacy interest in not being associated with investigations regarding possible criminal activities.

> It is surely beyond dispute that ‘the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.’ *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987). As we have noted before, persons involved in FBI investigations - even if they are not the subject of the investigation - "'have a substantial interest in seeing that their participation remains secret.'" *King v. Department of Justice*, 265 U.S. App. D.C. 62, 830 F.2d 210, 233 (D.C. Cir. 1987) (quoting *Senate of the Commonwealth of Puerto Rico v. Department of Justice*, 262 U.S. App. D.C. 166, 823 F.2d 574, 588 (D.C. Cir. 1987)). We have said quite recently that "exemption 7(C) [the federal FOIA equivalent of Exemption (3)(C)] takes particular note of the 'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity.'" *Dunkelberger v. Department of Justice*, 285 U.S. App. D.C. 85, 906 F.2d 779, 781 (D.C. Cir. 1990) (quoting *Stern v. FBI*, 237 U.S. App. D.C. 302, 737 F.2d 84, 91-92 (D.C. Cir. 1984)).

*Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990).

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).

> 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 matter, it does not appear the disclosure of the records will contribute anything to public understanding of the operations or activities of the government or the performance of an agency. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Thus, as the requested records do not relate to 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).

Accordingly, OAG shall redact from the bank records the names of individuals appearing therein and any personal identifying information relating to them.

## Conclusion

Therefore, the decision of OAG is reversed and remanded in accordance with this decision. OAG shall produce the withheld records, with redaction of the names of individuals appearing therein and any personal identifying information relating to them.

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: Bennett Rushkoff, Esq.