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

Freedom of Information Act Appeal: 2012-06

November 29, 2011

Allen H. Orenberg, Esq.

Dear Mr. Blades:

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 November 4, 2011 (the "Appeal"). You ("Appellant") assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated September 16, 2011 ("FOIA Request").

Background

Appellant's FOIA Request sought information for a named MPD officer, including disciplinary records such as citizen complaints and records of investigation regarding alleged misconduct,.

In response, by letter dated October 5, 2011, MPD stated that it could neither admit nor deny the existence of disciplinary records or complaints regarding the named MPD officer because it would be an unwarranted invasion of privacy of the officer under D.C. Official Code § 2-534(a)(2) and (3)(C).

On Appeal, Appellant states that the officer pleaded guilty to second degree murder and, "[i]n light of the criminal acts that [the officer] committed, it is clearly in the public interest that the MPD reveal the manner in which it handled any and all other acts of misconduct in which [the officer] was involved." Appellant contends that the public interest, which would include "the full illumination of the MPD's governmental activities in the area of discipline of its own officers," outweighs any privacy interest of the officer, which interest, Appellant asserts, does not exist.

In its response, dated November 23, 2011, MPD reaffirmed its prior position. In addition, it buttressed its position by citing D.C. Official Code § 1-631.03, which states that the policy of the District government is not to provide personnel information "to appropriate personnel and law-enforcement authorities . . . if such disclosure would constitute an unwarranted invasion of personal privacy . . . " It also notes that the requested records are not of a type which must be made public under D.C. Official Code § 5-113.06.

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, the 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 may be examined to construe the local law.

Two provisions of DC FOIA provide exemptions for relating to personal privacy. 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 the comparable exemption in the other provision, D.C. Official Code § 2-534(a)(2) ("Exemption (2)"), which applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." 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).

Prior to undertaking the privacy analysis, we must determine whether the broader privacy exemption of Exemption (3)(C) applies. Internal investigations conducted by a law enforcement agency such as MPD will be included within Exemption (3)(C) if such investigations focus on acts which could, if proved, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also Rugiero v. United States DOJ*, 257 F.3d 534 (6th Cir. 2001)(The exemption "applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well." *Id*. at , 550.) The records which Appellant seeks relate to such type of investigation. Therefore, Exemption (3)(C) will apply to this case.

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. *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

The first part of the privacy analysis is whether a sufficient privacy interest exists regarding the disclosure of the disciplinary records of the named MPD officer. The D.C. Circuit has stated:

> [I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)[Exemption (3)(C) under DC FOIA]. 'The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators.' *Bast*, 665 F.2d at 1254.

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984).

We find that there is a sufficient individual privacy interest for a person who is simply being investigated for wrongdoing based on allegations. "[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under 7(C) [as noted above, Exemption (3)(C) under DC FOIA]." *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). The D.C. Circuit has also stated that nondisclosure is justified for documents that reveal allegations of wrongdoing by suspects who never were prosecuted. *See Bast v. U. S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). As set forth above, the D.C. Circuit in the *Stern* case stated that individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity and that protection of this privacy interest is a primary purpose of the exemption in question. We believe that the same interest is present with respect to civil disciplinary sanctions which could be imposed on an MPD officer. The records sought by Appellant may consist simply of mere allegations of wrongdoing, the disclosure of which can have a stigmatizing effect without regard to the accuracy of the allegations. While Appellant argues that the named officer is a "convicted criminal" and no longer has a privacy interest, Appellant cites no authority for this proposition and we do not believe that one public sanction causes an individual to lose all of his or her privacy interests.

We say "may consist" because, in this case, MPD has not stated, and has maintained that it will not state, whether or not there are any records which exist relating to the named MPD officer. However, "[c]ourts have recognized that in some instances even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect. In these cases, the courts have allowed the agency neither to confirm nor deny the existence of requested records." *Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir.1983). *See also Rushford v. Civiletti*, 485 F. Supp. 477 (D.D.C. 1980)(involving records regarding complaints of criminal or other misconduct by judges. "[T]he Department of Justice may not be required to deny the existence of a criminal investigation when there has been none and to refuse to confirm or deny its existence when information to that effect does exist. *Id*. at 481.) This is referred to as a "Glomar" response. A Glomar response is warranted only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. We think that this approach is justified in the case of the Appeal. If there is a record of a written complaint or subsequent investigation against the MPD officer, simply identifying the written record may result in the harm that the exemption was intended to protect.

As stated above, the second part of a privacy analysis under Exemption (3)(C) 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).

As set forth above, Appellant argues that there is an overriding public interest in the internal disciplinary processes of MPD. In addition, Appellant argues that the named officer is a "convicted criminal" and no longer has a privacy interest and that it is in the public interest "that the MPD reveal the manner in which it handled any and all other acts of misconduct in which [the officer] was involved." In this case, we cannot find that there is a public interest in disclosure of disciplinary records of a lower-level employee which outweighs his individual privacy interests in nondisclosure. Such disclosure will not materially, if at all, inform one about an agency's performance of its statutory duties. See, e.g., *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984); *Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). ("A government employee has at least some privacy interest in his own employment records, an interest that extends to 'not having it known whether those records contain or do not contain' information on wrongdoing, whether that information is favorable or not. See *Dunkelberger*, 906 F.2d at 782."); *Kimberlin v. DOJ*, 139 F.3d 944, 948 (D.C. Cir. 1998). See also Freedom of Information Act Appeal 2011-20. Moreover, as we stated above, we do not believe that one public sanction causes an individual to lose all of his or her privacy interests.[1] Therefore, based on the foregoing, we find that the response of MPD to the FOIA Request was proper.

Therefore, we uphold the decision of MPD. The Appeal is hereby dismissed.

[1] The FOIA Request was phrased in terms of all records of the named officer. However, it was clear that the focus of the FOIA Request was the disciplinary records of such named officer and Appellant only addresses the withholding of the disciplinary records. We note that while the other records are not an issue, such records appear to be exempt from disclosure as an unwarranted invasion of privacy (the narrower standard) of the officer under D.C. Official Code § 2-534(a)(2).

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Ronald B. Harris, Esq.