

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

Freedom of Information Act Appeal: 2012-12

December 8, 2011

Edgar Ndjatou, Esq.

Dear Mr. Ndjatou:

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 June 22, 2011 (the “Appeal”). You, on behalf of a client (“Appellant”), assert that the Office of the Inspector General (“OIG”) improperly withheld records in response to the request of your client for information under DC FOIA dated June 27, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records submitted to OIG in connection with an investigation relating to the termination of his client from the Department of Human Resources.

In response, by letter dated July 8, 2011, OIG denied the FOIA Request pursuant to D.C. Official Code § 2-534(a)(3)(A)(i). It stated that OIG, a law enforcement body, “does not disclose information pertaining to ongoing criminal and administrative matters because premature public disclosure would interfere with pending or prospective law enforcement proceedings.”

On Appeal, Appellant challenges the denial of OIG, stating that disclosure “would not ‘interfere with pending or prospective law enforcement proceedings.’” Appellant contends that his client was unfairly terminated without required notice and the requested records “would inform her if in fact DHR had any stated reason for terminating her.” In addition, Appellant states that no one has advised his client that she is the subject of potential enforcement proceedings and OIG can provide his client with “some basic information concerning the investigation, such as a timeline.”

In its response, dated December 7, 2011, OIG reaffirmed its position. It maintains that the disclosure of the requested records would compromise “our ongoing investigation and prospective enforcement proceeding.” It states that the FOIA Request “seeks the source documents for the case and information regarding case planning and strategy.” OIG also states that the disclosure of the requested records would reveal the nature, scope, and direction of the investigation and allow the target or targets to view the evidence and fabricate defenses. In addition, it maintains that withholding the records is necessary to protect the identity of sources and prevent witness tampering and intimidation.

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)(3) provides, in pertinent part, an exemption from disclosure for:

Investigatory records compiled for law-enforcement purposes, . . . , but only to the extent that the production of such records would:

(A) Interfere with:

(i) Enforcement proceedings;

For the purposes of DC FOIA, law enforcement agencies conduct investigations which 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). The exemption “applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.” *Rugiero v. United States DOJ*, 257 F.3d 534, 550 (6th Cir. 2001). For purposes of the applicability of the exemption, it is sufficient if the enforcement proceedings are “reasonably anticipated.” *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). It is clear, and Appellant does not contest, that OIG is a law enforcement agency. OIG indicates that an enforcement proceeding is likely to result from the current investigation and, although it does not expressly state, it is reasonable to infer that such proceeding will involve potential civil or criminal sanctions. We find that the records in this case have been compiled for law enforcement purposes within the meaning of DC FOIA.

However, in order to establish the applicability of the exemption under D.C. Official Code § 2-534(a)(3)(A)(i), it must also be established that disclosure would interfere with enforcement proceedings.

As set forth above, OIG states that the disclosure of the requested records would reveal the nature, scope, and direction of the investigation and allow the target or targets to view the evidence and fabricate defenses. Such disclosure would divulge case planning and strategy. In addition, it maintains that withholding the records is necessary to protect the identity of sources and prevent witness tampering and intimidation. We believe that this is credible and establishes the necessary interference with the prospective enforcement proceeding. See, e.g., *Kay v. FCC*, 976 F. Supp. 23, 38-39 (D.D.C. 1997); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240-242 (1978).

Appellant states that the records are needed to inform his client about the basis for her termination and the denial of termination pay by the Department of Human Resources. However, disclosure is not evaluated based on the identity of the requester or the use for which the information is intended. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004); *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989). Moreover, while Appellant contends that OIG can provide his client with “some basic information concerning the investigation, such as a timeline,” that is not relevant for purposes of DC FOIA. Under the law, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978).

The contention that OIG can provide his client with “some basic information concerning the investigation” implicates the possibility of redaction of the records.¹ However, as we stated in Freedom of Information Act Appeal 2011-47:

The facts uncovered in an investigation form a mosaic and it cannot be determined with sufficient precision, especially in advance of the completion of the investigation or any subsequent enforcement proceedings, which facts are not material to the essential purposes of the endeavor and whose disclosure would not interfere with the investigation and enforcement proceedings. Even redacted records may provide information which, when combined with other facts, would reveal the scope and path of the investigation, thus potentially compromising the investigation. Accordingly, we do not find that the records are reasonably segregable.

Conclusion

¹ D.C. Official Code § 2-534(b) provides for the disclosure of “[a]ny reasonably segregable portion of a public record . . .”

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

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: Charles Willoughby, Esq.
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Keith Vancroft