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

Freedom of Information Act Appeal: 2012-13

December 15, 2011

Benjamin A. Baroody, Esq.

Dear Mr. Baroody:

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 November 18, 2011 (the "Appeal"). You ("Appellant") assert that the Office of the Chief Medical Examiner ("OCME") improperly withheld records in response to your request for information under DC FOIA dated September 15, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought records with respect to a named individual, a decedent upon whom OCME performed an autopsy ("KR"), on behalf of the family of KR. The FOIA Request stated that after KR's body was identified by family members and arrangements were made to transport his body to South Carolina, OCME caused the body of another individual ("John Doe") to be transported to South Carolina instead of KR and John Doe was buried in the family cemetery plot. The records requested included those of any investigation, files regarding KR, a description of John Doe, and files used in the processing of such individual.

In response, by letter dated October 24, 2011, OCME provided an autopsy report, toxicology report, and other so-called "FACTS" records. However, OCME stated that it could not provide records concerning John Doe as the exemption for personal privacy under D.C. Official Code § 2-534(a)(2) precluded such disclosure without the consent of his next of kin or a court order directing that such disclosure be made. OCME advised Appellant that his picture and other information would be placed on a national website established to locate missing persons and unidentified decedents. OCME further advised Appellant that John Doe remains unidentified. After receipt of the response, by letter dated October 27, 2011, Appellant stated that he was not seeking information regarding John Doe, but records concerning the handling of the bodies of KR and John Doe as well as records regarding any investigation by OCME. In response, by letter dated November 14, 2011, OCME generally reaffirmed its prior response, but provided the position, title, dates of service, and salary for the employee involved and who was identified in the records previously released.[1]

[1] D.C. Official Code § 2-536(a)(1) states that the names, salaries, titles, and dates of employment of all employees and officers of a public body are public information.

On Appeal, Appellant challenges the denial of the FOIA Request, contending that that there "appears to be a significant misunderstanding about the documents and records that I am requesting." Appellant states that he is not seeking any information about the identity or personal information of John Doe, but is seeking information "about how this mistake occurred and the steps that were taken by OCME after the mistake was noticed . . . [including] a copy of an investigation into this matter as well as personnel decisions taken with respect to [the employee involved] . . ."

In its response, dated December 9, 2011, OCME reaffirmed its position, summarizing its prior response. Insofar as the employee who was terminated was concerned, it added that he was terminated and has appealed his termination, but could not provide additional information. While it acknowledged that the FOIA Request sought information about the employee, it stated that a "FOIA request is not an appropriate mechanism for obtaining the information you are seeking."

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).

While OCME provided responsive records to Appellant pursuant to the FOIA Request, the Appeal concerns two categories of records which were withheld: records regarding the intake and processing of the body of John Doe and records, including any investigation and personnel decisions, regarding the employee involved.

The claim of exemption under both of these categories of records involves D.C. Official Code § 2-534(a)(2). 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, District of Columbia Official Code § 2-534(a)(3)(C) ("Exemption (3)(C)") provides an exemption from disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, . . . 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 D.C. 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). The claim of exemption under the first category is made under the Exemption (2). As OCME has not claimed that the records in the second category constitute investigatory records compiled for law-enforcement purposes, we will presume that Exemption (2) applies as well. We will analyze separately each contested category of records, beginning with the intake and processing of the body of John Doe.

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.

A privacy interest is cognizable under DC FOIA if it is substantial, that is, anything greater than de minimis. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In this case, as John Doe is deceased, the privacy interest would be that of family members. In *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), the Supreme Court established that the "right to personal privacy is not confined . . . to the 'right to control information about oneself,'" *Id*. at 165, and held that surviving family members had a "right to personal privacy with respect to their close relative's death-scene images." *Id*. at 170. In *ACLU v. United States Dep't of Homeland Sec.*, 738 F. Supp. 2d 93, 117 (D.D.C. 2010), the court upheld the withholding of the writings of a detainee in the days leading up to her suicide as such writings were likely to contain personal information. *See also Katz v. National Archives & Records Admin*., 862 F. Supp. 476 (D.D.C. 1994)(autopsy X-rays and photographs of President Kennedy properly withheld).

Here, as set forth above, according to OCME, John Doe remains unidentified. However, as also set forth above, OCME has sent his photograph and other identifying information to a national website established to locate missing persons and unidentified decedents. Thus, as of the date of this decision, there is no privacy interest implicated because Joe Doe has not been identified and it is uncertain whether or not he will be identified. Moreover, assuming that John Doe is identified later, in the main, the records requested are not of a type which would cause an unwarranted invasion of privacy such as death scene images or personal writings. Indeed, OCME has already made some or all of the pictures and personal descriptions public by providing them to the national website. Therefore, there is little, if any, privacy interest in the pictures and personal descriptions or documents regarding the chain of custody and disclosure of such records will not constitute an unwarranted invasion of privacy.

There is one exception to this conclusion. OCME produced an autopsy report and a toxicology report with respect to KR and, although it does not appear on the administrative record, we presume that such reports exist with respect to John Doe. Although the contents of the reports are not known, it is possible that they may contain the kind of information which may implicate a privacy interest if the surviving family were to become known. As Appellant states that he is not seeking any information about the identity or personal information of John Doe, but is seeking information "about how this mistake occurred and the steps that were taken by OCME after the mistake was noticed," such reports would not be a part of the records which Appellant is seeking and shall not be included in the records to be produced.

Accordingly, OCME shall produce, with respect to John Doe, records constituting "identification photographs," his description, and forms, log book entries, tags, and similar documents used in the intake and processing of the body during custody by OCME.

The second category of records comprises those regarding any investigation and personnel decisions with respect to the employee involved in processing of the bodies. OCME takes the position that no records regarding an employee may be disclosed other than those required by D.C. Official Code § 2-536(a)(1). However, D.C. Official Code § 2-536(a)(1) provides only a minimum required disclosure, but does not preclude the disclosure of additional information. As indicated above, the withholding of the requested records must be tested with respect to the privacy exemption.

As stated above, 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.

> [A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. See *Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976); *Simpson v. Vance*, 208 U.S. App. D.C. 270, 648 F.2d 10, 14 (D.C. Cir. 1980); *Sims v. CIA*, 206 U.S. App. D.C. 157, 642 F.2d 562, 575 (D.C. Cir. 1980). That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. See *Simpson*, 648 F.2d at 14. But it also reflects the employee's more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has obtained and kept in the employee's personnel file.

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

"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." *Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). "[P]ublic employees have an expectation that information gathered in the course of internal investigations will remain private. [citing *Beck v.*

Department of Justice]." *Kimberlin v. DOJ*, 921 F. Supp. 833, 836 (D.D.C. 1996), *aff'd* 139 F.3d 944 (D.C. Cir. 1998).

Moreover, 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). A disclosure that an employee has been the subject of an internal investigation or a disclosure revealed in connection with a termination, even if the allegations or the ultimate outcome of the appeal of the termination prove to be without merit, may be, at the least, embarrassing and could be damaging. Thus, there is a sufficient privacy interest present.

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).

While there may be a public interest in revealing the identity of a high-level government official involved in wrongdoing, there is generally not such an interest when lower-level employees are involved, particularly when they are the subjects of an investigation. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). In this case, the records sought relate to a low-level employee who is not a policy maker and the alleged mistake, if the employee was responsible at all for such mistake, appears to be an isolated instance. The disclosure of the records will not contribute significantly to public understanding of the operations or activities of the government. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Accordingly, the public interest in disclosure regarding the records of the employee does not outweigh the individual privacy interest. The decision of OCME to withhold the second category of records is upheld.

Conclusion

Therefore, the decision of OCME is upheld in part and reversed and remanded in part. In accordance with this decision, OCME is ordered to provide, with respect to John Doe, records

constituting "identification photographs," his description, and forms, log book entries, tags, and similar documents used in the intake and processing of the body during custody by OCME.

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Sharlene Williams, Esq.