

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

**Freedom of Information Act Appeal: 2012-33**

March 21, 2012

Mr. Michael D. Davis

Dear Mr. Davis:

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 February 26, 2012 (the “Appeal”). You (“Appellant”) assert that the Department of Corrections (“DOC”) improperly withheld records in response to your request for information under DC FOIA dated December 28, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought “[m]y D.C. Jail Housing Unit N.E.-2 Records from Dec. 1, 1998 thru Jan. 30, 1999.” Appellant states that he intends to use the records to contest his criminal conviction.

By letter dated January 20, 2012, DOC stated that it was denying the request “for the names of inmates housed in a D.C. Jail housing unit” pursuant to D.C. Official Code § 2-534(a)(2) and (3) “on the grounds of privacy interest, and for institutional security as well as law enforcement considerations. . .”

On Appeal, Appellant challenges the denial of the FOIA Request, contending that the stated reasons for the denial lack merit.

In its response, by email dated March 18, 2012, DOC reaffirmed its position. It states that Appellant submitted a request on January 3, 2012 for “a printout copy of the D.C. Jail, Northeast 2 Housing records of everyone who was housed there during December, 1998, thru January 1, 1998” and contends that, pursuant to case law which it cites, that it properly withheld the records for the reasons stated in its response by letter dated January 20, 2012. By footnote, DOC states that the FOIA Request is not the same as the request received by the agency and that “[i]f Mr. Davis is now submitting a different request, [the] agency needs to know and a response will be provided within the statutory time limit.”

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).

The threshold issue for decision is to determine the request which is under consideration in this matter. The administrative record indicates that Appellant submitted a FOIA request, dated December 23, 2011, as described by DOC.<sup>1</sup> The administrative record also indicates that Appellant submitted another FOIA request, identified above as the FOIA Request, dated December 28, 2012. It is this latter request which Appellant has submitted for our consideration. Because Appellant has not submitted the first request for our consideration, we will deem Appellant to have elected not to have filed an appeal with respect to the first request. However, it also appears that DOC has no record of receiving the latter request. Nevertheless, whether or not DOC has received the latter request, a request for the records of all inmates would include a request for the records of the Appellant as well. Thus, we view the second request to be a part of what was requested in the first request and the denial of the first request would also constitute a denial of the second request. Accordingly, whether we consider a denial in part of the first request or a denial in whole of the second request (which we have identified as the FOIA Request), the issue would be the same.

D.C. Official Code § 2-534(a)(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.” 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.

Unlike the request which DOC addresses, which is a third-party request for the records of others, the FOIA Request of Appellant is a “first-party” request for his own records.

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<sup>1</sup> According to the exhibit submitted by DOC, it was received on January 3, 2012, not submitted on that date as indicated by DOC.

Under the FOIA, for example, a person who requests records pertaining to himself has rights that will sometimes--albeit rarely--differ from those of other, third-party requestors. See *Reporters Committee [United States DOJ v. Reporters Comm. for Freedom of Press]*, 489 U.S. 749 (1989), 489 U.S. at 771 ("Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request."). . . . a privilege or privacy exemption that would block disclosure of documents requested by a third party might not always apply with equal force when the requestor is the subject of the sought-after documents. See, e.g., *United States Dep't of Justice v. Julian*, 486 U.S. 1, 14, 100 L. Ed. 2d 1, 108 S. Ct. 1606 (1988) ("there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report"); *Reporters Committee*, 489 U.S. at 771 ("the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public").

*Sinito v. United States DOJ*, 176 F.3d 512, 516-517 (D.C. Cir. 1999). In this case, we believe that incarceration records of Appellant are analogous to the rap sheets and presentence reports as described above. Accordingly, we find that there is no privacy interest in the incarceration records which are only those of the Appellant. Thus, DOC shall provide the requested records to Appellant.

While the requested records are not subject to a blanket exemption from disclosure, it is possible that some portion of the records may contain information which may be exempt. Accordingly, DOC may redact the requested records based upon any exemption which may apply, keeping in mind the nature of the FOIA Request as a first-party request. Likewise, Appellant should note that disclosure and the applicability of exemptions is not evaluated based on 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), and, accordingly, his need for the information will not be a factor in considering whether an exemption may apply. This order shall be without prejudice to Appellant to assert any challenge, by separate appeal, to the redactions made by DOC pursuant to this order.

### Conclusion

Therefore, the decision of DOC is remanded for disposition in accordance with this decision, which disposition is summarized as follows: DOC shall provide the requested records to Appellant, subject to redaction for any exemption which may apply. Appellant may challenge, by separate appeal, any redactions made by DOC.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under 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: Oluwasegun Obebe, Esq.