

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

Freedom of Information Act Appeal: 2012-37

April 6, 2012

Ms. Jackie Pinckney-Hackett

Dear Ms. Pinckney-Hackett:

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 March 22, 2012 (the “Appeal”). You (“Appellant”) assert that the District of Columbia Public Schools (“DCPS”) improperly withheld records in response to your request for information under DC FOIA dated February 2, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought “all Barring Notices served from 2007 to present.” (Barring Notices are administrative determinations by DCPS banning individuals from entering upon DCPS school premises.)

In response, by letter dated March 16, 2012, DCPS provided responsive records, with redactions for identifying information of individuals who were the subject of the orders.

On Appeal, Appellant challenges the denial of the FOIA Request, contending that “[t]he persons barred were not members rather visitors to the school and are not part persons covered under the exemptions [under D.C. Official Code § 2-534.]”

In its response, dated April 5, 2012, DCPS reaffirmed its position. DCPS states that it “redacted the names of all individuals who received the notices as personal, sensitive and confidential information.”

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 claim of exemption with respect to the redactions for the responsive records is based on privacy. 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. 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). The action undertaken by DCPS was a civil sanction. 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. 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.

The privacy interests protected by the exemptions to FOIA . . . embody the right of individuals ‘to determine for themselves when, how, and to what extent information about them is communicated to others.’ *Id.* [U.S. Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749 (1989)] at 764 n. 16, 109 S.Ct. 1468 (internal quotation marks omitted). This protection extends even to information

previously made public. *Id.* at 763-64, 109 S.Ct. 1468. Personal information, including a citizen's name, address, and criminal history, has been found to implicate a privacy interest cognizable under the FOIA exemptions.

Associated Press v. U.S. Dept. of Justice, 549 F.3d 62, 65 (2d Cir. 2008).

The Supreme Court held that “as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . .” *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989). Citing *Reporters Comm. for Freedom of Press*, it was held “that with regard to case management records compiled for law enforcement purposes, disclosure of fields identifying the subject of the records would implicate privacy interests protected by Exemption 7(C)[the federal equivalent of Exemption (3)(C)].” *Long v. United States DOJ*, 450 F. Supp. 2d 42, 68 (D.D.C. 2006).

In this case, like his or her criminal history, the knowledge that a civil sanction such as a “barring order” has been imposed upon an individual may be embarrassing and would implicate his or her privacy interest. 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).

Here, the disclosure of the records will not contribute anything to public understanding of the operations or activities of the government or the performance of MPD. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Thus, as this is not a case involving 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).

Appellant maintains that she has requested and received similar records in a prior request. However, the provision of records in another situation does not compel a similar result in this situation. Unless otherwise prohibited by law, the release of records under DC FOIA as well as the federal FOIA is discretionary and can and should be made, notwithstanding the applicability of an exemption, if the public interest will not be harmed by its release. Indeed, Mayor's Memorandum 2011-01 directs not only that DC FOIA be construed with the view toward expansion of public access, but that "records exempt from mandatory disclosure be made available as a matter of discretion when disclosure is not prohibited by law or harmful to the public interest." In Freedom of Information Act Appeal 2011-19, we ordered the release of records for which withholding was justifiable on the basis of the deliberative process privilege, but which, due to age, would not impair the quality of agency decisions. We do not believe that the circumstances justify the same exercise of discretion in this instance.

Conclusion

Therefore, the decision of DCPS is upheld and the Appeal is dismissed.

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: Donna Whitman Russell, Esq.