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

Freedom of Information Act Appeal: 2012-38

April 20, 2012

Alia L. Smith, Esq.

Dear Ms. Smith:

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 28, 2012 (the "Appeal"). You, on behalf of Ben Eisler and WJLA ("Appellant"), assert that the Department of Youth Rehabilitation Services ("DYRS") improperly withheld records in response to your request for information, dated February 6, 2012, under DC FOIA (the "FOIA Request").

Background

Appellant's FOIA Request sought records in eleven categories relating to certain named contract providers, which categories include budgets, youth outcomes, contract reviews, and certain performance deficiencies.

In response, by email dated February 24, 2012, DYRS provided records with respect to one of the categories; stated that it did not have responsive records with respect to two of the categories; stated that it could not disclose records under "confidentiality laws" with respect to two of the categories; and that it would need more time to provide records with respect to the other six categories.

On Appeal, Appellant asserts two challenges. First, Appellant states that DYRS improperly withheld records by failing to respond to the FOIA Request with respect to six specified categories. Second, Appellant contends that, with respect to two specified categories, DYRS improperly claimed exemption from disclosure under DC FOIA by simply referring generally to "confidentiality laws" without specifying the specific statutory confidentiality law on which it relies as well as the corresponding exemption under DC FOIA. To the extent that DYRS relies on a privacy exemption, Appellant contends that DYRS has not provided the necessary explanation as to the applicability of this exemption. Finally, Appellant contends that DYRS has failed to consider why the records cannot be disclosed with redaction of any exempt portions.

In its response, dated April 13, 2012, DYRS updated and amplified its previous response. First, DYRS states that it responded on April 13, 2012, to the six categories which remained, attaching

the transmittal email. Second, DYRS amplifies its response to each of the two categories for which it asserted an exemption. The first category is:

> All documents, including notes, directly relating to any youth and family treatment team meetings (also known as family team meetings and discharge meetings) that occurred from June 1st 2011 to June 20th 2011, and from January 1st 2012 to January 27th 2012. This includes but is not limited to all documents that indicate why a youth was referred to a particular member of the services coalition.

DYRS asserts that the responsive records are exempt under D.C. Official Code § 2-534(a)(2) as "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" and D.C. Official Code § 2-534(a)(6) as "[i]nformation specifically exempted from disclosure by statute." DYRS states that the documents withheld consist of "72 Youth Family Team Meeting Action Plans containing confidential information of youth committed to the agency. The Action Plans have the same standard format and generally contain similar types of information."

As to D.C. Official Code § 2-534(a)(6), DYRS maintains that the records are juvenile social records which are exempt under D.C. Official Code § 16-2332. As to D.C. Official Code § 2-534(a)(2), DYRS states:

> The requested documents contain confidential information about youth committed to the agency and their families, including names and contact information of youth, family members and others, along with extremely sensitive information pertaining to youth's treatment and rehabilitation.

Accordingly, it maintains that disclosure of the confidential information would constitute an unwarranted invasion of privacy of individuals committed to the supervision of the agency. DYRS also states that the information cannot be redacted because "disclosure of the documents redacted for names and contact information would nevertheless still allow individuals to 'work backwards' with information obtained from other sources to identify the individuals referenced . . ."

The second category is: "All formal complaints and grievances against Children, Children, Children, Alliance of Concerned Men, Inc., Culbreth & Culbreth, J.U.M.P., Maia Angel, LLC., and C.H.O.I.C.E., and all documents that show how those complaints or grievances were resolved." DYRS states that there is one formal complaint against one of the contractors alleging inappropriate sexual relations between a contractor staff member and an individual committed to the supervision of the agency. DYRS states that the withheld documents relate to the agency's response, including an investigation and information relating to the staff member. As was the case with the prior category of records, DYRS asserts that the responsive records are exempt under D.C. Official Code § 2-534(a)(2) as "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" and D.C. Official Code § 2-534(a)(6) as "[i]nformation specifically exempted from disclosure by

statute." In addition, DYRS asserts that the records are exempt under D.C. Official Code § 2-534(a)(3).

As to D.C. Official Code § 2-534(a)(6), DYRS maintains that the records are juvenile social records which are exempt under D.C. Official Code § 16-2332. As to D.C. Official Code § 2-534(a)(2), DYRS states the "documents contain confidential, highly personal, and sensitive information about a youth committed to the agency. Disclosure of this information would constitute an unwarranted invasion of privacy." As to D.C. Official Code § 2-534(a)(3), DYRS states that disclosure "would interfere with the investigation and any enforcement proceedings, potentially deprive the alleged perpetrator with the right to a fair trial, constitute an unwarranted invasion of personal privacy, and disclose the identity of the complainant." Finally, DYRS states that the documents cannot reasonably be redacted.

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, 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 first challenge of Appellant is that DYRS improperly withheld records by failing to respond to the FOIA Request with respect to six specified categories. However, subsequent to the filing of the Appeal, DYRS provided responsive records to Appellant. Based on the foregoing, the Appeal is moot and this portion of the Appeal is dismissed, without prejudice to Appellant to challenge, by separate appeal, these responses to the FOIA Request.

The second challenge of Appellant is that, with respect to two specified categories, DYRS improperly claimed exemption from disclosure under DC FOIA by simply referring generally to "confidentiality laws" without specifying the specific statutory confidentiality law on which it relies as well as the corresponding exemption under DC FOIA. We will analyze this challenge, and the DYRS response, with respect to each category.

As set forth above, the responsive records for the first category consist of 72 Youth Family Team Meeting Action Plans, which contain evaluations, proposals, and recommendations regarding individuals under the supervision of DYRS. These records were submitted to us for in camera review.

D.C. Official Code § 2-534(a)(6) exempts from disclosure:

> (6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:
> (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
> (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

D.C. Official Code § 2-1515.06 provides, in pertinent part:

> (a)(1) Records pertaining to youth in the custody of the Department or contract providers shall be privileged and confidential and shall be released only in accordance with this subsection. . . .
> (3) Juvenile social records shall be released only to persons and entities permitted to inspect those records under § 16-2332 and in accordance with the procedures governing the release of records under that section.

D.C. Official Code § 16-2332 provides that juvenile social records may be inspected by the specified personnel of the Courts, specified Family Court case participants and law enforcement officers, specified government agencies and entities, and "[o]ther persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of the respondent's family, or in the work of the Family Court, if authorized by rule or special order of the court."

As the responsive records pertain to individuals who are "committed to the agency," the records are juvenile social records. Accordingly, the requested records are privileged and confidential under D.C. Official Code § 2-1515.06. As Appellant does not qualify under one of the specified categories of persons who are permitted to inspect such records under D.C. Official Code § 16-2332, the requested records are exempt in whole from disclosure under D.C. Official Code § 2-534(a)(6).

The second category of records, characterized by DYRS as the response of the agency to allegations of inappropriate sexual relations between a contractor staff member and an individual committed to the supervision of the agency, consist of an investigative report by DYRS regarding the incident, DYRS emails regarding the incident and the investigation, records regarding the contractor investigation of the staff member, including records regarding the staff member, and an updated directive of the contractor entitled "Policy and Procedure Regarding Student to Staff Contact."

After examining the investigative report by DYRS and the DYRS emails regarding the incident and the investigation, we believe that these records constitute juvenile social records and are exempt from disclosure for the reasons set forth above.

The next portion of records in this category are the records regarding the contractor investigation of the staff member, including records regarding the staff member. These records relate to action taken by the contractor in response to the allegations set forth above. These records do not relate to the supervision of individual receiving services from the agency, but to the staff member of the contractor, and are not, therefore, juvenile social records. Nevertheless, this does raise an issue regarding a privacy interest.

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, 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 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). In this case, there is no evidence in the administrative record that these records were compiled for a law enforcement purpose. As the records appear to involve personnel records, not investigatory records compiled for law-enforcement purposes, the matter would be judged by the standard for Exemption (2).[1]

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

[1] Because there is no evidence in the administrative record that these records were compiled for a law enforcement purpose, there is no support for the contention of DYRS that disclosure of the records would interfere with enforcement proceedings and is exempt under D.C. Official Code § 2-534(a)(3) .

> the employee's more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, . . . in the employee's personnel file.

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

In this case, there is a clear personal privacy interest in the investigation undertaken by the employer-contractor regarding the alleged incident.

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).

The question is whether the disclosure of the records withheld will contribute anything to public understanding of the operations or activities of the government or the performance of DYRS or its contractors. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). While there is a generalized interest in the misconduct occurring in the performance of government contracts, "the interest of targets of disciplinary investigations . . . clearly outweighs such a generalized public interest in fair and efficient government. See *Dep't of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976)." *Carter v. United States Dep't of Commerce*, 830 F.2d 388, 390, n.8 (D.C. Cir. 1987). It has been held that 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. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). Similarly, in this case, there is a minimal public interest in the activities of a single, low-level staff employee of a contractor. Accordingly, the public interest in disclosure here does not outweigh the individual privacy interest.

Appellant places into issue the possibility of disclosure of the records with redaction of any exempt portions. However, redaction of personal details, such as names and identifying numbers, will not be sufficient if a knowledgeable reader can otherwise identify an individual or individuals from the unredacted material. *Whitehouse v. United States DOL*, 997 F. Supp. 172 (D. Mass. 1998); *Carter v. U.S. Dept. of Commerce*, 830 F.2d 388 (D.C. Cir. 1987). In this case, Appellant has already published the name of the staff member and, therefore, redaction of

the name would not protect his privacy interest in this case as the unredacted portions of the records could be associated with the individual.

The last record is an updated directive of the contractor entitled "Policy and Procedure Regarding Student to Staff Contact." As we noted with respect to the records regarding the contractor investigation of the staff member, these records do not relate to the supervision of individual receiving services from the agency and are not, therefore, juvenile social records. As this is a general operating directive and does not apply to any named individual, no privacy interests are implicated. Therefore, as the record appears to be issued as a result of a "formal complaint" and, as there is no exemption under DC FOIA which would apply, the record should be disclosed to Appellant.

Conclusion

Based on the foregoing, the decision of DYRS is moot in part, is upheld in part, and is reversed in part. DYRS shall provide the record entitled "Policy and Procedure Regarding Student to Staff Contact" to Appellant. This order shall be without prejudice to Appellant to challenge, by separate appeal, the responses to the FOIA Request made subsequent to the filing of the Appeal.

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: Michael Umpierre