

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

Freedom of Information Act Appeal: 2012-66

August 13, 2012

Daniel Wemhoff, Esq.

Dear Mr. Wemhoff:

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 July 25, 2012 (the “Appeal”). You (“Appellant”) assert that the Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under DC FOIA dated July 12, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought a photograph of an MPD officer. In response, by letter dated July 19, 2012, MPD denied the FOIA Request because the release of the record would constitute a clearly unwarranted invasion of personal privacy exempt from disclosure exempt under D.C. Official Code § 2-534(a)(2).

On Appeal, Appellant challenges the denial of the FOIA Request based upon “an exemption to privacy claims whenever there may be impropriety or involvement by a public official of unacceptable behavior, or when found to be a witness to such activity as will be shown in this appeal.” Appellant alleges that the MPD officer “was involved in the eviction of a patron” from a restaurant, which Appellant claims is a human rights violation.

In response, dated August 8, 2012, MPD reaffirmed its position. MPD states that the photograph is part of the personnel file of the officer, the release of the photograph could jeopardize the safety of the officer if he or she is assigned to undercover work, and the release of the photograph “would not shed light on the workings of the government.”

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)(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). The exemption in this matter is asserted under, and would be judged by the standard for, Exemption (2).

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).

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. Empls. v. United States Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008).

There is clearly a personal privacy interest in the record in this matter.

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).

Appellant attempts to find a superseding public interest to overcome the privacy interest by citing a case which mentions “official misconduct.” (Appellant cites no authority for the proposition that there is such a public interest when the subject is a witness.) Even if, arguably, such case law were to apply to lower and mid-level government employees, Appellant indicates only that “unacceptable behavior” occurred. Moreover, there is no allegation that the activities of the MPD officer occurred during the course of his official duties. Appellant does state that there have not been any complaints made regarding the MPD officer in connection with the incident. There is nothing more here than innuendo to support the argument.

Appellant indicates that the photograph is needed to pursue a claim regarding an alleged human rights violation. 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). “The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. *EPA v. Mink*, 410 U.S. 73, 79, 92 (1973); *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974).” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 (1975). “The private needs of the companies for documents in connection with litigation, however, play no part in whether disclosure is warranted. [citations omitted].” *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984).

In this case, Appellant has offered, at most, a private need to overcome the privacy interest. However, 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).

Conclusion

Therefore, the decision of MPD is upheld. 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 District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Ronald B. Harris, Esq.