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

Freedom of Information Act Appeal: 2012-71

August 28, 2012

Mr. Jack Ghannam

Dear Mr. Ghannam:

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"), undated (the "Appeal"). You ("Appellant") assert that the Department of Consumer and Regulatory Affairs ("DCRA") improperly withheld records in response to your request for information under DC FOIA received by DCRA on May 7, 2012, (the "FOIA Request").

Background

Appellant's FOIA Request sought the following records:

1. Records regarding a complaint filed with DCRA by Appellant with respect to a named certified public accountant.

2. Emails between certain named DCRA employees and three individuals, including the certified public accountant, alleged to be located in Michigan.

3. All reviews or decisions issued by DCRA regarding the Complaint.

DCRA responded by email dated June 14, 2012. With respect to the first and third categories, DCRA stated that "all but one of the documents revealed by this search of our records are documents either provided by you, or provided to you." It provided the one document identified as not in the possession of Appellant (with the redactions of an address based on the exemption for privacy under D.C. Official Code § 2-534(a)(2)), but withheld the others, stating that "FOIA does not require the agency provide copies of documents already in the possession of the requester in order to respond to a request." With respect to the second category, DCRA stated that it was withholding the records "pursuant to D.C. Official Code § 2-534(a)(2), (Personal Privacy), and § 2-534(a)(4) (Interference with ongoing enforcement proceedings)."
On Appeal, Appellant challenges the response to the FOIA Request. First, Appellant states that he has been "in litigation with the subject of this complaint . . . [and] every aspect of both our lives has been made part of the legal public record in Michigan during the past five years." In

addition, Appellant states: "There have been numerous emails and documents exchanged between the staff of the DRCA and [the subject of the complaint] and her lawyers. This is a complaint in regards to her CPA License held by the District of Columbia." Based on the foregoing, Appellant contends that there could be no "'invasion of privacy'."

Second, Appellant states: "I know for a fact that the information provided by the subject and her attorneys contains false and inflammatory information which is libelous in nature." Appellant contends that DCRA cannot know whether the "voluminous information" provided by the subject "is in fact true and correct, unless I am given a chance to review it and respond true [sic] unless it is disclosed to me and I can prove its veracity."

Third, Appellant contends that the withheld records "have nothing to do with privacy" and that "DCRA is continuing and conspiring with [the subject of the complaint] and her attorneys to publish these libelous statements."

Fourth, Appellant states that he "requested emails between members of the DCRA's Counsel's staff, [the subject of the complaint] and her attorneys." Appellant contends that because the subject of the complaint and her attorneys are not part of the District government, their communications do not qualify for exemption from disclosure under DC FOIA.

In its response, by email dated August 24, 2012, DCRA revised its position with respect to the second category of requested records, but otherwise reaffirmed, by implication, its position.

With respect to the second category of records, DCRA states that there were eight withheld records, which consisted of emails between the subject of the complaint by Appellant and DCRA employees. DCRA further states that the emails

> were withheld pursuant to D.C. Official Code § 2-534(a)(3)(a)(1) (exempting from disclosure investigatory records compiled for law enforcement purposes, the release of which would interfere with enforcement proceedings), and D.C. Official Code § 2-534(a)(2) (exempting from disclosure documents or parts of documents, the release of which would constitute a "clearly unwarranted invasion of personal privacy"). The emails all comprised part of the investigatory record of the then-ongoing investigation into [Appellant]'s complaint. (OPLD complaints are investigated by the DCRA Regulatory Investigations Section), and each contained private contact information for [the subject of the complaint]. Additionally, one email sent by [the subject of the complaint] contained substantial private information pertaining to non-DCRA related legal matters pertaining to a prior (and apparently ongoing) personal dispute between [Appellant and the subject of the complaint].

However, because "at this time the investigation has been completed and a final decision on the complaint has been issued by the Board," DCRA states that it is now providing to Appellant seven of the eight emails, with redactions for "private contact information" pursuant to D.C. Official Code § 2-534(a)(2). As to the eighth email, it continues to assert that the record is exempt from disclosure under D.C. Official Code § 2-534(a)(2) as it "contains extensive

descriptions of a contentious personal dispute between [Appellant and the subject of the complaint], as well as [the subject of the complaint]'s personal reflections on those matters."

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).

Appellant contests the withholding of records by DCRA. DCRA has withheld records in response to the FOIA Request in two grouping: the first and third categories of the FOIA Request and the second category of the FOIA Request.

It appears that in its original response to the FOIA Request, DCRA misstated one of the statutory provisions upon which it was relying. While DCRA cited "D.C. Official Code § 2-534(a)(4) (Interference with ongoing enforcement proceedings)," the relevant statutory provision dealing with enforcement proceedings is D.C. Official Code § 2-534(a)(3)(A)(i), which it cites in connection with the Appeal.

D.C. Official Code § 2-534(a)(3) provides, in pertinent part, an exemption from disclosure for:

> Investigatory records compiled for law-enforcement purposes, including the records of Council investigations . . ., but only to the extent that the production of such records would:
>
> (A) Interfere with:
>
> (i) Enforcement proceedings;

D.C. Official Code § 2-534(a)(2) ("Exemption (2)") exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." We note that there is also a privacy provision providing for an exemption from disclosure with respect to investigatory records compiled for law-enforcement

purposes. 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).

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 records involved in the Appeal were compiled as a result of an investigation conducted by the Regulatory Investigations Section of DCRA pursuant to a complaint made by Appellant regarding the named certified public accountant. As a result of such investigation, pursuant to District of Columbia Official Code § 47-2853.17, the Board of Accountancy was authorized, among other things, suspend or revoke the license of the certified public accountant or impose a civil penalty not to exceed $5,000 for each violation. Therefore, the records would constitute investigatory records compiled for law-enforcement purposes.

Accordingly, notwithstanding the fact that it was not asserted by DCRA, because it involves investigatory records compiled for law-enforcement purposes, the matter would be judged by the standard for Exemption (3)(C).

With respect to the first and third categories of the FOIA Request, as set forth above, DCRA has withheld all but one document because "FOIA does not require the agency provide copies of documents already in the possession of the requester in order to respond to a request." However, DC FOIA does not permit the withholding of records based simply upon the determination or belief that a requester already has such records. In this case, the records were provided to DCRA or provided by Appellant in connection with a complaint made by Appellant. The complaint process regarding the named certified public accountant and the FOIA Request are two separate matters. As we stated in Freedom of Information Act Appeal 2011-63, "[t]he production of documents in a separate matter does not satisfy a proper request for records under DC FOIA." *Id.* at 4. As DCRA has stated that these records have already been in the possession of Appellant, we presume that they were provided to DCRA by Appellant or DCRA has provided them to Appellant. Therefore, the exemptions under D.C. Official Code § 2-534(a)(3) would not apply. DCRA shall provide the withheld records in the first and third categories to Appellant. To the extent that the records were not provided to DCRA by Appellant or DCRA did not provide them to Appellant, these records are exempt from disclosure pursuant to Exemption (3)(C) for the reasons set forth hereafter in our analysis of the withheld email in the second category of records.

With respect to the second category of records, DCRA states that is now providing to Appellant seven of the eight withheld records, with redactions for "private contact information." Thus, the Appeal is moot with respect to these records and it is unnecessary to decide the claims of exemption with respect to these records. With respect to the last record, DCRA continues to assert the claim of exemption based on 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. *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 (19890] 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).

The record in question here was compiled as a result of the investigation of which the named certified public accountant was the subject. "When the subject . . . is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex . . ." *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989). While Appellant contends that there is no privacy interest because he has been "in litigation with the subject of this complaint . . . [and] every aspect of both our lives has been made part of the legal public record in Michigan during the past five years," this argument is belied by the fact that Appellant does not possess, and seeks, the requested records. 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.
> . . .
>
> When the subject . . . is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773, 780 (1989).

Appellant does not indicate that he needs the record to learn about the performance by DCRA of its statutory duties. At most, he indicates that he needs the records so that he can review and respond to them because "the information provided by the subject and her attorneys contains false and inflammatory information which is libelous in nature" and "DCRA is continuing and conspiring with [the subject of the complaint] and her attorneys to publish these libelous statements." Aside from the fact that there is no evidence on the administrative record that any record contains "false and inflammatory information which is libelous in nature" and that DCRA is conspiring to publish the same---other than bare assertion by Appellant for which there seems to be no basis---Appellant has no rights to participate in the administrative proceeding resulting from his complaint and recites none. Based on the fact that Appellant has made a complaint against the named certified public accountant and has been involved with such individual in litigation for five years, it appears that Appellant desires the withheld record, as well as the other records, to advance his personal interests.

> The Supreme Court has suggested that in the typical FOIA case in which one citizen seeks information about another, 'the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records.' *Id.* [*Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)]. This is certainly true in the present case.

Albuquerque Pub. Co. v. U.S. Dept. of Justice, 726 F.Supp. 851, 855 (D.D.C. 1989).

Here, the disclosure of the withheld record will not contribute anything to public understanding of the operations or activities of the government or the performance of DCRA. *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. The claim of exemption by DCRA for the withheld record is upheld.

Conclusion

Based on the foregoing, the decision of DCRA, as revised, is upheld in part, is moot in part, and is reversed in part. DCRA shall provide the withheld records in the first and third categories of the FOIA Request to Appellant to the extent that they were previously provided to DCRA by Appellant or DCRA has previously provided them to Appellant.

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: Hamilton Kuralt