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

Freedom of Information Act Appeal: 2012-74

September 5, 2012

James A. Frost, Esq.

Dear Mr. Frost:

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 August 17, 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 December 19, 2011 (the "FOIA Request") by failing to respond to the FOIA Request.

Background

Appellant's FOIA Request sought records which show:

> 1. "The names of all persons who are known to the Metropolitan Police Department to have been present at/on the house and lot in the 1000 block of Irving Street, Northeast D.C., from 12 noon February 13, 2011, through 12 noon February 14, 2011, where between the late evening hours of the 13th and the early morning hours of the 14th a [certain named individual] died (besides the Catholic University of America students who were renting the property and had signed a lease agreement personally or had someone sign as an obligor);"
>
> 2. "The names of persons provided in response to the first question, if any, who have been charged with having committed crimes in the District of Columbia on or after February 13, 2011, and the crimes charged."

Although MPD acknowledged the FOIA Request, when a final response was not received, Appellant initiated the Appeal.

In response, by email dated September 4, 2012, MPD states that "Mr. Frost has made an improper FOIA request in that he seeks information rather than documents. Two prior requests that he has filed have been found to be improper. *See MLC 2012-64 and MLC 2012-72*." In addition, MPD states that "Mr. Frost has filed several similar requests and has been advised by the department that there is a pending criminal investigation of the incident that he has identified which precludes making available the investigative file."

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 Appeal involves the same factual circumstances as those in Freedom of Information Act Appeal 2012-64 and Freedom of Information Act Appeal 2012-72, which were also appeals filed by Appellant. As we stated in more detail in those decisions, an agency is not required to conduct research or to answers to question questions posed as FOIA requests. In this case, the second part of the "request" set forth above characterizes the first part of the request as a question ("[t]he names of persons provided in response to the first question"). The first part of the request would require a factual analysis of the records to exclude those persons who are not relevant based on specific, detailed criteria which Appellant sets forth. Therefore, MPD argues, with some justification, Appellant has not made a proper request under DC FOIA.

We could construe the first part of the FOIA request as cognizable if it had requested records identifying all persons present at the house and lot on the 1000 block of Irving Street, N.E., from noon of February 13, 2011, through noon of February 14, 2011, where a [certain named individual] died. Therefore, we will analyze the FOIA Request on this basis. However, given this construction, we find that any responsive records pursuant to the first request are exempt from disclosure under D.C. Official Code § 2-534(a)(3)(C), which provides an exemption for "[i]nvestigatory records compiled for law-enforcement purposes . . . to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy."[1]

[1] In the Appeal, we do not believe that there is any dispute that the records have been compiled for law enforcement purposes. *Cf*. D.C. Official Code § 2-534(a)(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 D.C. Official Code § 2-534(a)(2) requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from D.C. Official Code § 2-534(a)(3)(C). Thus, the standard for evaluating a threatened invasion of

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 D.C. Circuit has stated:

> [I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)[D.C. Official Code § 2-534(a)(3)(C) under DC FOIA]. 'The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators.' *Bast*, 665 F.2d at 1254.

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984).

In the case of the factual circumstances surrounding the Appeal, it appears that the individuals who may be identified in the records may be suspects or witnesses. We find that there is a sufficient individual privacy interest for a person who is being investigated for wrongdoing. 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). "[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under 7(C) [as noted above, D.C. Official Code § 2-534(a)(3)(C) under DC FOIA]." *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). The D.C. Circuit has also stated that nondisclosure is justified for documents that reveal allegations of wrongdoing by suspects who never were prosecuted. See *Bast v. U. S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). As set forth above, the D.C. Circuit in the *Stern* case stated that individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity and that protection of this privacy interest is a primary purpose of the exemption in question.

It is clear that an individual who is a witness has a sufficient privacy interest in his or her name and other identifying information which is in a government record. *See Stern v. FBI, supra*. Disclosure may lead to unwanted contact and harassment. See *Lahr v. NTSB*, 569 F.3d 964 (9th Cir. 2009)(privacy interest found for witnesses regarding airplane accident); *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1023 (9th Cir. 2008)(privacy interest found for government employees who were cooperating witnesses regarding wildfire); *Lloyd v.*

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privacy interests under D.C. Official Code § 2-534(a)(3)(C) is broader than under D.C. Official Code § 2-534(a)(2). *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

Marshall, 526 F. Supp. 485 (M.D. Fla. 1981) ("privacy interest of the witnesses [to industrial accident] and employees is substantial . . ." *Id*. at 487); *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984)(privacy interest found for witnesses regarding industrial accident); *Codrington v. Anheuser-Busch, Inc.*, 1999 U.S. Dist. LEXIS 19505 (M.D. Fla. 1999) (privacy interest found for witnesses regarding discrimination charges). An individual does not lose his privacy interest because his or her identity as a witness may be discovered through other means. *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984); *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 501 (1994). ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.")

There is clearly a personal privacy interest in any records responsive to the first part of the FOIA Request.

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).

The second part of the FOIA Request requests records indicating whether any individuals identified in records responsive to the first part of the FOIA Request were charged with committing any crimes in the District of Columbia and, if so, the crimes committed. We note that this part does not request records regarding the charging of an offense related to the incident identified by the FOIA Request, but *any* offense which may have been committed by an individual identified in records responsive to the first part of the FOIA Request. It is clear that any records responsive to the second part of the FOIA Request would reveal the names of individuals whose identities and other personal information are exempt from disclosure with respect to the first part of the FOIA Request. Therefore, any records responsive to the second part of the FOIA Request are exempt under D.C. Official Code § 2-534(a)(3)(C) as well.

Conclusion

Therefore, we uphold the decision of MPD. The Appeal is hereby dismissed.

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: Ronald Harris, Esq.