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

Freedom of Information Act Appeal: 2012-75

September 18, 2012

Kalea Seitz Clark, Esq.

Dear Ms. Clark:

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 20, 2012 (the "Appeal"). You ("Appellant") assert that the Office of the Chief Financial Officer ("OCFO") improperly withheld records in response to your requests for information under DC FOIA dated July 10, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought "resumes, job applications, performance reviews and financial disclosures for OCFO employees Tony George, Doug Collica and Darrin Sharp." In response, by letter dated July 12, 2012, OCFO denied the FOIA Request on the ground that disclosure of the requested records constitutes a clearly unwarranted invasion of personal privacy and is exempt under D.C. Official Code § 2-534(a)(2).

On Appeal, Appellant challenges the denial of the FOIA Request on the ground that "the disclosure of resumes and job applications of District employees is not a 'clearly unwarranted' invasion of privacy given the public's interest in the background and qualifications of those holding such jobs." Appellant cites a former appeals decision in support of its position. Appellant requests the "release of all records responsive to this request."

In its response, by letter and affidavit both dated September 7, 2012, OCFO clarified its original response by stating that its records did not include a resume for Mr. Collica or performance evaluations for Mr. George or Mr. Sharp, but it otherwise reaffirmed its prior position. OCFO maintains that the withheld resumes, job applications (Employment Application—DC 2000), performance reviews (Performance Evaluation Form), and financial disclosures (Confidential Financial Disclosure Report—OCFO Form 450) contain "'information of a personal nature'" and that Appellant "has failed to provide satisfactory support that the public interest is sufficiently 'significant' to warrant an invasion of privacy." As to the former appeals decision cited by Appellant, with respect to resumes and job applications, OCFO argues that disclosure would not

reveal anything about the performance by OCFO of its statutory functions. With respect to performance reviews and financial disclosures, OCFO argues that the decision is inapposite as it does not address these categories of records. OCFO has submitted, for in camera review, the withheld records, with proposed redactions in the event that such records are ordered to be released.

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).

Here there are four categories of personnel records in question. While Appellant only addresses the withholding of the records in the first two categories, resumes and job applications, in the Appeal, we presume that it also contests the withholding of the records in the second two categories, performance reviews and financial disclosures, as it appeals the blanket denial of the FOIA Request. We will set forth the relevant general legal principles prior to analyzing their application in this matter.

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."[1]

[1] 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, because it involves personnel records, not

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

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).

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

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investigatory records compiled for law-enforcement purposes, the matter would be judged by the standard for Exemption (2).

involved, particularly when they are the subjects of an investigation. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984).

In applying these principles, as stated above, the first part of the analysis is to determine whether there is a sufficient privacy interest present. We stated in Freedom of Information Act Appeal 2012-76: "In general, it has been held that an employee has a privacy interest in the contents of his employment file." In *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984), the court found that applications for employment implicated a sufficienct privacy interest. In *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984), the court found that employee evaluation forms implicate a sufficient privacy interest. "[D]isclosure of even favorable information may well embarrass an individual or incite jealousy in his or her co-workers. We therefore agree with the District Court's finding that substantial privacy interests are at stake." *Id*. Likewise, there is a sufficient privacy interest in personal financial information of a government employee. *See, e.g., Barvick v. Cisneros*, 941 F.Supp. 1015, 1020 (D. Kan.1996) ("life insurance; annuitant indicator; retirement plan").

The second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. We will address first the first two categories of withheld records, resumes and job applications. Both case law and our administrative decisions have made it clear that the public interest in the applications of successful candidates for government employment outweigh the privacy interest of the employees. In *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984), in finding that the public interest prevailed, the court stated:

> [D]isclosure of information submitted by the five successful applicants would cause but a slight infringement of their privacy. In contrast, the public has an interest in the competence of people the Service employs and in its adherence to regulations governing hiring. Disclosure will promote these interests.

Id. at 948.

See also Barvick v. Cisneros, 941 F.Supp. 1015 (D. Kan.1996), *Associated General Contractors, Northern Nevada Chapter v. U.S. Environmental Protection Agency*, 488 F.Supp. 861, (D. Nev. 1980)("It cannot be said under any standard of reasonableness that information regarding the education, former employment, academic achievements and qualifications of employees are so personal that disclosure would 'constitute a clearly unwarranted invasion of personal privacy.'" *Id*. at 863 -864). In ordering the release of an email chain regarding the hiring decision for an attorney, a California federal court stated:

> Plaintiff's interest-and the public's interest-in determining whether Ms. Goldstein's hiring was improper is sufficient to outweigh any minimal privacy interest Ms. Goldstein may have in keeping these opinions from the public. Accordingly, these documents must be disclosed.

Habeas Corpus Resource Center v. U.S. Dept. of Justice, 2008 WL 5000224, 4 -5 (N.D. Cal. 2008).

Our own appeals decisions have recognized and adopted this view. In Freedom of Information Act Appeal 2011-36, relying on *Core* and *Barvick*, we stated, in pertinent part, that "it has been found that there is a public interest in disclosure of information by successful job applicants of information relating to name, present and past job titles, present and past grades, present and past salary, present and past duty stations, and present and past salary, which public interest would result in disclosure . . ." In Freedom of Information Act Appeal 2011-56, in recognizing these principles, the Department of Human Resources reconsidered its position and released the resumes of the Excepted Service appointees of the Mayor. In MCU 409467, cited by Appellant in the Appeal, citing *Core* among other authority, it was found that the "names, professional qualifications, and work experience of the successful candidates is required to be disclosed," but not other private information such as home telephone numbers and addresses, dates of birth, and social security numbers.

Accordingly, the resumes and Employment Applications which are maintained by OCFO for the named individuals must be provided to Appellant. As we stated above, OCFO has submitted, for in camera review, proposed redactions to these records. Although the redacted material is not available for our viewing, it is clear that these redactions are too extensive. On the resumes, OCFO shall redact only the personal information, which appears to be home telephone numbers and addresses (and possibly email addresses), and not the information associated with previous employment. On the Employment Applications, only the following may be redacted: section 2 (Personal Data); section 10 (Background Information) to the extent that it does not relate to the qualifications for the position; and the applicants' signatures.

The last two categories of withheld records are performance reviews and financial disclosures. As we explained in more detail above, the public interest in disclosure focuses on the performance by an agency of its statutory duties. However, "a government employee's privacy interests may be diminished in cases where information sought under FOIA would likely disclose 'official misconduct. [citations omitted].'" *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, (9th Cir. 2008). As we also indicated above, the courts have "placed emphasis on the employee's position in her employer's hierarchical structure as 'lower level officials . . . generally have a stronger interest in personal privacy than do senior officials.' [citations omitted]." *Id.* In consideration of the focus on the performance of government functions, the 9th Circuit has stated:

> [T]o compel the disclosure of the . . . employees' identities, such information must 'appreciably further' the public's right to monitor the agency's action. *Id*. at 497; see also *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991) (concluding that 'disclosure of information affecting privacy interests is permissible only if the information reveals something directly about the character of a government agency or official' (emphasis in original) (citation omitted)).

In the case of the Appeal, we note that the named employees have higher-level positions. Nevertheless, there is nothing in the administrative record that indicates that disclosure of the Performance Evaluation Forms or the Confidential Financial Disclosure Reports would contribute anything to public understanding of the operations or activities of the government or the performance of OCFO nor is it otherwise apparent that the disclosure of these records would do so. Indeed, as we indicated above, while Appellant addressed the public interest in disclosing the first two categories of withheld records, it has not done so for the last two categories. We are aware that there have been newspaper articles, published by the Appellant, which have raised the possibility of official misconduct. However, even if we were to take administrative notice of these articles for the purposes of the Appeal, we note that, at this time, there is only the suspicion, not the likelihood, of official misconduct and that such suspicion has been raised by the Appellant itself. Mere suspicion by a requester does not create a sufficient public interest. *Harrison v. Fed. Bureau of Prisons,* 611 F. Supp. 2d 54, 66 (D.D.C. 2009). We find that the public interest in disclosure of the Performance Evaluation Forms or the Confidential Financial Disclosure Reports does not outweigh the personal privacy interest of the named employees. Accordingly, the withholding of these records by OCFO was justified.

Conclusion

Therefore, the decision of OCFO is upheld in part and is reversed and remanded in part. The resumes and Employment Applications which are maintained by OCFO for the named individuals shall be provided to Appellant within five business days after the date of this decision. On the resumes, OCFO shall redact only the personal information, which appears to be home telephone numbers and addresses (and possibly email addresses), and not the information associated with previous employment. On the Employment Applications, only the following may be redacted: section 2 (Personal Data); section 10 (Background Information) to the extent that it does not relate to the qualifications for the position; and the applicants' signatures.

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: Clarene Phyllis Martin, Esq.
Charles Barbera, Esq.