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

Freedom of Information Act Appeal: 2012-76

September 7, 2012

Mr. Scott McWilliams

Dear Mr. McWilliams:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) ("DC FOIA"), dated August 31, 2012 (the "Appeal"). You ("Appellant") assert that the Department of Corrections ("DOC") improperly withheld records in response to your request for information under DC FOIA dated August 20, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought "the full names, start and end dates, ending salaries, and ending position titles for any and all staff member who resigned/quit or retired from the Department of Corrections from 1 January 2008 to 31 July 2012."

In response, by email dated August 29, 2012, DOC denied the FOIA Request under "D.C. Official Code § 2-534(a)(2) and (6) and DPM 3113.2 [DCMR § 6-B3113.2], since these individuals are no longer employees of the D.C. Department of Corrections."

On Appeal, Appellant challenges the denial of the FOIA Request:

> My request did not inquire as to any personal information, such as addresses, phone numbers, or the like. I am seeking only their first [sic] name, dates of employment, position titles, and ending salary. The employees were public employees at the time of their engagement, paid with tax payer dollars. Thus, this information should be released as public information. There is no 'unwarranted invasion of personal privacy' through the release of these records.

In its response, dated September 7, 2012, DOC reaffirmed its position. While acknowledging that "[t]he names, salaries, title, and dates of employment of all employees and officers of a public body" are "specifically made public information" by D.C. Official Code § 2-536(a)(1), it

indicates that this provision applies to current, not former, employees. DOC re-states its argument that the items of information with respect to former employees constitute "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" which is exempt from disclosure under D.C. Official Code § 2-534(a)(2). DOC maintains that Appellant "did not advance any public interest that would be served by the disclosure of the list sought" and that, under case law which it cites, would not "'shed light' on DOC's performance of its statutory duties." In addition, DOC argues that District personnel rules "are incorporated into the exemption provisions of the D.C. FOIA by § 2-534[(a)](6)" and the items of information which Appellant seeks are exempt under DCMR § 6-B3113.2.

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).

DOC contends that records requested are not permitted to be disclosed under D.C. Official Code § 2-534(a)(6) and DCMR § 6-B3112.3 (personnel rules). D.C. Official Code § 2-534(a)(6) provides an exemption for information specifically exempt from disclosure by statute if the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. In this instance, DOC cites a rule under the District of Columbia Municipal Regulations for which there is no statutory counterpart. DOC made this argument, albeit under a different rule, in Freedom of Information Act Appeal 2011-36. In that decision, we were unwilling to find that a personnel rule alone can support an exemption which requires statutory authority. However, as the privacy rule cited there was rooted in personal privacy considerations, we considered the matter under D.C. Official Code § 2-534(a)(2). Here DOC specifically cites in this provision as sufficient authority for its position.

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]

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).

In this case, there are two competing considerations presented. On one hand, D.C. Official Code § 2-536(a)(1) requires disclosure of "[t]he names, salaries, title, and dates of employment of all employees and officers of a public body." In fact, the Department of Human Resources proactively discloses this information for the employees of all agencies on its website. On the other hand, the position of DOC is that this provision applies only to current employees. The

[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, not investigatory records compiled for law-enforcement purposes, the matter would be judged by the standard for Exemption (2).

question is whether the disclosure of termination dates of former employees constitutes a clearly unwarranted invasion of personal privacy.

In general, it has been held that an employee has a privacy interest in the contents of his employment file. In Freedom of Information Act Appeal 2011-68/72, we found that there was a privacy interest in the date of resignation of a District government employee who was the subject of a FOIA request. In Freedom of Information Act Appeal 2011-24, a request was made for, among other records, records regarding employees terminated due to a reduction in force during a specified period. The request asked for records which included the name, current job title and identification number, date of hire, and grade and step of each employee. We found that there was a sufficient privacy interest present as a disclosure that the employment of a person has been terminated due to a reduction in force may be, at the least, embarrassing and may result in further contact and questioning by third parties.

As in Freedom of Information Act Appeal 2011-68/72, the resignation dates of District employees are involved, although, in the Appeal, the FOIA Request does not involve a named employee. As in Freedom of Information Act Appeal 2011-24, the FOIA Request involves the identification of individuals departing from service. We note that here the departure from service underlying the FOIA Request was on a voluntary basis rather than at the direction of the District and would not involve the potential for embarrassment which may attach to a reduction in force. Nevertheless, disclosure of the names of the individuals requested could result in further contact and questioning by third parties, such as persons or entities who may be interested in pursuing litigation against the District or pressing other grievances. Accordingly, we find that 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.

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

While the Appellant characterizes the FOIA Request as seeking records regarding the expenditure of taxpayer funds, the FOIA Request essentially seeks records identifying employees who have departed from DOC during a stated time period. There is nothing on the administrative record that suggests that knowing the names of the individuals (and presumably, in the main, lower-level to mid-level employees) would contribute significantly to public understanding of the operations or activities of the government or of the performance of DOC. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Accordingly, the public interest in disclosure here does not outweigh the individual privacy interest.

In Freedom of Information Act Appeal 2011-24, we stated:

> The main purpose of the FOIA Request was to obtain the names of employees, with other information ancillary thereto. It would appear that the provision of the ancillary information would not fulfill the purpose of the FOIA Request and ordering disclosure of the records with redaction of names and other identifying information would not serve that purpose.

We believe that this applies equally to the Appeal.

Appellant stated in the FOIA Request that the "request is not being made for a commercial purpose." 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).

Conclusion

Therefore, the decision of DOC 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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Oluwasegun Obebe, Esq.