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

Freedom of Information Act Appeal: 2012-79

September 21, 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 28, 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 June 22, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought records for three named individuals, such records to include, but not be limited to, their applications for appointment as special police officers. In response, by letter dated August 28, 2012, MPD denied the FOIA Request because the release of the records would constitute a clearly unwarranted invasion of personal privacy exempt from disclosure under D.C Official Code § 2-534(a)(2).

On Appeal, Appellant challenges the denial of the FOIA Request on the ground that he has "an absolute right" to have the records produced.

In response, by email dated September 18, 2012, MPD states that the release of any records in its possession would constitute a clearly unwarranted invasion of personal privacy and that Appellant has not stated any public interest in the release of any such records.

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).

In support of his position, Appellant merely states a conclusion, that is, he is entitled to receive the records. Likewise, in response, MPD offers only conclusory statements and does not indicate the nature of the records withheld. Ordinarily, as an agency has the burden of proof to establish an exemption, a decision in favor of an appellant may be expected. However, as the privacy interests of third parties are involved, our further examination of the matter is warranted.

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).

As stated above, the withheld records in the Appeal have not been identified. As the FOIA Request is an MPD-wide request for all records on the named individuals, we will presume that all of the records, except that those that may exist with respect to the applications for appointments as special police officers, are investigatory records compiled for law-enforcement purposes as MPD is a law enforcement agency. The exemption in this matter for these records would be judged by the standard for Exemption (3)(C).

Presumably, there are records with respect to the applications for appointments as special police officers. Under D.C. Official Code § 5-129.02, on application to the Mayor, an individuals may be appointed as a special police officer or security officers in connection with the property of a corporation or an individual are required to complete minimum levels of training. This authority has been delegated to MPD. Pursuant to rules codified in Chapter 11 of Title 6-A of the District of Columbia Municipal Regulations, the applicants must satisfy prescribed criteria and are subject to a criminal background check. The appointees may be approved to carry firearms. In *Providence Journal Co. v. Pine*, 1998 WL 356904, 11 (R.I.Super.,1998), the court found that, under a disclosure law similar to DC FOIA, records regarding an application to carry firearms were not law enforcement records as "the records are compiled in order to facilitate an

administrative and discretionary decision concerning the granting of a gun permit to an applicant." As we believe that the application pursuant to D.C. Official Code § 5-129.02 is an analogous process, these records 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.

As we set forth in more detail in Freedom of Information Act Appeal 2012-74 in which Appellant was the appellant, an individual who is or has been a suspect or witness or who has otherwise been investigated for wrongdoing has a sufficient privacy interest in his or her name and other identifying information which is in a government record. As we stated in such decision:

> 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).

Accordingly, there is clearly a personal privacy interest in any withheld law enforcement investigatory records. In addition, there is also a personal privacy interest in records collected from individuals in connection with their application and appointment as special police officers.

As stated above and in Freedom of Information Act Appeal 2012-74, 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).

As indicated above, Appellant has not set forth any public interest in the disclosure of the requested investigatory records. Moreover, there is nothing that even suggests that the disclosure of the withheld law enforcement investigatory records will 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 the withheld law enforcement investigatory records do not appear to involve the efficiency or propriety of agency action, there is no public interest involved in these records.

Any records associated with the application and appointment as special police officers of the three named individuals would not be judged by the same standard as those for withheld law enforcement investigatory records. While the case law regarding the issuance of gun permits provides the closest analogy, the courts applying a disclosure law similar to DC FOIA have not ruled on the public interest component of the balancing test. Insofar as a public interest could be identified, it may be in the scrutiny of the examination of applications and issuance of appointments by MPD. However, a generalized interest in such oversight is insufficient to overcome a privacy interest.

> '[W]hen governmental misconduct is alleged as the justification for disclosure, the public interest is insubstantial unless the requester puts forth compelling evidence that the agency denying the FOIA request is engaged in illegal activity and shows that the information is necessary in order to confirm or refute that evidence.' *Computer Professionals v. United States Secret Service*, 72 F.3d 897, 905 (D .D.C.1996). A mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by exemption 7(C). *Id.*

Providence Journal Co. v. Pine, 1998 WL 356904, 13 (R.I. Super. 1998). While this principle was enunciated in connection with the analogous provision of Exemption (3)(C), the court applied it, and we think that it applies as well, in the context of Exemption (2). Here, there is no evidence, or even an allegation, of governmental misconduct

Accordingly, we find that the public interest in disclosure of the records associated with the application and appointment as special police officers of the three named individuals does not outweigh the personal privacy interest of the records associated with the application and appointment as special police officers of the individuals.

Accordingly, based on the administrative record, the withholding of the records by MPD is upheld.

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.