GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2015-12

December 19, 2014

BY EMAIL

Mr. Adam Marshall
Katie Townsend, Esq.

Re: Freedom of Information Act Appeal 2015-12

Dear Mr. Marshall and Ms. Townsend:

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 November 20, 2014 (the "Appeal"). You ("Appellant") assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA on October 2, 2014 ("FOIA Request").

Background

Appellant's FOIA Request sought "all video from BWC [body worn cameras] worn by MPD officers that was created on October 1, 2014."

In response, by email dated November 7, 2014, MPD identified 128 responsive video recordings, but denied the FOIA Request, based on the exemption from disclosure under D.C. Official Code § 2-534(a)(3)(A)(i) (law enforcement investigatory records whose release would interfere with enforcement proceedings) with respect to "video recordings [which] depict arrests and/or active criminal investigations" and the exemptions from disclosure for personal privacy under D.C. Official Code § 2-534(a)(2) and (3)(C) with respect to video recordings of "individuals subject to arrest, suspects in the commission of crimes, and victims and/or witnesses to crimes." With respect to the latter video recordings, MPD stated that it did not have the capability to redact the videos with respect to personal identifying information.

On Appeal, Appellant challenges the response to the FOIA Request. Noting that MPD stated that the videos from "'arrests and/or active criminal investigations', along with 'faces, names, and other identifying information regarding arrestees, suspects, victims, and witnesses are exempt from disclosure,'" Appellant states:

> This leaves a host of other nonexempt information, including the conduct of MPD law-enforcement officers themselves, that the public he has a strong interest in obtaining. Among other things, the requested records will help the public

> understand how the law-enforcement officer tasked with protecting their safety and well-being are conducting themselves, and provide the public with needed information concerning the BWC pilot program itself.

Appellant identifies "'contact[s]' with civilians which did not involve an arrest" as video records which are not exempt from disclosure under the exemptions claimed by MPD.

Furthermore, Appellant asserts that MPD has failed to meet its obligation under D.C. Official Code § 2-534(b) to segregate nonexempt information. It disputes the claim of MPD that it cannot make redactions to the videos. It states that "redacting videos is not technologically difficult" and specifies an example of low-cost "software that would permit video footage to be redacted with minimal effort." It also states that "[t]here are numerous computer programs available that would make such redactions easy to accomplish."

In its response, dated December 18, 2014, MPD reaffirmed its position. While acknowledging that the videos are records under DC FOIA and "it is legally obligated to provide 'reasonably segregable' non-exempt portions of the records," MPD reiterates that it "presently does not have the technical capacity, either internally or through contract, to redact the non-exempt footage responsive to the Reporters Committee's request."

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 § 2-537(a). In aid of that policy, the 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 may be examined to construe the local law.

While Appellant makes the perfunctory argument that the withheld videos are records which must be disclosed under DC FOIA, it does acknowledge that the disclosure of records is subject to exemptions and does not directly dispute that the claim by MPD that videos involving "arrests or active criminal investigations" or "arrestees, suspects, victims, and witnesses" are exempt from disclosure. Its argument is that videos showing citizens but not involving an arrest do not qualify for exemption. In addition, it argues that MPD can redact exempt information from the videos and disclose the unredacted portion.

Although Appellant does not expressly specify, its contest of the claim of exemption by MPD for the contested videos would be 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).[1]

The first part of the privacy analysis is whether a sufficient privacy interest exists regarding any individuals identified in the withheld records. 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)[Exemption (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).

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

[1] 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). 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). Although it is not directly addressed in the administrative record, we presume that the videos depict investigatory activities which could result in sanctions. Accordingly, we will consider the exemption under the standard for Exemption (3)(C).

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.

In Freedom of Information Act Appeal 2013-63, we found that there was a privacy interest of third parties captured by surveillance videotapes. We stated:

> Here the videotapes include images of patrons and employees who are clearly third parties. We cannot agree with the contention of Appellant that there is no privacy interest in videotape captured by private, hidden (or unobtrusive) security cameras and collected pursuant to a law enforcement investigation. At the very least, an individual does not waive his individual privacy interest as a consequence of his or her employment in a nightclub. Although it was not at issue in the case, in *Judicial Watch, Inc. v. FBI*, 522 F.3d 364 (D.C. Cir. 2008), the government made, and the requester did not object to, redactions based on individual privacy interests to videotape showing the attack on the Pentagon, which was recorded by a nearby hotel security camera. We find that there is clearly a personal privacy interest in the images on the videotape.

As a starting point, under the "categorical principle" in *Reporters Comm. for Freedom of Press*, quoted above, where the words and images of private citizen are captured in government records, here in a video, a privacy interest is implicated. Furthermore, the presence of an individual in a video recorded by the police may create an association with, or suspicion of, criminal activity, whether warranted or not and regardless of whether an arrest was made. Moreover, even where an arrest has not been made, an individual may have been a suspect or a potential witness in an investigation where an arrest was not made.

Consequently, like the images of individuals captured on the restaurant security cameras in Freedom of Information Act Appeal 2013-63 and the individuals recorded on a hotel security camera in *Judicial Watch, Inc. v. FBI*, we find that there is a sufficient personal privacy for individuals who appear in the withheld videos.

As stated above, the second part of a privacy analysis under Exemption (3)(C) 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).

The Supreme Court has held that

> where there is a privacy interest protected by Exemption 7(C)[the federal equivalent of Exemption (3)(C)] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004). The Court explained that there is a presumption of legitimacy accorded to the official conduct of the government and

> where the presumption is applicable, clear evidence is usually required to displace it. . . . Allegations of government misconduct are 'easy to allege and hard to disprove,' *Crawford-El v. Britton*, 523 U.S. 574, 585, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998), so courts must insist on a meaningful evidentiary showing.

Id. at 174-175. The Court also indicated considerations involved in evaluating the public interest.

> First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

Id. at 172. In accord, *Kretchmar v. FBI*, 882 F. Supp. 2d 52 (D.D.C. 2012) ("An overriding public interest warranting disclosure of exempt material is established only upon a showing that the withheld information is necessary to confirm or refute 'compelling evidence that the agency denying the FOIA request is engaged in illegal activity.' *Quinon v. FBI*, 86 F.3d 1222, 1231, 318 U.S. App. D.C. 228 (D.C. Cir. 1996) (citations omitted)." *Id*. at 57.)

In the Appeal, there has been no allegation of wrongdoing by MPD, the agency in question. Accordingly, under the principles set forth above, there is no public interest to overcome the privacy interest of the individual identified in the records. As we have indicated in past decisions, a generalized interest in oversight alone will not suffice to support an overriding interest in disclosure. *See*, e.g., Freedom of Information Act Appeal 2013-63. See also *McCutchen v. United States Dep't of Health & Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994) ("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)."); *Providence Journal Co. v. Pine*, 1998 WL 356904, 13 (R.I. Super. 1998).[2] The primary public interest stated by Appellant, that "the requested records will help the public understand how the law enforcement officers tasked with protecting their safety and well-being," does not satisfy the standard which is necessary to overcome the individual privacy interest here.[3]

Notwithstanding a determination that videos are not releasable in full, as stated above, Appellant asserts that MPD has failed to meet its obligation under D.C. Official Code § 2-534(b) to segregate nonexempt information, disputing the claim of MPD that it cannot make redactions to the videos. As also stated above, Appellant states that "redacting videos is not technologically difficult" and that "[t]here are numerous computer programs available that would make such redactions easy to accomplish."

In prior decisions, MPD was found not to have the capability to modify an audiotape and disclosure was not required.[4] Moreover, as to the argument that there is low-cost computer software which would MPD could use, as we stated in Freedom of Information Act Appeal 2013-06, "DC FOIA provides no warrant to second-guess the management practices of an agency *in the technologies or equipment which it acquires and maintains* or, as we have stated in the past, in the compilation and maintenance of its records [emphasis added]."[5]

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[2] "'[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*."

[3] Likewise, the secondary public interest stated by Appellant, to provide "information concerning the BWC pilot program itself," does not satisfy such standard.

[4] *See*, e.g., Freedom of Information Act Appeal 2014-57, Freedom of Information Act Appeal 2013-55, Freedom of Information Act Appeal 2013-21, Freedom of Information Act Appeal 2013-06, Freedom of Information Act Appeal 2012-44, Freedom of Information Act Appeal 2011-60, and Freedom of Information Act Appeal 2011-11 (Reconsideration). Similarly, in Freedom of Information Act Appeal 2010-08, the Office of Unified Communications was found not to have the capability to modify an audiotape and disclosure was not required.

[5] In the Washington Post newspaper article which Appellant cites in the Appeal, it is stated that five camera models will be tested in the pilot program. While Appellant cites an example of a low-cost computer program and states that other low-cost software is available, we do not know whether those low-cost programs are compatible with all or, for that matter, any of the camera models being tested. In its response, MPD indicated that it has purchased a subscription to an editing program for which certain of its employees have begun training and it is exploring contracting out the editing function. Nevertheless, the fact remains that on the date of response to the FOIA Request and, for that matter, as of the date of this decision, MPD does not have the technical capacity to redact the videos.

Therefore, based on the foregoing, we find that the withholding of the videos by MPD was proper.

Conclusion

Therefore, we uphold the decision of MPD. The Appeal is hereby 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: Ronald B. Harris, Esq.
Teresa Quon Hyden, Esq.

In its response to the Appeal, MPD indicates that editing video footage is an arduous process, requiring frame-by-frame editing. MPD also indicates that a video contains 30 frames per second (18,000 frames in a 10-minute video) and that each image in a video must be redacted separately. Although this raises an issue as to whether the editing may be unduly burdensome, based on the lack of technical capability at this time, it is not necessary to consider the issue in this decision.