GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2015-15

December 31, 2014

BY EMAIL

Maureen Costigan, Esq.

Re: Freedom of Information Act Appeal 2015-15

Dear Ms. Costigan:

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 December 4, 2014 (the "Appeal"). Your law firm, on behalf of a client ("Appellant"), asserts that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated August 5, 2014 ("FOIA Request").

Background

Appellant's FOIA Request sought "[a]ny and all traffic camera video and surveillance recordings of traffic" on designated portions of Massachusetts Avenue, N.W., and Wisconsin Avenue, N.W, on a designated date and time range. The son of your client died in a motor vehicle accident on such date.

In response, by letter dated September 11, 2014, MPD stated that with respect to the request for "[a]ny and all information pertaining to the accident [ ]," it was granting the FOIA Request in part and denying it in part. It provided photographs and stated that it would provide additional records on a rolling basis. However, it withheld "any available video footage and 911 audio" based on the exemption for privacy under D.C. Official Code § 2-534(a)(2) and stated that it did not have the technical capability to make redactions. By letter dated September 17, 2014, MPD provided a final response, transmitting additional records with redactions based on the exemption for privacy under D.C. Official Code § 2-534(a)(2) and (3)(C).

On Appeal, Appellant challenges the response to the FOIA Request. Appellant contests the redactions on the documents as to 12 stated groupings. Appellant also challenges the "wholesale withholding of video and 911 calls" as "overbroad and unnecessary."

> The value of being able to view the videos of the accident far outweighs the privacy interest of individuals in the videos particularly because it is extremely unlikely that any individuals could be identified and located based on the videos. The audio of the 911 calls again are the reports of volunteers called into helping

> would not object or Frank further assistance. Even the content of the calls without the identification of the caller would offer insight into the accident and the investigation.

In its response, dated December 30, 2014, MPD reaffirmed its position. With respect to the videos and 911 calls, MPD states that "[p]ersons identified in videos and 911 recordings clearly have a privacy interest in not being identified in law enforcement records" and that it "does not have the capability to redact exempt and non-responsive images and audio recordings in order to protect the privacy interests of persons identified." With respect to redactions, MPD indicates, with reference to each record which Appellant identified in the Appeal, that such redactions were made to protect the individual privacy interests of witnesses and a participant in the incident. MPD also indicates that it has withheld records based on the deliberative process privilege as well as "a crime report that contains arrest and other information relating to arrestees and suspects." In two instances, MPD does indicate that it will release redacted information relating to the decedent.

<u>Discussion</u>

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.

Appellant raises an issue with respect to two groups of records: (1) documentary records; and (2) video and the audio recordings of 911 calls.

Notwithstanding that MPD responded to what it stated was a request for "[a]ny and all information pertaining to the accident," the FOIA Request only specified "traffic camera video and surveillance recordings" as the basis of its request.[1] Therefore, the documentary records are nonresponsive to the FOIA Request and were not required to be disclosed. Accordingly, we do not need to consider the applicability of the claim of exemptions asserted by MPD as to redactions on such records.[2] Likewise, the FOIA Request did not specify the audio of 911 calls

---

[1] This office confirmed with Appellant that this was the only request submitted.

[2] MPD has stated that it will release certain record or portions of records which were previously redacted or withheld. However, as indicated, such records are not at issue in the Appeal and

and such audio is also nonresponsive to the FOIA Request and need not be disclosed. Therefore, the only challenge which is properly raised concerns video footage, which was withheld of the basis of privacy under D.C. Official Code § 2-534(a)(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. *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).[3]

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).

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.

---

such release is in its discretion.

[3] 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 the exemption has been asserted under Exemption (2) and there is no indication that law-enforcement activities are involved, we will consider the exemption under the standard for Exemption (3)(C).

In Freedom of Information Act Appeal 2015-12, we found that there was a personal privacy interest in the images of individuals captured on body-worn cameras of MPD police officers.

We have not viewed the images on the videos. However, it is reasonable to presume that such images capture the license plates of motor vehicles, whose owners could face unwanted contact regarding the events on the videos. It is also reasonable to presume that pedestrians on the videos are individuals who frequent the locations shown and could also be located and face unwanted contact. Consequently, like the images of individuals captured on the restaurant security cameras in Freedom of Information Act Appeal 2013-63, the individuals recorded on a hotel security camera in *Judicial Watch, Inc. v. FBI*, and the images of individuals captured on body-worn cameras of MPD police officers in Freedom of Information Act Appeal 2015-12, we find that there is a sufficient personal privacy for individuals who appear, or whose vehicles appear, in the withheld videos.

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).

Appellant states that the records "would provide insight into the accident and the investigation." 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). As the administrative record does not otherwise indicate that the conduct of MPD is in question, 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).

In Freedom of Information Act Appeal 2015-12, we found that MPD did not have the technological capacity to redact videos. Quoting Freedom of Information Act Appeal 2013-06, we stated: "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."

<u>Conclusion</u>

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.