

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-33**

March 13, 2015

Mr. Willie Murphy

RE: FOIA Appeal 2015-33

Dear Mr. Murphy:

This letter responds to the letter you sent to the Chief of the Metropolitan Police Department ("MPD") dated November 18, 2014, appealing the denial of a request you submitted to the MPD under the District of Columbia Freedom of Information Act ("DC FOIA"). The MPD forwarded this office your appeal, as the DC FOIA provides that the Mayor shall respond to administrative appeals of FOIA decisions.

Background

In your appeal, you assert that on October 21, 2014, you requested from MPD Citizen Complaints (PD-99s), a list of PD Form 150as, MPD incidents, Department Disciplinary Office, and Internal Affairs Division investigations regarding Sixth District Vice Officers B. Vigil and L. Shefman. On November 18, 2014, the MPD responded to your request, stating that it could neither admit nor deny whether any complaints or investigations had been filed regarding Officers Vigil and Shefman. The MPD further stated that any responsive records would be exempt from disclosure under D.C. Official Code § 2-534(a)(2) because producing them would constitute an unwarranted invasion of the officers' personal privacy.

On appeal, you contend that the officers in question are public officials and "by law any citizen requesting this information should be allowed to obtain these public records concerning these two officer(s) and their work performance."

In response to your appeal, the MPD sent this office a letter on March 12, 2015, reaffirming its position that disclosing citizen complaint records and disciplinary files of identified police officers would constitute an unwarranted invasion of the officers' personal privacy.

Discussion

It is the public policy of the District of Columbia 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, the DC FOIA creates the right "to inspect ... and ... copy any public record of a public body . . ." *Id.* at § 2-532(a). The right to inspect public records is subject to various exemptions that 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.

Two provisions of DC FOIA provide exemptions relating to personal privacy. 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.” The other provision, D.C. Official Code § 2-534(a)(2) (“Exemption (2)”), applies to “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” While Exemption (2) requires that the invasion of privacy be “clearly unwarranted,” the word “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 Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

Internal investigations conducted by a law enforcement agency such as MPD fall within Exemption (3)(C) if these investigations focus on acts that 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). *See also Rugiero v. United States Dep’t of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (The exemption “applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.”) Since the records you seek relate to investigations that could result in civil or criminal sanctions, Exemption (3)(C) applies to your request.

Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of one’s individual privacy interests against the public interest in disclosing his or her disciplinary files. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). On the issue of privacy interests, the D.C. Circuit has held:

[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).<sup>1</sup> ‘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).

Here, we find that Officers Vigil and Shefman have sufficient privacy interests in allegations of their misconduct. “[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,

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<sup>1</sup> Exemption 7(C) under the federal FOIA is the equivalent of Exemption (3)(C) under the DC FOIA.

an appropriate subject for exemption under 7(C).” *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). An agency is justified in not disclosing documents that allege wrongdoing even if the accused individual was not prosecuted for this wrongdoing, because the agency’s purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *Bast v. United States Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981).

As discussed above, the D.C. Circuit in the *Stern* case held 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. We believe that the same interest is present with respect to civil disciplinary sanctions that could be imposed on an MPD officer. The records you seek may consist of mere allegations of wrongdoing, the disclosure of which could have a stigmatizing effect regardless of accuracy.

We say “may consist” because, in this case, MPD has not stated, and has maintained that it will not state, whether or not complaint records exist relating to the officers you have identified. This type of response is referred to as a “Glomar” response, and it is warranted when the confirmation or denial of the existence of responsive records would, in and of itself, reveal information exempt from disclosure. *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 68 (2nd Cir. 2009). The MPD’s Glomar response is justified in this matter because if a written complaint or subsequent investigation against Officers Vigil and Shepman exists, identifying the written record may result in the harm that the FOIA exemptions were intended to protect.

Your position that there is an overriding public interest in the disclosure of a public employee’s disciplinary files was addressed by the court in *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held:

The public's interest in disclosure of personnel files derives from the purpose of the [FOIA]--the preservation of "the citizens' right to be informed about what their government is up to." *Reporters Committee*, 489 U.S. at 773 (internal quotation marks omitted); *see also Ray*, 112 S. Ct. at 549; *Rose*, 425 U.S. at 361. This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that "reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.

*Id.* at 1492-93.

In the instant matter, releasing the disciplinary files of two police officers would constitute an invasion of their privacy under Exemptions (3)(C) and (2) of the DC FOIA and would not shed light on the MPD's performance of its statutory duties.

Conclusion

Based on the foregoing, we uphold the MPD's decision and hereby dismiss your appeal. This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s/ Melissa C. Tucker

Melissa C. Tucker  
Associate Director  
Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)