

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-51**

April 10, 2015

VIA ELECTRONIC MAIL

Mr. Ronald Lewis

RE: FOIA Appeal 2015-51

Dear Mr. Lewis:

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 (“DC FOIA”), dated March 20, 2015 (the “Appeal”). You, (“Appellant”) assert that the District of Columbia Department of Behavioral Health (“DBH”) failed to provide information pursuant to your DC FOIA request.

Background

On February 20, 2015, you submitted a FOIA request under the DC FOIA to the DBH seeking the following:

- A copy of all documentation bearing your name, Ronald Lewis and pertaining to the position of “Mental Health Counselor 23281”, from the date of October 1, 2013 to January 31, 2014.
- This documentation should consist of all media and written material to include emails, letters, memos, faxes, text messages, voice-mail messages and etc. that was sent or received by any person employed with the District of Columbia government dates cited.

Particular interest is based on all documentation generated within the following dates.

- On October 1, 2013 I successfully submitted an application for the position of Mental Health Counselor (23281).
- On October 29, 2013, I was contacted by Solomon Igwulu, RN and scheduled for an interview.
- On Monday, October 30, 2013 at 10:00 am, I was interviewed for the position.

You submitted similar FOIA requests on February 10, 2015, March 2, 2015 and again on March 13, 2015 related to Mental Health Counselor positions 26416 and 23281.

In a letter response, dated March 12, 2015, the DBH notified you that it had completed its search under DC FOIA and informed you that District of Columbia employment law exempts from disclosure information that is of a private nature such as the names of applicants who were

interviewed for a position. All other responsive information and records located pursuant to your DC FOIA request were then provided with the exception of the redacted names of other applicants who were interviewed for the position.

In response to the filing of the Appeal, the DBH contends that it conducted another search for documents, including emails, texts and phone messages mentioning or bearing your name, regarding the mental health counselor position(s), but no additional documents were identified.

On appeal, you state that the DBH “failed to provide the requested information, and failed to provide the requested information in a timely manner, in accordance to established District of Columbia law.” The DBH sent you correspondence requesting additional information and clarification as to your request(s), but did not receive a response. The DBH also requested that you send a single request so as to limit any potential confusion from multiple requests which could delay production of the requested information. As the DBH has responded to your DC FOIA request, the assertion that the DBH failed to provide the requested information portion of your appeal is rendered moot. The only matter left to be addressed is whether the redacted information provided is consistent with DC FOIA law.

### Discussion

It is the public policy of the District of Columbia (“the District”) 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, DC FOIA created the right “to inspect ... and ... copy any public record of a public body ...” *Id.* at § 2-532(a).

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).

District of Columbia 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, District of Columbia 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 interest 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).

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).

There is cognizable and sufficient privacy interest in information about an individual contained in employment applications and relating to the employment process. *Core v. United States Postal Service*, 730 F.2d 946 (4<sup>th</sup> Cir. 1984); *Barvick v. Cisneros*, 941 F. Supp. 1015 (D. Kan. 1996). A selection certificate is a document prepared in the course of a hiring process which identifies suitable candidates, with rankings culled from a broader pool of applicants, for submission to a selecting official for a hiring decision. There is an individual privacy interest in the names and information on the selection certificate.

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, 89<sup>th</sup> Cong., 1<sup>st</sup> 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 DBH states that it has conducted a full and complete search for the information requested under DC FOIA, finding only two documents. The two documents are as follows:

- Notice of Status of Employment Application – 1 page

- Selection Certificate Ref. 26416 – 1 page

The redacted information is private in nature as it contains only the names of individual applicants who were identified as suitable candidates and subsequently interviewed for the position. The release of this information would shed no light on the agency's performance of its statutory duties. As a result, the public interest in disclosure of names from a selection certificate is outweighed by individual privacy interests.

Conclusion

Therefore the decision of the DBH is upheld. 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,

/s/ Gregory M. Evans

Gregory M. Evans  
Associate Director  
Mayor's Office of Legal Counsel

cc: Deon C. Merene, Deputy General Counsel and FOIA Officer, DBH (via email)