

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-58**

May 4, 2015

Mr. Travis Wolf

RE: FOIA Appeal 2015-58

Dear Mr. Wolf:

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”). In your appeal, you assert that the Office of Police Complaints (“OPC”) improperly withheld records you requested under the DC FOIA.

Background

On February 26, 2015, you submitted a request under the DC FOIA to the OPC stating, “[p]ursuant to the Freedom of Information Act and the Metropolitan Police Department General Order 1202.5, Series 95, Number 3 and Special Order Number 10, Series 95, please answer this request for copies of any and all complaints on file with the Office of Police Complaints for the following officers: [a list of officers and badge numbers.]”

The OPC denied your request on April 1, 2015, stating that “Without admitting or denying the existence of such records, the release of any Office of Police Complaints information involving the above-named officers would constitute an unwarranted invasion of personal privacy.” According to OPC, the records are exempt from disclosure under D.C. Official Code §§ 2-534(a)(2), (a)(3)(C).

On appeal, you challenge the OPC’s decision, contending that the public has a right to know how the OPC handles complaints against police officers concerning actions taken against the public. You state that you are “re-submit[ing]” your FOIA request; however, you include in your appeal a much more detailed request for eight specific types of documents relating to four police officers.

The OPC sent this office a response to your appeal on April 30, 2015. Citing previous FOIA appeals decisions, the OPC reaffirmed its earlier response and reasserted claims of privacy interests. Further, the OPC notes the incongruity between the initial FOIA request and the eight additional requests found in the appeal. OPC maintains that your new requests should not be considered in this appeal but that even if you had properly refiled these new requests OPC’s response would remain the same.¹

¹ We agree with OPC’s analysis that the request on appeal is clearly different and greater than

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 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 the OPC 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

the original request. Nevertheless, for the sake of efficiency, we treat the new requests as having been properly filed and as having been rejected by OPC under the rationales OPC discussed in its response to your appeal.

privacy interest is a primary purpose of Exemption 7(C)². ‘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 there is a sufficient privacy interest for a person who is simply being investigated for wrongdoing based on allegations. “[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) [Exemption (3)(C) under DC FOIA].” *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 the 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 officer of the Metropolitan Police Department (“MPD”). 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 OPC has not stated, and has maintained that it will not state, whether complaint records exist relating to the named MPD officers. 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 OPC’s Glomar response is justified in this matter because if a written complaint or subsequent investigation against the officers you have named exists, identifying the written record may result in the harm that the FOIA exemptions were intended to protect.

With regard to the second part of the privacy analysis under Exemption (3)(C), we examine whether the public interest in disclosure is outweighed by the individual privacy interest at issue. On appeal, you argue that “[p]olice officers are public servants, and the information requested directly pertains to the officers’ service during the scope of duties.” The 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:

² Exemption 7(C) under the federal FOIA is the equivalent of Exemption (3)(C) under the DC FOIA.

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 we find that the public interest releasing the records you have requested pertaining to certain named police officers does not outweigh their individual privacy interests under Exemptions (3)(C) and (2) of the DC FOIA.³

Conclusion

Based on the forgoing we affirm the OPC's decision and dismiss your appeal.

This shall constitute 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: Christian J. Klossner, Deputy Director, OPC (via email)

³ We also note that any public interest that would be served by disclosing the wrongdoings of police officers might be served by the OPC's annual, redacted, online report of all sustained findings of misconducts, along with extensive data regarding the type of allegations made and the demographics of complainants. *See Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). OPC's annual reports may be found at <http://policecomplaints.dc.gov/page/annual-reports-for-OPC>