

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-65**

March 15, 2015

VIA ELECTRONIC MAIL

Sarah E. Young

RE: FOIA Appeal 2015-65

Dear Ms. Young:

This letter responds to the administrative appeal you submitted to the Mayor on behalf of Katie Kronick under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

Under the DC FOIA you submitted a request to the MPD for any and all civilian complaints filed against four named officers. On April 30, 2015, the MPD denied your request stating that without admitting or denying the existence of the requested records, the disclosure would constitute an unwarranted invasion of personal privacy. In its denial, the MPD cited D.C. Official Code § 2-534(a)(2) (“Exemption 2”) as the authority to exempt the records from disclosure.

On appeal, you challenge the MPD’s decision, asserting that the requested information is necessary for Ms. Kronick to preserve her client’s Sixth Amendment right to present a complete and adequate defense in a criminal case. You state that the credibility of the arresting officers will be a central issue at the criminal trial. You cite *Martinez v. United States*, 982 A.2d 789 (D.C. 2009) and *Longus v. United States*, 52 A.3d 836, 850 (D.C. 2012) as holding that sustained and pending complaints are relevant in criminal prosecutions, therefore the requested information is necessary to present a complete and adequate defense.

The MPD sent this office a response to your appeal on May 6, 2015, in which it reaffirmed its earlier response and asserted the additional protection of privacy interests under D.C. Official Code § 2-534(a)(3)(C) (“Exemption 3(C”). The MPD cited *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993) in support of its position that privacy interests can exclude complaints against officers from disclosure under DC FOIA. Finally, the MPD asserts that its response, neither confirming nor denying the existence of the records sought, is an appropriate “Glomar” response, citing Freedom of Information Act Appeal 2013-58.

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, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

As the MPD stated, Exemption 2 and Exemption 3(C) of DC FOIA relate to personal privacy. Exemption 2 applies to “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” 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.” 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 MPD fall within Exemption 3(C) if these investigations focus on acts that could, if proven, 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 Reporters Comm. for Freedom of Press*, 489 U.S. at 756. 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).¹ The 7(C) exemption recognizes the stigma potentially

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

associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators.’

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (quoting *Bast v. United States Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)).

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*, 665 F.2d at 1254.

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 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 MPD has maintained that it will neither confirm nor deny, 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 MPD’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 DC 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 nondisclosure of the records would infringe upon the Sixth Amendment rights of Ms. Kronick’s client. 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:

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 disclosing the records at issue would not shed light on MPD’s performance of its statutory duties and would constitute an invasion of the individual police officers’ privacy interests under Exemptions 3(C) and (2) of the DC FOIA.²

² We also note that any public interest that would be served by disclosing the wrongdoings of police officers might be served by the Office of Police Complaints’ (“OPC”) 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>

Conclusion

Based on the forgoing we affirm the MPD'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

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/s John A. Marsh*

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

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