

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-82**

August 4, 2015

VIA ELECTRONIC MAIL

Mr. CJ Ciaramella

RE: FOIA Appeal 2015-82

Dear Mr. Ciaramella:

This letter responds to the administrative appeal you submitted 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 Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

On April 9, 2015, you requested from MPD “all firearm discharge reports, incident reports regarding an officer-involved shooting, and citizen complaints against” four named officers. On April 20, 2015, MPD responded to your request, stating that it could neither admit nor deny whether any complaints or investigations had been filed regarding the named officers. 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 MPD lacks the authority to assert a response of neither admitting nor denying the existence of a record, a so-called *Glomar* response. Further, you argue that the involvement of MPD’s Gun Recovery Unit in a controversial shooting is a matter of public concern that demands disclosure. To the extent privacy concerns are involved, you contend that they may be addressed by MPD producing redacted, reasonably segregated portions of the records.

The MPD responded to your appeal in a letter to this office dated July 16, 2015, reaffirming its position that disclosing firearm discharge reports, incident reports, and citizen complaints concerning 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 of 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). Accordingly, decisions construing the federal statute 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).¹ District of Columbia Official Code § 2-534(a)(2) exempts from disclosure “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” Determining whether disclosure of a disciplinary record would constitute an invasion of personal privacy requires a balancing of one’s individual privacy interests against the public interest in the release of the requested information. *Citizens for Responsibility & Ethics in Wash. v. United States Dep’t of Justice*, 48 F. Supp. 3d 40, 50 (D.D.C. 2014).

Here, the citizen complaints 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 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 exists, identifying the written record may result in the harm that the FOIA exemption is 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. United States Dep’t of Justice*, 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held that:

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.

¹ This office accepts MPD’s *Glomar* response, despite your argument that MPD has no authority to assert such a response. As a matter of practice, *Glomar* responses have been accepted in past FOIA Appeals. *See, e.g.*, FOIA Appeals 2014-28; 2013-7.

Id. at 1492-93.

In the instant matter, releasing citizen complaints filed against the named police officers would constitute an invasion of their privacy under District of Columbia Official Code § 2-534(a)(2) and would not shed light on the MPD's performance of its statutory duties.

Unlike citizen complaints, however, we find that a public interest may exist in the requested "firearm discharge reports, [and] incident reports regarding an officer-involved shooting." The officers you identified are members of MPD's Gun Recovery Unit, a unit tasked with reducing gun violence in the District. Reports of firearm discharge and officer-involved shootings are directly related to the unit's core mandate, and the release of such information would therefore inform citizens of MPD's performance of one of its statutory duties. MPD has not explained which particular privacy interests related to the reports are protected under D.C. Official Code § 2-534(a)(2). Further, under FOIA, even when an agency establishes that it has properly withheld a document under an exemption, it must disclose all reasonably segregable, nonexempt portions of the requested documents. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). Here, MPD has not explained whether any portions of the report are reasonably segregable.

Conclusion

Based on the foregoing, we uphold the MPD's decision in part and remand it in part. MPD's denial of citizen complaints pertaining to four named officers is affirmed. With respect to the requested firearm discharge reports and incident reports regarding an officer-involved shooting, MPD shall, within 7 business days of this decision, disclose the reports or provide a detailed explanation as to why they are protected under the DC FOIA and not segregable.

We consider this appeal to be moot and it is dismissed; provided, that the dismissal shall be without prejudice to you to assert any challenge, by separate appeal, to MPD's subsequent response.

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)