

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-91**

September 10, 2015

VIA ELECTRONIC MAIL

Ms. Cynthia Perry

RE: FOIA Appeal 2015-91

Dear Ms. Perry:

This letter responds to the administrative appeal you filed with 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 Department on Disability Services (“DDS”) improperly withheld records you requested under DC FOIA.

Background

On July 16, 2015, you requested of DDS the following information pertaining to DDS employees: (1) performance evaluations (eliminating all names); (2) all disciplinary actions related to performance; (3) a list of employees by title, grade and step placed on a Performance Improvement Plan (PIP); (4) all appeals resulting from performance evaluations; and (5) the final outcome of all performance appeals. You requested further that the response identify “the above information by title, grade, step and date of hire; eliminating all names in order to eliminate conflict with Exemption 6.”

On August 3, 2015, DDS denied your FOIA request on the grounds that the information is protected under D.C. Official Code § 2-534(a)(2) (“Exemption 2”).<sup>1</sup> Citing supporting case law, DDS asserted that under the analogous provision of the federal FOIA, performance evaluations, disciplinary actions, and performance improvement plans are exempt from disclosure. DDS further claimed that the personal privacy interests involved in the requested documents outweigh the public interest in disclosure regardless of whether of individual employee names are redacted.

On appeal, you challenge DDS’s withholding under Exemption 2,<sup>2</sup> arguing that the information requested should be disclosed because it involves only a *de minimis* privacy interest. Citing case

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<sup>1</sup> Exemption 2, often known as the personal privacy exemption, exempts from disclosure “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

<sup>2</sup> Although your appeal refers to “Exemption 6,” which is the analogous provision of federal FOIA, we refer to this provision as Exemption 2 under the DC FOIA.

law, you assert that Exemption 2 is not applicable when personal information cannot be linked to a particular individual. You claim that the information you seek cannot be linked to a particular individual because your request states that names should be removed from the disclosures. You further state that the information is pertinent to your clients, members of a collective bargaining unit, because DDS has implemented a new rating system pertaining to these individuals.

DDS provided this office with a response to your appeal, in which it reaffirmed its decision to withhold the requested information under Exemption 2<sup>3</sup>. DDS further asserted that disclosure of the requested information is prohibited under the guidance of Chapter 31A, § 3113.6 of the District's Personnel Manual, which states that "[e]xcept as provided in this section, information required to be included in an Official Personnel Folder shall not be available to the public." In subsequent correspondence to this office, DDS confirmed that records of disciplinary actions related to performance are kept in the Official Personal File of each DDS employee. DDS asserted that Exemption 2 is applicable even if individual employee names are redacted because sufficient identifying information would remain. DDS further contended that you did not cite any legal precedent supporting the disclosure of employee performance data. Subsequently, DDS provided our office with an illustrative sample of the documents requested for our *in camera* review.

### 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 a public record, however, is subject to exemptions. *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 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).

The primary issue in this appeal is DDS's reliance on Exemption 2 to withhold the information you requested. For Exemption 2 to apply there must be a substantial privacy interest in the requested information. *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) ("[a] substantial privacy interest is anything greater than a *de minimis* privacy interest."). Government employees generally have a substantial privacy interest with respect to their disciplinary actions and performance evaluations. *See, e.g., Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283-85 (D.D.C. 2011); *see also Bonilla v. DOJ*, 798 F. Supp. 2d 1325, 1332 (S.D. Fla. 2011); *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984) ("[A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures.").

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<sup>3</sup> A copy of DDS's response is attached.

Even if a substantial privacy interest exists, Exemption 2 can be overcome if a FOIA requester asserts a greater public interest in disclosure of the records. *See NARA v. Favish*, 541 U.S. 157, 172 (2004). If there is a privacy interest in non-disclosure and a public interest in disclosure, the competing interests must be balanced to determine whether disclosure “would constitute a clearly unwarranted invasion of personal privacy.” *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982). This balancing of private and public interests must be conducted 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. 352, 360-61 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of FOIA. 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. *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-773 (1989).

With respect to an individual's performance review and disciplinary action, courts have primarily held that there is an insufficient public interest in disclosure that would outweigh the privacy interest involved. *See, e.g., Ripskis v. HUD*, 746 F.2d 1, 3-4 (D.C. Cir. 1984) (finding that an interest in efficient and evenhanded personnel policies does not outweigh the personal privacy interests involved in employee evaluations). *But see, Perlman v. DOJ*, 312 F.3d 100, 107 (2d Cir. 2002) (finding that wrongdoing of a serious and intentional nature by high-level government officials is of sufficient public interest to outweigh the officials privacy interest).

Here, DDS has represented that the information you requested constitutes personnel records. It is evident from the cases cited by DDS, as well as the cases we cite above, that public employees have a privacy interest in records related to their performance evaluations and disciplinary actions. *See, e.g., Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283-85 (D. D.C. 2011). Even if a DDS employee's name were removed from the records you seek, the information could still be linked to an individual based on title, grade, step, and date of hire. Moreover, the records at issue reveal little or nothing about DDS's conduct or performance of its statutory duties, which is the purpose of FOIA.

The countervailing interest you raise in favor of disclosure is that the records would aid your client's representation of its collective bargaining unit members. It is not clear that this goal advances a significant public interest. The Supreme Court has stated that:

Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public. . . . The bargaining process facilitation interest is ultimately unavailing, however, because it ‘falls outside the ambit of the public interest that the FOIA was enacted to serve,’ *i.e.*, the interest in advancing ‘public understanding of the operation or activities of the government.’

*U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 499-500 (1994) (internal citations and quotations omitted).

As a result, we find that the privacy interests associated with the records you seek outweigh any public interest. Therefore, DDS properly withheld the records under Exemption 2.

Although not raised by DDS, the records at issue in this appeal are also protected under D.C. Official Code § 2-534(a)(6) (“Exemption 6”). Exemption 6 provides protection for “[i]nformation specifically exempted from disclosure by statute ... provided [the] statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for ... types of matters to be withheld.” The applicable statute here is D.C. Official Code § 1-631.03, which states that “[i]t is the policy of the District government to make personnel information in its possession or under its control available upon request to appropriate personnel and law-enforcement authorities, except if such disclosure would constitute an unwarranted invasion of personal privacy or is prohibited under law or rules and regulations issued pursuant thereto.” The District of Columbia Court of Appeals has recognized that D.C. Official Code § 1-631.03 protects the privacy of individuals discussed in personnel information, rendering it available only upon request to appropriate personnel and law-enforcement authorities in certain circumstances. *See District of Columbia v. FOP Metro. Police Labor Comm.*, 33 A.3d 332, 347 n.16 (D.C. 2011). Accordingly, based on the language of D.C. Official Code § 1-631.03, we believe the personnel information you are seeking from DDS is exempt under Exemption 6 of the DC FOIA in addition to Exemption 2.<sup>4</sup>

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<sup>4</sup>Arguably, the records are additionally protected under certain District of Columbia Municipal Regulations (“DCMR”) that are incorporated by reference in D.C. Official Code § 1-631.04, which provides that “[t]he Mayor shall issue rules and regulations governing the disclosure of official information contained in personnel records.” Chapter 31 of Title 6B of the DCMR, entitled “Records Management and Privacy of Records,” regulates the disclosure of personnel records. Under 6B DCMR § 3113.1, the information about present and former government employees that is available to the public consists of an individual’s name, present and past position titles, grades, salaries, and duty stations. None of the documents you requested from DDS is included among those items available for public review. Further, based on the representations of DDS and our *in camera* review of a sample of responsive records, it is evident that most, if not all, of what you are seeking would be exempt from disclosure under 6B DCMR § 3113.6, which states that “[e]xcept as provided in this section, information required to be included in an Official Personnel Folder shall not be available to the public.”

Conclusion

Based on the foregoing, we affirm DDS'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

/s John A. Marsh\*

John A. Marsh  
Legal Fellow  
Mayor's Office of Legal Counsel

cc: Jason Botop, Assistant General Counsel, DDS (via email)

\*Admitted in Maryland; license pending in the District of Columbia; practicing under the supervision of members of the D.C. Bar