

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2016-09**

November 3, 2015

VIA U.S. MAIL

Mr. George Fadero

RE: FOIA Appeal 2016-09

Dear Mr. Fadero:

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 records you requested pertaining to a named police officer were improperly withheld by the Metropolitan Police Department (“MPD”) and the Office of Police Complaints (“OPC”).

Background

Based on the attachments you included in your appeal, it appears that you submitted requests under the DC FOIA to both the OPC and MPD for complaints or cases against a specific named officer of the MPD. On August 1, 2014, the OPC denied your request, stating that without admitting or denying the existence of the requested records, the disclosure thereof would constitute an unwarranted invasion of personal privacy. In its denial, the OPC cited D.C. Official Code § 2-534(a)(2) (“Exemption 2”) and D.C. Official Code § 2-534(a)(3)(C) (“Exemption 3(C)”) as grounds for exempting any existing records from disclosure. On August 20, 2014, the MPD sent you a similar denial letter citing Exemption 2.

On appeal you challenge the decisions of both agencies, asserting that the requested information is necessary to prove you have been wrongfully convicted of a crime. You state that the records would allow you the opportunity to show the lack of credibility of the police officer and exonerate you.

Both the OPC and the MPD sent this Office responses to your appeal on November 2, 2015. The OPC reaffirmed its earlier position asserting authority from cases, statutes, and prior FOIA appeal determinations to support its decision that the records would be exempt under Exemption 2 and Exemption 3(C).<sup>1</sup> Similarly, the MPD reaffirmed its denial under Exemption 2, citing case law and a prior FOIA appeal determination in support of its position that privacy interests can preclude the disclosure of complaints against police officers under the DC FOIA.<sup>2</sup> Additionally,

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<sup>1</sup> A copy of the OPC’s response is attached to this determination.

<sup>2</sup> A copy of the MPD’s response is attached to this determination.

both the OPC and the MPD provide further support for their use of a “Glomar” response, neither confirming nor denying the existence of the records sought.

### 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).

Exemptions 2 and 3(C) of the 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).

Records pertaining to investigations conducted by the MPD and OPC are exempt from disclosure under Exemption 3(C) if the 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 the 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)<sup>3</sup>. “The 7(C) exemption recognizes the stigma potentially 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 associated with a police officer who is 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 [(3)(C)].” *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 with alleged criminal activity and that protection of this privacy interest is a primary purpose of the investigatory records exemption. We find that the same interest is present with respect to civil disciplinary sanctions that could be imposed on an MPD officer. 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 the MPD and OPC have maintained that they will neither confirm nor deny whether complaint records exist relating to the MPD officer about whom you seek records. 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). Here, the Glomar response is justified because if a written complaint or subsequent investigation against the officer you have named exists, identifying the written record would likely 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 disclosure of the records could allow you establish your innocence and exonerate you from a wrongful conviction. 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

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<sup>3</sup> Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

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, disclosing the records at issue would not shed light on either MPD’s or OPC’s performance of their statutory duties and would constitute an invasion of the individual police officer’s privacy interests under Exemptions 3(C) and (2) of the DC FOIA.<sup>4</sup>

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<sup>4</sup> 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 decisions issued by the MPD and the OPC 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

/s John A. Marsh\*

John A. Marsh  
Legal Fellow

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)  
Michael G. Tobin, Executive Director, OPC (via email)  
Nykisha, Cleveland, Public Affairs Specialist, OPC (via email)

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