GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-24

January 8, 2016

VIA ELECTRONIC MAIL

Mr. Will Sommer

RE: FOIA Appeal 2016-24

Dear Mr. Sommer:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested under the DC FOIA.

Background

On March 13, 2015, you submitted a request to MPD seeking "all surveillance footage held by the Metropolitan Police Department related to the January 2015 arrest of Marion C. 'Christopher' Barry at the PNC Bank in Chinatown." MPD denied your request, asserting privacy exemptions under DC FOIA related to investigatory records and personal privacy.

You appealed MPD's denial, contending that release of the requested footage would not violate Mr. Barry's privacy because he was a candidate for public office at the time the video was recorded. MPD responded to your appeal by email to this Office on December 29, 2015. Therein, MPD reasserted exemptions under D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C), and argued that Mr. Barry's well known status does not amount to a public interest in the context of FOIA.

Discussion

It is the public policy of the District of Columbia 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, DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." *Id.* at § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request.

The crux of this matter is whether the video you requested is exempt from disclosure under DC FOIA because it contains material which, if released, would constitute an invasion of privacy.

Exemption 2

D.C. Official Code § 2-534(a)(2) ("Exemption 2") provides an exemption from disclosure for "[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 record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). The first part of the analysis determining whether a sufficient privacy interest exists. *Id*.

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

In light of the applicable case law, we find that Mr. Barry has more than a *de minimis* privacy interest in a video capturing his unlawful or embarrassing conduct, regardless of where the conduct occurred or whether he plead guilty to any offense captured in the video.

The second part of a privacy analysis examines whether the individual privacy interest is outweighed by the public interest. The Supreme Court has stated that this analysis must be conducted with respect to the central purpose of FOIA, which is

> 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. 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.

Reporters Comm. for Freedom of Press, 489 U.S. at 772-773.

On appeal you argue that releasing the video at issue would not violate the privacy of Mr. Barry or anyone else because "Mr. Barry, as a candidate for public office at the time the video was taken, was a public figure. Additionally – and most importantly – the footage was taken in a bank, a place that is open to the public." We glean from this statement your position that the public interest in disclosure is Mr. Barry's former status as a candidate for public office when the video was recorded.

Courts have consistently held that the purpose of FOIA is to inform citizens of "what their government is up to." *Id*. "This inquiry . . . should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific

information being withheld." *Schrecker v. United States Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (internal citations omitted). Information is deemed valuable under FOIA when it would permit public scrutiny of an agency's behavior or performance. *Id.* at 666.

In this instance, there has been no claim that the video would provide insight into the behavior or performance of a District agency. Your view of the public interest in the video does not comport with the standard under applicable case law, in that disclosure of the video would not contribute significantly to public understanding of the operations or activities of the government, which is "the only relevant public interest" to be weighed. *Reporters Comm*., 489 U.S. at 775.

When there is a *de minimis* privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *See*, *e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) ("In the usual case, we would first have identified the privacy interests at stake and then weighed them against the public interest in disclosure . . . In this case, however, where we find that the request implicates no public interest at all, 'we need not linger over the balance; something … outweighs nothing every time.'"). *See also, Bartko v. United States Dep't of Justice*, 79 F. Supp. 3d 167, 173 (D.D.C. 2015) ("In an ultimate balancing, something in the privacy bowl outweighs nothing in the public-interest bowl every time.").

Having found no public interest in disclosure of the video of Mr. Barry's conduct, this Office concludes that MPD's denial of your request was proper.

Exemption 3

In light of our finding that the video at issue was properly withheld under Exemption 2 proper, we shall not engage in a substantive analysis of whether it was properly withheld under D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3"). The standard for withholding a record under Exemption 2 is higher than the standard under Exemption 3. A record is exempt from disclosure if releasing it would constitute a "*clearly* unwarranted invasion of privacy" under Exemption 2 (emphasis added). The standard under Exemption 3 is that a record may be withheld if its release would constitute an "unwarranted invasion of privacy." Since we have determined that release of the video would constitute a "clearly unwarranted invasion of person privacy," we necessarily find that its release would amount to an "unwarranted invasion of privacy."

Body-Worn Camera Regulations

We acknowledge your position that under body-worn camera regulations the outcome of this appeal might be different; however, the video in question was not obtained from a body-worn camera issued to MPD. Since body-worn camera regulations do not apply to your request, we have adjudicated your appeal under the relevant DC FOIA exemptions.

Conclusion

Based on the foregoing, we affirm MPD's decision. 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 DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker
Associate Director

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