

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR**

**Mayor's Office of Legal Counsel**



September 1, 2017

VIA ELECTRONIC MAIL

Keith Allison

RE: FOIA Appeal 2017-139

Dear Mr. Allison:

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 of Corrections (“DOC”) improperly redacted records you requested under the DC FOIA.

Background

The present appeal is related to a prior determination, FOIA Appeal 2017-86, issued by this Office. The issue in FOIA Appeal 2017-86 was DOC’s denial of your FOIA request based on a waiver agreement you signed. Because the waiver did not explicitly reference the FOIA statute, we remanded the matter to DOC and ordered it to conduct a search, review responsive documents and provide you with non-exempt portions of records on a rolling basis. This Office noted that some of the responsive records might be covered by various FOIA exemptions and may require redaction.

On appeal, you challenge DOC’s redaction of records – attaching 15 pages of the redacted records. You contend that because you have already received some of these documents that you are entitled to them. Further, you argue that because some of these documents should have been placed in your personnel file that you are entitled to them. Your appeal also appears to contain a new FOIA request for your “annual yearly performance rating for 2013 & 2014.”<sup>1</sup>

DOC provided this office with a response to your appeal on August 31, 2017, in which DOC reaffirmed its position vis-à-vis the withheld documents.<sup>2</sup> DOC argues that the redactions made to responsive documents were proper under D.C. Official Code §§ 2-534(a)(2) (“Exemption 2”), (a)(3)(C) (“Exemption 3C”), (a)(3)(D) (“Exemption 3D”), and (a)(4)(“Exemption 4”).

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<sup>1</sup> The underlying FOIA request for this appeal was for “the results of each findings; ... Credit background Check ... Criminal Background Check ... Personal Reference ... Employee Reference ... Employment History.” If you would like to request additional documents then you must file a new FOIA request with DOC.

<sup>2</sup> A copy of DOC’s response is attached.

## 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 FOIA statute. *See 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).

The crux of this matter is the propriety of the partial redactions made by DOC. DOC produced 9 responsive documents, totaling 92. These documents are:

1) transmittal cover sheet, 2) disqualification summary report, 3) decision notification, 4) authorization for release of information, 5) confidential Human Resource interview form, 6) pre-employment/new hires/other internal processes form, 7) background investigation reports’, 8) employment questionnaire and 9) Mr. Allison's prior DOC employment adverse action records.

Your appeal included 15 pages of these documents. In phone calls with this Office you indicated that it is these 15 pages that you are concerned with. As a result, this decision will focus solely on the propriety of the redactions made on those 15 pages of documents.

Under D.C. Official Code 2-534(b), DOC was obligated to review the records subject to FOIA exemptions, disclose portions that are reasonably segregable and non-exempt, and explain to you the reasoning for any withholdings. *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F.Supp. 2d 106, 120 (D.D.C. 2010)).

## *Personal Privacy*

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, . . . to the extent that the production of such records would . . . 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 potential invasion of privacy 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). Here, DOC has asserted both privacy exemptions.

Records pertaining to investigations conducted by the DOC are potentially 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.”). While some of the records you seek appear to be related to the findings of an investigator, that investigator was performing an investigation in order to make an employment decision. It is not clear how the withheld documents relate to an investigation that could result in civil or criminal sanctions. As a result Exemption 3 does not apply to the responsive, redacted documents.

Determining whether disclosure of a record would constitute an unwarranted invasion of personal privacy requires a balancing of one’s individual privacy interests against the public interest in disclosure. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 756.

On pages 8, 75, 86, 87, 89, 90, and 92 of the documents DOC provided in its response, the signatures of employees were redacted. This Office finds that government employees do not have a privacy interest in their signature on official documents that you have already seen, as such release does not appear to rise to the level of “creat[ing] a palpable threat to privacy.” *Prison Legal News v. Samuels*, 787 F.3d 1142, 1147 (D.C.Cir. 2015). *See Trupei v. DEA*, No. 04-1481, slip op. at 3-5 (D.D.C. Sept. 27, 2005) (ordering disclosure of signature where name of retired DEA agent was already released, because “speculative” possibility of misuse of signature did not establish cognizable privacy interest). Such release is not akin to release of “employment history and job performance evaluation.” *Stern v. FBI*, 737 F.2d 84, 91 (D.C.Cir.1984). Nor would such release reveal that the individuals “suffered some sort of injury or loss, or was the subject to discrimination.” *Prison Legal News*, 787 F.3d at 1148. Finding no privacy interest we need not weigh the public interest in disclosure. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). These signatures should be disclosed.

Similarly, on page 85 of the documents attached to DOC’s response, DOC has redacted the name of who sent the underlying memorandum. This too should be disclosed as the memorandum was addressed to you. The document does not reveal anything that would amount to a “clearly unwarranted invasion of privacy.” This name should be disclosed.

On pages 7, 13, 75, and 76, of the documents attached to DOC’s response, DOC has redacted the name of the investigator. This too should be disclosed – the investigator is a government employee performing his or her job and does not have a substantial privacy interest in his or her identity as it relates to the ordinary performance of his job. The release of his or her identity would not amount to a “clearly unwarranted invasion of privacy.” The investigator’s name should be disclosed. For the same reason, the name of the requesting manager on page 13 should also be released.

On page 7 and 8, of the documents attached to DOC's response, DOC has redacted the names of a Captain and Lieutenant. We have held in the past that the subject of discipline has a privacy interest in that information – but you are the subject of the discipline discussed on pages 7 and 8 and not the Captain or Lieutenant. There is no information on pages 7 or 8 about the Captain and Lieutenant which would suggest that they are individuals that “suffered some sort of injury or loss, or was the subject to discrimination,” or which would “create a palpable threat to privacy.” *Prison Legal News*, 787 F.3d at 1147-48. These names should therefore be disclosed.

Conversely, this Office agrees with the redactions, made pursuant to Exemption 2, of the name of the “Major” on page 8 of DOC's attachment of responsive document. Revealing the name of the Major would reveal his identity as the person who completed a confidential Employment Questionnaire. We find that the Major has a privacy interest in not being revealed as having completed this confidential form. The only relevant public interest in DC FOIA is information which “sheds light on an agency's performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773. We find that public interest is adequately served by the Major being referred to generically by his title.

#### *Confidential Sources*

Because we found that these documents were not compiled in an effort that could result in either criminal or civil sanctions, we have found that Exemption 3 is inapplicable to the withheld documents. DOC has made redactions on pages 73-76 of its response, in part, pursuant to Exemption 3C and 3D. These redactions are not appropriate under Exemption 3.

#### *Deliberative Process Privilege*

On page 8 of DOC's attachment of responsive documents, DOC has made redactions under Exemption 4. Specifically, DOC has asserted that the redactions made under Exemption 4 were pursuant to the deliberative process privilege – which “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). We agree with DOC's redactions made under Exemption 4 – as they appear to redact the candid predecisional opinion of the investigator in making a recommendation as to the candidate's qualification for employment.

Additionally, although not an argument raised by DOC, we find that the redactions on pages 73-76 (the Reference Questionnaire) made by DOC are appropriate, albeit under the deliberative process privilege. This document was created by DOC before a decision was made in regards to your continued employment. The document solicits and captures the candid thoughts and impressions of an individual who answered under a pretense of confidentiality. This information was used by DOC in its deliberative process in coming to a final decision relating to your reemployment. As a result, we find that this is the sort of information protected by Exemption 4.<sup>3</sup> DOC's redactions of the questionnaire were therefore appropriate.

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<sup>3</sup> Exemption 4 protects inter-agency communications – to the extent that the reference was a non-

### Conclusion

Based on the foregoing, we affirm in part and remand in part DOC's decision. Within seven business days from the date of this decision, DOC shall release to you unredacted documents consistent with this decision. Specifically, DOC shall release copies of the documents identified by this decision that do not redact: the signatures, the investigator's name, the names in the memorandum "from:" line, and the names of some of the officers in the narrative report. DOC may continue to withhold the redacted portions of the above discussed Questionnaire.

This constitutes the final decision of this Office; however, you are free to initiate a new appeal based on the subsequent substantive response you receive from DOC.

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.

Respectfully,

Mayor's Office of Legal Counsel

cc: Oluwasegun Obebe, Records, Information & Privacy Officer, DOC (via email)

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governmental actor, we find that Questionnaire is still embraced by Exemption 4 because of the consultant corollary. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001)