GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-15

February 7, 2017

VIA ELECTRONIC MAIL

Ms. Charlotte Keenan

RE: FOIA Appeal 2017-15

Dear Ms. Keenan:

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 requested under the DC FOIA.

Background

On March 9, 2016, the Network for Victim Recovery of DC, working on behalf of your client, submitted a request to MPD seeking the entire investigative record relating to a criminal investigation of alleged sexual assault. MPD partially granted and partially denied your client's request. MPD granted the request in part by providing several documents from the investigative record after redacting personally identifiable information. MPD denied the request in part by withhholding in their entirety statements of the suspect and a witness. MPD asserted that the redaction and withholding were necessary under DC FOIA exemptions set forth in D.C. Official Code §§ 2-534(a)(2), (3)(C) to protect personal privacy.

On appeal you challenge MPD's withholding of the witness and suspect statements, contending that they should be released with redactions made to personally identifiable information rather than being entirely withheld. Further, you assert that there is an overriding public interest in the release of the statements to understand the application of prosecutorial discretion in sexual assault cases.

On January 31, 2017, MPD sent this Office its response to your appeal.[1] Therein, MPD reasserted that releasing the withheld statements would amount to an unwarranted invasion of the suspect's and witness's privacy. Further, MPD asserted that the public interest you raise relates to federal prosecutorial discretion and not the conduct of MPD; therefore, the unrelated public interest does not outweigh privacy interests in the withheld statements. In a follow-up email, on February 2, 2017, MPD clarified its position that the statements cannot be reasonably redacted because someone with knowledge of the underlying incident could identify the individuals who

[1] MPD's response is attached to this decision.

made the statements. As a result, no reasonable amount of redaction would be sufficient to protect the privacy interests at issue.

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 DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See 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 crux of this appeal is whether the witness and suspect statements you requested are exempt from disclosure under DC FOIA because releasing them would constitute an unwarranted invasion of personal privacy.

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*.

D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3") is more expansive than Exemption 2, and protects from public disclosure information contained in an investigatory file that "would constitute an unwarranted invasion of privacy." Exemption 3 lacks the key word "clearly" that is contained in Exemption 2, and therefore is a broader privacy privilege. Here, the broader standard of Exemption 3 applies because the records being withheld are located in an investigatory file.

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). Moreover, there is a sufficient privacy interest in recorded witness statements. *See Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990) (finding a "'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity.'"). As a result, this Office finds that there is a substantial privacy interest in the suspect and witness statements. Further,

this Office agrees with MPD's assessment that redaction of personally identifiable information in the statements would not sufficiently the protect privacy interests associated with the statements. As MPD asserted, due to the personal nature of the statements, redaction would not prevent someone with knowledge of the incident from identifying the individual who made the statement.

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.

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. Typically, courts have held that public interest is not transferable from state to federal matters. *See Landano v. DOJ*, 956 F.2d 422, 430 (3d Cir. 1992) (discerning "no FOIA-recognized public interest in discovering wrongdoing by a state agency"); *Garcia v. DOJ*, 181 F. Supp. 2d 356, 374 (S.D.N.Y. 2002) ("The discovery of wrongdoing at a state as opposed to a federal agency . . . is not the goal of FOIA."); *Thomas v. Office of the United States Atty.*, 928 F. Supp. 245, 251 (E.D.N.Y. 1996) (recognizing that [federal] FOIA cannot serve as basis for requests about conduct of state agency). *But see Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) (finding that public interest exists in Custom Service's handling of smuggling incident despite fact that information pertained to actions of state law enforcement officers).

You argue that release of withheld documents would aid the public in understanding the exercise of prosecutorial discretion with regard to alleged sexual assaults. MPD distinguishes that a public interest involving the decision of federal prosecutors is not relevant to compel the disclosure of MPD records. S*ee Landano*, 956 F.2d at 430 (finding that public interest of state actions are not applicable to federal FOIA). Here, because federal prosecutors handle felonies and certain misdemeanors in the District, a sufficient nexus between the exercise of federal prosecutorial discretion and MPD investigatory records potentially exists.

Still, it is unclear that the public interest outweighs the privacy interests here. The government's broad discretion regarding the decision whether or not to prosecute is well established. *See e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) (finding that several factors are involved in the decision to prosecute and the process is ill-suited to judicial review). The record on appeal indicates that the federal decision to not prosecute was based on issues involving intoxication and consent. Specific details found in the suspect and witness statements would strongly implicate privacy concerns. *See Fitzgibbon* 911 F.2d at 767 (finding that individuals have a strong privacy interest in avoiding association with alleged criminal activity). It is not clear, however, that shedding light on these details would significantly advance the public's understanding of the government attorney's decision not to prosecute. As a result, MPD properly withheld the suspect and witness statements pursuant to Exemption 3.

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,

Mayor's Office of Legal Counsel
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cc: Ronald Harris, Deputy General Counsel, MPD (via email)