GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

Mayor's Office of Legal Counsel

September 22, 2017

VIA ELECTRONIC MAIL

Mr. Darragh Inman

RE: FOIA Appeal 2016-152

Dear Mr. Inman:

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 you requested, on behalf of your client, under the DC FOIA.

Background

On July 27, 2017, you submitted a request to MPD for "[a]ny and all additional notes, investigative reports, writings, or materials pertaining to the investigation and prosecution of the incident described [in a specified police report]." You demonstrated that you were seeking the documents on behalf of your client who was the victim of the reported incident.

On August 31, 2017, MPD indicated that your request was granted in part and denied in part. MPD asserted that it denied your request with respect to witness statements on the basis that disclosure of those statements would constitute a clearly unwarranted invasion of privacy pursuant to D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C). MPD further stated that it could not release the statements of other parties without their authorization.

By letter dated September 8, 2017, you appealed MPD's denial, contending that you need the records to help prepare for a civil negligence suit. You reiterate that you are seeking statements from two witnesses and the individual who pled guilty to the crime against your client, as well as the full investigative file of the investigating officer. You assert that it is in the public interest to expedite your client's efforts to seek justice through the legal system, and that the two witnesses and the defendant will be subject to subpoena power in the forthcoming civil trial.

On September 22, 2017, MPD sent its response to your appeal to this Office.[1] Therein, MPD reasserted that responsive documents are protected from disclosure pursuant to D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C). MPD noted that your appeal appeared to expand the records sought by your initial request. As a result, MPD stated that it would process the expanded aspects of your appeal as a new FOIA request.

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

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).

Although MPD asserts that it will newly process certain aspects of your request, this determination will address whether the witnesses' and defendant's statements are exempt from disclosure under DC FOIA because releasing them would constitute an unwarranted invasion of privacy.

D.C. Official Code §§ 2-534(a)(2) ("Exemption 2") and (a)(3)(C) ("Exemption 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).

Exemption 3(C) is applicable to records pertaining to investigations conducted by the MPD 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 at issue involve statements compiled for the purpose of a criminal investigation, 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).[2] "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)).

"[A]s a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . ." *Reporters Comm. For Freedom of Press*, 489 U.S. at 780. As a result, this Office finds that there is a substantial privacy interest in the statements of the witnesses and defendant.

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.

Here, you argue that it is in the public interest to expedite your client's civil suit. You further assert that the witnesses and the defendant should have diminished protection under FOIA

[2] Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

because they will be subject to subpoena power in a forthcoming civil trial. Courts have consistently held that a private interest in connection with litigation is not relevant in determining whether disclosure is warranted under FOIA. *See Massey v. FBI*, 3 F.3d 620, 625 (2d Cir. 1993) ("[The] mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest."); *Joslin v. U.S. Dep't of Labor*, No. 88-1999, slip op. at 8 (10th Cir. Oct. 20, 1989) (finding no public interest in release of documents sought for use in private tort litigation).

In light of the case law discussed above, you have not articulated a public interest as contemplated by the FOIA statute in that the requested records relating to witness and defendant statements would appear to reveal little or nothing about MPD's conduct as an agency. This Office therefore finds that there is no public interest in disclosure of the documents at issue, whereas there is a cognizable privacy interest. Further, you have not provided to MPD an authorization from the witnesses or defendant to grant you permission to access to these records. As a result, MPD properly withheld the records pursuant to Exemption 3(C).

Conclusion

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

Respectfully,

Mayor's Office of Legal Counsel

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