

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



Mayor's Office of Legal Counsel



September 26, 2017

VIA ELECTRONIC MAIL

Mr. John T. McFarland

RE: FOIA Appeal 2017-156

Dear Mr. McFarland:

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 Department of Consumer and Regulatory Affairs (“DCRA”) failed to respond to your request under the DC FOIA.

Background

On June 20, 2017, you submitted a FOIA request for records relating to (1) an altercation, (2) an employee’s personnel file, and (3) a copy of a job description. Your request also included a list of fourteen questions that you requested DCRA answer for you. DCRA did not respond to your request.

On September 12, 2017, this Office received your appeal and notified DCRA. DCRA responded on September 19, 2017.¹ In its response, DCRA asserts that withholding the records was proper pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”).² Additionally, DCRA explains why no job description exists as described in your request. Finally, DCRA stated that it was not obligated to answer your questions.

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 . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public

¹ DCRA’s response is attached to this decision.

² Exemption 2 prevents disclosure of “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *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).

Constructive Denial

You submitted your request on June 20, 2017. DCRA failed to provide all responsive requested records within the 15 days prescribed by D.C. Official Code § 2-532 (c)(1). As a result of missing the deadline set by the statute, this Office finds that DCRA constructively denied your request. D.C. Official Code § 2-532(e). On appeal, DCRA has provided its response asserting that responsive records are withheld pursuant to Exemption 2.

Exemption 2

Under Exemption 2, determining whether disclosure of a record would constitute an unwarranted 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 is 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). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). Summarily, this Office finds that there is a privacy interest in employee’s personnel records as well as in an agency’s investigation of an altercation between employees. *See* 6B DCMR § 3100.

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. The relevant “public interest” for the purpose of DC FOIA is generally limited to furthering the statutory purpose of DC FOIA.

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.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

An investigative report of an altercation between employees would not reveal anything about DCRA's performance of its statutory duties – and as such there is no public interest in such a document. When there is a 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). As a result, we find that DCRA has properly withheld the requested records concerning an altercation under Exemption 2.

Conversely, not everything located in a personnel file is *de facto* without a public interest. The 6B DCMR § 3113 specifically allows for the disclosure of:

- (a) Name.
- (b) Present and past position titles.
- (c) Present and past grades.
- (d) Present and past salaries.
- (e) Present and past duty stations (which includes room numbers, shop designations, or other identifying information regarding buildings or places of employment).

Additionally, past FOIA decisions have found that there is a public interest in a successful job applicant's application and resume. *See Core v. United States Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) ("Having balanced the privacy interests of the five successful applicants against the public's interest, we conclude that disclosure would not 'constitute a clearly unwarranted invasion of personal privacy.' Exemption 6,³ therefore, does not bar disclosure of the information Core seeks about the successful applicants."); *Barvick v. Cisneros*, 941 F. Supp. 1015, 1017 (D. Kan. 1996) (upholding an agency's decision to release redacted applications for successful candidates and withhold resumes and applications for unsuccessful applicants); *see also*, FOIA Appeals 2011-36, 2011-56, 2012-75, 2014-06, 2014-11, 2014-27, 2015-48, 2016-80, and 2016-81.⁴

DCRA has an obligation to review the records contained within the personnel file to see if portions of the records may be properly disclosed subject to redaction pursuant to D.C. Official Code § 2-534(b) rather than withheld in their entirety.

³ Exemption 6 is the federal equivalent of DC FOIA's Exemption 2.

⁴ *See also Habeas Corpus Resource Ctr. v. DOJ*, No. 08-2649, 2008 WL 5000224, at *4 (N.D. Cal. Nov. 21, 2008); *Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007); *Samble v. U.S. Dep't of Commerce*, No. 1:92-225, slip op. at 11 (S.D. Ga. Sept. 22, 1994); *Associated Gen. Contractors, Inc. v. EPA*, 488 F. Supp. 861, 863 (D. Nev. 1980).

Creating New Records

A portion of your request is a list of fourteen questions that you would like DCRA to answer. This part of your request amounts to an interrogatory. DCRA is not obligated by DC FOIA to answer interrogatories. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency “has no duty either to answer questions unrelated to document requests or to create documents.”); *see also* FOIA Appeal 2014-41; FOIA Appeal 2017-36. The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). “FOIA creates only a right of access to records, not a right to personal services.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009).

Conclusion

Based on the foregoing, we affirm DCRA’s decision in part and remand in part. Within 15 days of this decision DCRA shall review the withheld personnel file records and disclose to you nonexempt portions of those records or issue to you a new letter clarifying its justification for withholding records in their entirety. This constitutes the final decision of this Office; though you may file a separate appeal of DCRA’s subsequent response.

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,

The Mayor’s Office of Legal Counsel

cc: Erin Roberts, FOIA Officer, DCRA (via email)