

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-16**

February 8, 2017

VIA U.S. MAIL

Mr. Paul Wagner

RE: FOIA Appeal 2017-16

Dear Mr. Wagner:

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 videos you requested pertaining to arrests were improperly redacted by the Metropolitan Police Department ("MPD").

Background

On January 16, 2017, you submitted a request under the DC FOIA to the MPD for videos that were used in certain prosecutions. MPD identified 10 videos that were responsive to your request, which MPD released in redacted form on its YouTube account. MPD informed you that the redactions were made pursuant to D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)").

On appeal you challenge MPD's redactions, arguing that because the Office of the Attorney General played unredacted versions of the videos in court, the subjects of the videos have lost their privacy interests, therefore redaction is improper. You argue that the disparate policies regarding the use of video at trial of the District's Attorney General and the U.S. Attorney are "unfair to the public." Additionally, you contend that the records were not labeled with court case numbers, which rendered you unable to determine which video related to each case.¹

MPD sent this Office a response to your appeal on February 1, 2017². MPD reaffirmed its position, asserting authority from cases, statutes, and prior FOIA appeal determinations to support its decision that the redaction of records was proper under Exemption 3(C).

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

¹ This Office does not consider MPD's failure to label the records to have caused you to be "denied the right to inspect a public record." D.C. Official Code § 2-537(a). As a result, this Office does not have the jurisdiction to review whether the labeling of the YouTube videos was proper.

² A copy of MPD's response is attached to this determination.

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 DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemptions 2³ 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).

Records pertaining to investigations conducted by the MPD are 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.”). Since the records you seek relate to investigations that could result in civil or criminal sanctions, Exemption 3(C) applies to your request.

Under the applicable case law, your argument that the videos at issue should be released in unredacted form because they were played in court is not persuasive. *Long v. United States DOJ*, 450 F. Supp. 2d 42, 68 (D.D.C. 2006) (“the fact that some of the personal information contained in these records already has been made public in some form does not eliminate the privacy interest in avoiding further disclosure by the government.”). As a result, the fact that the videos were played in an unredacted form in court is not dispositive of the privacy analysis here.

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 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)⁴. “The 7(C) exemption recognizes the stigma potentially

³ D.C. Official Code § 2-534(a)(2)

⁴ Exemption 7(C) is the federal FOIA equivalent to DC FOIA’s Exemption 3(C).

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)).

As discussed in *Stern*, individuals have a strong interest in not being associated with alleged criminal activity, and protection of this privacy interest is a primary purpose of Exemption 3(C). As a result, we find that there is a sufficient privacy interest here associated with individuals captured on video by a body-worn camera during an arrest. The disclosure of an unredacted version of the videos you seek could have a stigmatizing effect for the subjects of the videos.

With regard to the balancing analysis under Exemption 3(C), we examine whether the privacy interests of the individuals recorded are outweighed by the public interest in disclosure. On appeal, you argue that MPD’s refusal to release an unredacted version of the video “is unfair to the public and must be corrected.” In order for a document’s release to be in the public interest under DC FOIA, the document’s release must further 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. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency’s own conduct.

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

You have not asserted how disclosing the records at issue in an unredacted form would shed light on MPD’s conduct or performance of its statutory duties, nor do we independently find a public interest in unredacted versions of the records. Having established that the subjects of the videos hold a privacy interest and that no countervailing public interest exists, we find that MPD properly redacted the videos. *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.”). Further, MPD’s disclosure is consistent with the requirements of reasonably redacted disclosure found in D.C. Official Code § 2-534 (b).

Conclusion

Based on the forgoing we affirm the decision issued by the MPD and dismiss your appeal.

This shall constitute 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 the DC FOIA.

Sincerely,

Mayor's Office of Legal Counsel

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