

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-53**

April 27, 2017

VIA ELECTRONIC MAIL

Ms. Geneva Sands

RE: FOIA Appeal 2017-53

Dear Ms. Sands:

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 surveillance videos you requested pertaining to a December 4, 2016 arrest were improperly withheld by the Metropolitan Police Department ("MPD").

Background

You submitted a request under the DC FOIA to the MPD for surveillance videos pertaining to a December 4, 2016 arrest at Comet Ping Pong. MPD denied your request pursuant to D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)").

On April 12, 2017, you filed this appeal, challenging MPD's denial. In your appeal you argue that the public interest in release outweighs privacy concerns because of "the threat posed by 'fake news.'" To this end, you maintain that release of the surveillance video would "shed light on the issue of 'fake news' and . . . [would] serve the public interest." You further note that the subject of the video acted in the public, with no expectation of privacy and that other photos and videos of the incident are already publicly available such that the subject's "likeness has already been recorded in the news media." Additionally, you point out that the subject of the video has pleaded guilty to a crime and admitted his guilt.

MPD sent this Office a response to your appeal on April 19, 2017.¹ MPD reaffirmed its position, asserting that the subject of the video had a greater than *de minimus* privacy interest and that release of the video would not support the public interest as it is defined in FOIA. As a result, MPD reasserted that the withholding of videos 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 represent them as public officials and employees." D.C. Official Code § 2-531. In aid of that

¹ A copy of MPD's response is attached to this determination.

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 2² 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 can be 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 an investigatory records that resulted in criminal sanctions, Exemption 3(C) applies to your request.

Under the applicable case law, your argument that the videos at issue should be released because the subject’s “likeness has already been recorded in the news media” 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 may have been played in court or that other footage of the subject may already exist in the public domain is not dispositive of the privacy interest 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

² D.C. Official Code § 2-534(a)(2).

of Exemption 7(C)³. “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)).

As discussed in *Stern*, individuals have a strong interest in not being associated with 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 surveillance cameras during an arrest. The disclosure of the videos you seek could have a stigmatizing effect on 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 disclosure would help the public “understand the full nature of the threat posed by ‘fake news.’” In order to 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 withheld records at issue would shed light on MPD’s conduct or performance of its statutory duties, nor do we independently find a public interest (as contemplated by DC FOIA) in the release 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 withheld 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.”).

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

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)