

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-73**

May 18, 2017

VIA E-MAIL

Mr. Christopher LaFon

RE: FOIA Appeal 2017-73

Dear Mr. LaFon:

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 Alcohol Beverage Regulation Administration ("ABRA") improperly withheld and redacted records you requested on behalf of your client under the DC FOIA.

Background

In a letter dated February 22, 2017, you submitted a FOIA request to ABRA for records of communications between a complainant and ABRA.

On April 19, 2017, ABRA responded to your request by providing a number of partially redacted documents and withholding other documents. ABRA cited to D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)") and D.C. Official Code §2-534(a)(2) ("Exemption 2") as the bases for its redactions and withholdings.

On appeal you challenge the ABRA's partial denial, asserting the ABRA improperly withheld and redacted records. You assert the existence of a public interest in the records based on your client's right to review the documents before ABRA considers whether to renew the liquor license associated with your client's establishment. Allowing your client to review the records would, you contend, allow him to cross-examine his accusers. For these reasons, you object to the redaction and withholding of "the substance of the complaints" against your client's establishment.

ABRA sent this Office a response to your appeal on May 5, 2017,¹ in which the agency reaffirmed its position that it properly withheld and redacted certain records under Exemptions 2 and 3(C). ABRA argued primarily that: (1) the records at issue were properly withheld and redacted pursuant to Exemption 3(C); (2) your appeal did not adequately challenge Exemption 3(C) such that you have waived that argument;² and (3) you have not identified a legally

¹ A copy of ABRA's response is attached. ABRA also attached additional responsive records that it recently identified. We direct ABRA to provide them to you directly.

² This Office has historically construed appeals as broadly as possible and does not consider your

cognizable public interest as contemplated under the DC FOIA to overcome any personal privacy concerns associated with the records.

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 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).

Investigatory Records

Exemptions 2 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, 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).

Here, ABRA has briefed this Office primarily on Exemption 3(C) and has posited that because all of the redacted and withheld documents are exempt under Exemption 3(C), this Office need not reach an analysis of Exemption 2. We disagree with ABRA’s premise that the withheld and redacted documents should be evaluated under Exemption 3(C).

Records that ABRA compiles for law enforcement purposes and that pertain to investigations ABRA conducts 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.”).

It is without question that ABRA has legal authority over enforcement of this area of regulation. What is not clear is that the redacted and withheld records are “investigatory records compiled for law enforcement purposes.” *See* Exemption 3. It does not appear that ABRA solicited the

objection to redactions and withholdings under Exemption 3 to have been waived.

information in the emails from the complainant as part of investigative activity.³ *Tax Analysts v. IRS*, 294 F.3d 71, 78 (2002) (internal citations omitted). (“the court set forth a two-part test whereby the government can show that its records are law enforcement records: the investigatory activity that gave rise to the documents is ‘related to the enforcement of federal laws,’ and there is a rational nexus between the investigation at issue and the agency’s law enforcement duties.”) *FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 814-15 (D.C. 2014) (“the phrase ‘investigatory records compiled for law enforcement purposes’ in exemption 3 [of the District’s FOIA] refers only to records prepared or assembled in the course of ‘investigations which focus directly on specifically alleged illegal acts’”).

Instead, the majority of the emails appear to be complaints sent by an individual to ABRA asking the agency to take certain actions against a commercial establishment. The withheld and redacted records do not appear to have been gathered by ABRA in conjunction with an investigation.⁴ In fact, ABRA’s FOIA officer conveyed to this Office that many of the emails were received during a time in which ABRA was not investigating the matter. The FOIA Officer further indicated that ABRA compiled the responsive emails in direct response to your FOIA request, and that the documents were not already compiled as part of an investigative file. As a result, these documents should not be evaluated under the standard of Exemption 3.

Personal Privacy Interest

Because this Office does not agree that the bulk of withheld and redacted records qualify as being a part of “investigatory records compiled for law-enforcement purposes . . .” this Office instead analyzes the privacy interest at issue here under the “clearly unwarranted” standard of Exemption 2.

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.; *see also Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998) (stating that clear privacy interest exists with respect to names, addresses, and other identifying information, even if it is already available in other public filings).

Because of the voluminous nature of the withheld records, this Office will not opine on each email at this point but will instead offer general guidance to ABRA to consider in reevaluating its redactions and withholdings. After reviewing a representative sampling of the withheld and

³ If these records were created in connection with a complaint submitted to ABRA’s hotline, then those would be more likely to be subject to withholding under Exemption 3, because it would entail at least a passive investigative activity. Alternatively, if ABRA had a designated email address or website for the public to submit anonymous complaints for the purpose of initiating investigation, those communications might be subject to Exemption 3 and trigger a privacy interest.

⁴ Indeed, this would appear to be why ABRA is not asserting that release of the records would “[i]nterfere with . . . [an] Enforcement proceeding . . .” pursuant to D.C. Official Code § 2-534(a)(3)(i).

redacted emails, it is not clear that the substantive portions that were withheld and redacted contain information that would constitute an unwarranted invasion of privacy if released. For example, the complainant's requests for an investigation and updates on the investigation do not appear to raise a privacy interest. Similarly, the complainant offering unsolicited directions as to the way that ABRA should conduct an investigation is not traditionally associated with the concept of "personal privacy."⁵ Instead, it seems that the complainant, through emails, was petitioning his government for redress of a community problem. In one email the complainant states, "Let this email serve as another record of our complaint." In other emails the complainant writes as if speaking on behalf of himself and his neighbors. We glean from this that the complainant intended for his emails to serve as a "record" and not as a private disclosure with an expectation of privacy.

Other emails that we reviewed, such as requests from the complainant for inspection reports, do not appear to raise a privacy interest. Nor do statements by the complainant describing the actions taken by ABRA⁶ or the complainant's thoughts on those actions.

Some redactions in the emails involve a corporate website and email domain. Under DC FOIA a corporation has no personal privacy interest, because legal fictions do not possess personal privacy.⁷ *FCC v. AT&T Inc.*, 562 U.S. 397, 409-410 (2011) ("When it comes to the word 'personal,' there is little support for the notion that it denotes corporations, even in the legal context.").

Lastly, because your request was for emails sent or received by a specified complainant, it is unclear what personal privacy is maintained by redacting the name of the complainant from the "to" and "from" lines of the emails. If the emails were not sent or received by the complainant, they would not be responsive to the request. Therefore, there is no need to redact the complainant's name.

Public Interest

With regard to the second part of the privacy analysis under Exemption 3(C), we examine whether any individual privacy interest associated with the redacted and withheld records is outweighed by the public interest in disclosure. In order for a document's release to be in the public interest under DC FOIA, the release must further the statutory purpose of DC FOIA:

⁵ If release of these complaints would risk the disclosure of "the identity of a confidential source," ABRA may cite to D.C. Official Code § 2-534(a)(3)(D), though it is unclear here if the complainant would qualify as a "confidential source."

⁶ If these communications revealed ABRA's investigative techniques, ABRA may cite to D.C. Official Code § 2-534(a)(3)(E), though the withheld records do not appear to contain a level of detail to qualify for that exemption.

⁷ That the complainant used a business email address to make personal requests of the government does not give the company a personal privacy interest to warrant redactions of the company's website and email domain.

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.

On appeal, you assert that there a public interest in the records because of your client’s right to cross-examine. This argument is inapplicable to the instant matter; the right to cross-examine a witness is not a public interest recognized by DC FOIA. A requester’s identity and involvement in litigation relating to the request are well established as irrelevant in the FOIA context. *North v. Walsh*, 881 F.2d 1088, 1099 (D.C. Cir. 1989) (“FOIA rights are unaffected by the requester’s involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery . . .”). Nevertheless, because we are remanding this matter to ABRA to reevaluate its personal privacy analysis, we need not examine your stated public interest at this juncture.

Conclusion

Based on the foregoing, we affirm in part and remand in part ABRA’s decision. Within 10 business days from the date of this decision, ABRA shall: (1) provide you with its supplemental response; (2) review the withheld and redacted documents under the privacy standard of Exemption 2; and (3) make additional disclosures as necessary in accordance with the guidance offered herein. You may file a separate appeal to challenge ABRA’s subsequent response.

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.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Jessie Cornelius, Public Information/FOIA Officer, ABRA (via email)