

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-75**

May 24, 2017

VIA ELECTRONIC MAIL

Moses V. Brown, Esq.

RE: FOIA Appeal 2017-75

Dear Mr. Brown:

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”) on behalf your client. In your appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

On April 4, 2017, you submitted a request to MPD seeking all records, including telephone calls with dispatch, videos, and inspection reports, related to a particular criminal matter involving your client, the victim in the criminal matter. MPD responded to you on April 19, 2017, by granting your request in part and denying it in part. MPD granted your request in part by providing you with some documents. It denied your request in part by redacting portions of documents (i.e., names and telephone numbers of witnesses and other involved parties) under D.C. Official Code § 2-534(a)(2) (“Exemption 2”) and withholding documents under D.C. Official Code § 2-534(a)(3)(C) (“Exemption 3(C)”).

You appealed MPD’s response to the Mayor on the grounds that your client has filed a civil suit against the defendant in the underlying criminal matter, and “[a] release of all records collected during the investigation of that criminal charge allows the victimization of my client to cease.” You further contend that releasing the requested records will neither prejudice the defendant nor impede any ongoing criminal case, as none exists.

At the request of this Office, MPD sent us a response to your appeal.¹ MPD maintains its position on the withholding of the documents. MPD asserts that witnesses and suspects in the underlying criminal matter have a significant privacy interest associated with the records, as does the defendant who was arrested and acquitted after trial. In addition, MPD contends that you have not asserted a public interest in the documents that would shed light on MPD’s actions vis a vis its investigation of the incident. Thus, according to MPD, there is no public interest that outweighs the individual privacy interests at issue here. MPD also provided this Office with

¹ MPD’s response is attached to this decision.

redacted and unredacted versions of the responsive records for *in camera* review. Finally, MPD noted that the remaining responsive documents in its possession are recordings of an interview MPD conducted with your client, which was disclosed to you, and an interview MPD conducted with the defendant, which MPD withheld.

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).

The primary issue in this appeal is whether MPD appropriately applied Exemptions 2 and 3(C) to prevent the disclosure of information that would constitute an unwarranted invasion of privacy.

Exemption 2 provides an exemption from disclosure for “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” Determining whether disclosure of a record would constitute an 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.*

Similarly, Exemption 3(C) exempts disclosure of information contained in “[i]nvestigatory records compiled for law-enforcement purposes” that would “[c]onstitute an unwarranted invasion of privacy.” Exemption 3(C) lacks the key word “clearly” that is contained in Exemption 2, and therefore is a stronger privacy privilege. After reviewing the responsive records *in camera*, this Office finds that the standard of Exemption 3(C) applies because the records were compiled for law enforcement purposes in response to your client’s criminal complaint.

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). Moreover, there is a sufficient privacy interest in recorded witness statements. *See Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990)

(finding a “‘strong interest’ of individuals, whether they be suspects, witnesses, or investigators, ‘in not being associated unwarrantedly with alleged criminal activity.’”).

After comparing an unredacted copy of the responsive records with the redacted copy you received, this Office finds that there is a substantial privacy interest associated with a majority of the redacted material, which involved personally identifiable information such as names, home addresses, and phone numbers. Some of the information MPD redacted, however, does not appear to involve privacy interests. For example, the incident address,² job titles of witness, number of years witnesses worked in their positions, and the page numbers of reports involve no or questionable privacy interests. Additionally, this Office notes that MPD’s practice of redacting in white is not a best practice, as it makes it difficult to determine where redactions have been made.

Regarding the pages of the responsive records that were withheld entirely, it appears that MPD’s motive was to streamline production rather than protect privacy interests. The majority of withheld pages involve limited, duplicative, transmittal, or administrative information rather than personal privacy interests. To the extent that exemptions do apply, under D.C. Official Code § 2-534(b) MPD has a duty to segregate exempt portions instead of withholding entire pages of responsive records. Further, some of the withheld pages involve email exchanges of an MPD officer clarifying his investigation; these exchanges cannot be withheld in their entirety pursuant to the personal privacy protections under Exemptions 2 or 3(C). To the extent these emails involve privacy interests that information can be redacted. If MPD has another basis for withholding the emails in their entirety, MPD must articulate that reason in accordance with DC FOIA.

For the portions of the records where a substantial privacy interest exists, 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

² Here, the incident address appears to be a business address rather than a personal address. Generally, FOIA’s privacy protection applies only to individuals, not businesses. *See FCC v. AT&T Inc.*, 562 U.S. 397, 410 (2011). However, the redaction of business names and addresses has been upheld when necessary to protect the privacy interests of individuals to be safe from physical violence. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006). Here, MPD has not asserted that the redaction of the business address is necessary to protect employees.

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.

Your arguments that disclosure will neither prejudice nor impede any ongoing investigation or case are not relevant to an analysis under Exemption 3(C).³ Further, your client's personal interest in disclosure does not shed light on MPD's conduct as an agency. As a result, for the information that involves a substantial privacy interest and no countervailing public interest, MPD properly redacted the records pursuant to Exemption 3(C).

Conclusion

Based on the foregoing, MPD's decision is affirmed in part and remanded in part. This Office affirms MPD's redaction of the following personally identifiable information: names, personal addresses, and personal phone numbers. Within 10 business days from the date of this decision, MPD shall review the other previously redacted information (e.g., business addresses, professional information, and report page numbers), as well as records withheld in their entirety, and either provide you with additional disclosures in accordance with the guidance provided herein or explain their continued withholdings/redactions.

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)

³ These arguments could be pertinent under D.C. Official Code §§ 2-534(a)(3)(A) and (3)(B), which protect disclosure of information that would interfere with enforcement proceedings or deprive an individual of a fair trial, but those exemptions are not at issue here.