

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-82**

June 14, 2017

VIA E-MAIL

Ms. Justine Coleman

RE: FOIA Appeal 2017-82

Dear Ms. Coleman:

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 Metropolitan Police Department ("MPD") improperly withheld records you requested pertaining to complaints against George Washington University police officers.

Background

On March 19, 2017, you submitted a FOIA request to the MPD for records related to complaints against George Washington University police officers for the past 10 years. On May 18, 2017, MPD denied your request, stating that disclosure of the records would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) ("Exemption 2") and D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)"). MPD further asserted that due to the small number of complaints, redaction would not be sufficient to prevent the identification of individuals involved and protect their personal privacy.

On appeal you challenge MPD's response, asserting that police officers do not have a right to privacy while performing their work. Additionally, you assert that MPD has granted similar FOIA requests in the past and should grant your current request.

MPD sent this Office a response to your appeal on June 7, 2016.¹ MPD reaffirms its earlier position that under Exemptions 2 and 3(C) the records are exempt in their entirety due to the small number of officers involved. In further support of its position, MPD cites a GW Hatchet article from 2013 that identifies an officer after MPD disclosed records in response to a similar FOIA request. Finally, MPD argues that you have not raised a public interest applicable to DC FOIA to balance against the privacy interests of the individuals involved in the records sought.

¹ A copy of the MPD's response is attached.

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).

Exemptions 2 and 3(C)

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).

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.

Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of one’s individual privacy interests against the public interest in disclosing the disciplinary files. *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)². “The 7(C) exemption recognizes the stigma potentially

² Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

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)).

Here, we find that there is a sufficient privacy interest associated with police officers being investigated based on allegations of wrongdoing. “[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under [(3)(C)].” *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). An agency is justified in not disclosing documents that allege wrongdoing even if the accused individual was not prosecuted for the wrongdoing, because the agency’s purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *Bast*, 665 F.2d at 1254.

As discussed above, the D.C. Circuit in the *Stern* case held that individuals have a strong interest in not being associated with alleged criminal activity and that protection of this privacy interest is a primary purpose of the investigatory records exemption. *Stern*, 737 F.2d at 91-92. We find that the same interest is present with respect to disciplinary sanctions that could be imposed on police officers. Even if records consist of mere allegations of wrongdoing, the disclosure could have a stigmatizing effect regardless of accuracy.

With regard to the second part of the privacy analysis under Exemption 3(C), we examine whether the individual privacy interest is outweighed by the public interest to require disclosure. On appeal, you assert that the GW community deserves to be informed about officer misconduct. The public interest in the disclosure of a public employee’s disciplinary files was addressed by the court in *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held:

The public’s interest in disclosure of personnel files derives from the purpose of the [FOIA]--the preservation of “the citizens’ right to be informed about what their government is up to.” *Reporters Committee*, 489 U.S. at 773 (internal quotation marks omitted); *see also Ray*, 112 S. Ct. at 549; *Rose*, 425 U.S. at 361. 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.

Id. at 1492-93.

In the instant matter, disclosing identity of individuals in the records you are seeking would not shed light on MPD's performance of its statutory duties and would constitute an invasion of the individual police officers' privacy interests under Exemptions 3(C) and (2) of the DC FOIA.

Segregability

The last issue to be considered is whether MPD can redact the records to protect personal privacy interests. D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009).

Here, MPD asserts that redaction cannot protect the privacy interests at issue because the GW Hatchet published the name of an officer who was the subject of a redacted complaint that it received from a prior FOIA request. The article references two GW special police officers who were suspended. It identifies one officer but not the second, stating that MPD redacted the officer's identity. Not having reviewed the prior FOIA disclosure, it is unclear how the GW Hatchet identified one of the officers in the report; however, the article demonstrates that the MPD's redactions were successful at protecting the identity of the other officer. As a result, we find that MPD's prior experience with a similar request does not justify withholding the responsive records in their entirety but rather allows for more thorough redaction to remove potentially identifying material from the responsive records.

MPD further asserts that due to the small number of officers employed and the close community of the GW campus, the privacy interests involved cannot be protected through redaction. We note that the request here is for a 10-year window. MPD has not identified the number of officers or complaints during the relevant timeframe. As a result, MPD has not offered sufficient evidence to justify withholding the responsive records in their entirety.

Conclusion

Based on the forgoing, we remand the MPD's decision. MPD shall conduct a reasonable search for responsive records and provide non-exempt responsive records, subject to redaction, to you on a rolling basis, beginning in 10 business days from the date of this decision.

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