

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-86**

June 27, 2017

VIA ELECTRONIC MAIL

Keith Allison

RE: FOIA Appeal 2017-86

Dear Mr. Allison:

This letter responds to the administrative appeal you filed with 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 Department of Corrections (“DOC”) improperly withheld records you requested under the DC FOIA.

Background

On April 3, 2017, you sent a clarified request to the DOC for personnel records relating to yourself. On April 10, 2017, DOC responded, granting in part and denying in part your requests. In specific, DOC withheld documents responsive to your request that related to a confidential background investigation conducted on you for pre-employment screening. DOC withheld these documents on the basis of D.C. Official Code §§ 2-534(a)(3)(A)(i) and (a)(3)(D). Further DOC withheld these documents because of a waiver which you signed as a part of the application process that stated:

I understand that information and documents related to the background check, suitability investigation or any other inquiry shall be kept in strict confidence and shall not be disclosed to me nor shall any information be discussed with me in a manner that would reveal or permit me to deduce the source of any information.

On appeal, you challenge DOC’s withholding of responsive records. Your appeal is largely a narrative of your belief that you are entitled to re-employment. You contend that “The Office of Investigation . . . is using the Supervisor Questionnaire Sheet to fabricate untruthful accusations against me to deny me the right for re-employment” and that if a completed supervisor questionnaire sheet about you exists, you would like a copy. You refute DOC’s characterization of the withheld records as confidential, because “[t]his information is of public record because the supervisors’ references and questionnaire is considered part of the employees yearly Annual Performance rating, which can’t be deduce [sic] from and by the applicant requesting the information.”

DOC provided this office with responses to your appeal on June 21, 2017, and June 22, 2017, in which DOC reaffirmed its position vis-à-vis the withheld documents. DOC argues that release of the documents would interfere with an ongoing enforcement proceeding in the District's Office of Human Rights, that you have waived your FOIA rights to these documents, and that regulations preclude the documents' release pursuant to D.C. Official Code § 2-534(a)(6).<sup>1</sup>

### 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 right to inspect a public record, however, is subject to exemptions. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal FOIA statute. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute 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 crux of this matter is DOC's assertion<sup>2</sup> that you have waived your FOIA rights for the requested records by virtue of having signed an Authorization for Release of Information ("Authorization"), which states, in relevant part:

I understand that information and documents related to the background check, suitability investigation or any other inquiry shall be kept in strict confidence and shall not be disclosed to me nor shall any information be discussed with me in a manner that would reveal or permit me to deduce the source of any information.

The Authorization further provides that "the Department of Corrections has the authority to establish my suitability for employment by conducting pre-employment checks and background checks and investigations in accordance with D.C. Code § 1-604.01 et seq. and Chapter 4 of the District of Columbia Personnel Regulations." DOC's second argument in support of its withholding is based on DOC Policy 3040.6H ("DOC Policy"), which, according to DOC, precludes disclosure of the records sought.

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<sup>1</sup> Copies of DOC's response and declaration are attached.

<sup>2</sup> This Office rejects DOC's Exemption 6 argument, as it relies on a regulation whereas Exemption 6 protects information exempted from disclosure by statute. Similarly, this Office disagrees with DOC's Exemption 3 argument relating to an Office of Human Rights investigation, because the withheld records are not investigatory records compiled for law enforcement purposes, and there is no evidence that their disclosure would interfere with an enforcement proceeding.

We need not reach the issue of whether a waiver of FOIA rights is possible because we find that in withholding the instant records, DOC has incorrectly interpreted the waiver provision contained in the Authorization you signed as applying to FOIA.

The relied upon Authorization and DOC Policy allow for records to be kept “in strict confidence in accordance with . . . the District Personnel Manual (DPM) Chapters 4 and 31.” DOC Policy 3040.6H at 3. Accordingly, under the policy, “information related to pre-employment and background investigations and suitability actions shall be kept in strict confidence in accordance with DPM Chapters 4 and 31.” To that end, “[s]ources of information shall not be disclosed except as specifically authorized . . . [by] the DPM.” Both the Authorization and the DOC Policy appear to contemplate a waiver of disclosure rights found in DPM Chapters 4 and 31; however, neither appears to contemplate a waiver of rights under the DC FOIA. Therefore, assuming for the sake of argument the validity of the Authorization, it pertains only to your disclosure rights under Chapters 4 and 31 and not under DC FOIA or any other law or regulation.

For the reasons discussed above, we reject the two FOIA-related arguments that DOC has thus far advanced in defense of its withholding (i.e., the arguments concerning Exemption 6 and Exemption 3 as it relates to the proceeding before OHR). The withheld records may still be exempt, in whole or in part, under other FOIA exemptions.<sup>3</sup> DOC is obligated under D.C. Official Code 2-534(b) to review the withheld records, disclose portions that are reasonably segregable and nonexempt, and explain to you the reasoning for any withholdings. *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F. Supp. 2d 106, 120 (D.D.C. 2010)).

### Conclusion

Based on the foregoing, we remand DOC’s decision. Within seven business days from the date of this decision, DOC shall review the withheld documents in accordance with the DC FOIA and release to you any segregable, nonexempt portions, along with a justification for any continued withholdings.

This constitutes the final decision of this Office; however, you are free to initiate a new appeal based on the subsequent substantive response you receive from DOC.

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<sup>3</sup> E.g., under D.C. Official Code §§ 2-534(a)(3)(D), (a)(3)(E), which exempts from disclosure documents that would disclose the identity of a confidential source or disclose investigative techniques and procedures not generally known outside the government, and under the deliberative process privilege, which may be invoked under D.C. Official Code § 2-534(a)(4).

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: Oluwasegun Obebe, Records, Information & Privacy Officer, DOC (via email)