GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-90

June 30, 2017

Anonymous Requestor

RE: FOIA Appeal 2017-90

Dear Anonymous Requestor:

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 an individual who was criminally prosecuted in connection with an MPD investigation.

Background

You submitted a FOIA request to the MPD for records relating to a federal prosecution that "would have been turned over to defense counsel in discovery." On June 15, 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 § 2-534(a)(3)(C) ("Exemption 3(C)").

On appeal you challenge MPD's response, asserting without legal authority that "the discovery file is a public record once turned over to defense counsel, … [and] must be supplied upon request." Additionally, you assert that "[a]ny semblance of a balancing test between the public's right to know about 11 unresolved violent crimes and a convicted felon's right to privacy will lead to the same conclusion."

MPD sent this Office a response to your appeal on June 23, 2017.[1] Therein, MPD argues, citing to federal case law, that this Office should dismiss the appeal because a requester who does not identify himself or herself does not, under FOIA, have standing to file an appeal to contest an agency's response.[2] Substantively, MPD is "not in a position to ascertain what documents would

[1] A copy of the MPD's response is attached.
[2] This Office acknowledges legal precedent that an anonymous individual lacks standing to appeal under the federal Freedom of Information Act ("federal FOIA"); however, we are not persuaded that it is controlling over DC FOIA, particularly in light of the District's public policy that all persons are entitled to full and complete information regarding the affairs of government. *See* D.C. Official Code § 2-531.

be turned over to a defense attorney," because "[t]he department does not turn documents over to defense lawyers except at the direction of the courts or prosecutors." To that end, MPD "does not have any 'discovery files.'"[3]

Further, MPD reaffirms its earlier position that under Exemptions 2 and 3(C) the records are exempt because they contain "personal identifiers and other information that would lead to the identification of one or more individuals." Additionally, MPD argues that the introduction of evidence in a criminal trial is not dispositive of whether such evidence must be released under FOIA. 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, because the public interest analysis of DC FOIA is related to the performance of governmental duties and not personal interest. Finally, MPD indicates that you have not presented any authorization from any of the individuals referenced in the investigatory documents that would allow you to obtain the documents.

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 stature 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).

[3] We agree with MPD that it does not appear likely that it would possess documents exactly as described in your request. However, MPD's denial letter indicated that records have been withheld, therefore this decision applies to those records. If you desire records from a prosecutor's office, you should file a separate request there.

Records pertaining to investigations conducted by the MPD are subject to 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)[4]. "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)).

Here, we find that this is a request from a third party for law enforcement records about private citizens. This categorically is an invasion of privacy for all individuals who could be identified by the records. *SafeCard Services*, 926 F.2d at 1206. "[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).

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 therefore conclude that a privacy interest exists in the withheld documents.

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 public's right to know about 11 unresolved violent crimes" outweighs "a convicted felon's right to privacy." Under DC FOIA, the public interest must go to furthering the statutory purpose of FOIA, which is reviewing the propriety of governmental actions:

> This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters*

[4] Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

> *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.

Beck v. Department of Justice, et al., 997 F.2d 1489, 1492-93 (D.C. Cir. 1993).

In the instant matter, it is not clear how records relating to the prosecution of a defendant would reveal anything about MPD's performance of its statutory duties.
As a result of the existence of a privacy interest and the apparent lack of a public interest in the records at issue, MPD properly withheld portions of the records that would reveal the identities of private individuals pursuant to Exemption 3(C) 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).

Courts have required an agency to address whether it could redact records to protect individual privacy interests, while releasing the remaining information. *Canning v. DOJ*, No. 01-2215, slip op. at 19 (D.D.C. Mar. 9, 2004) (finding application of Exemption 7(C) to entire documents rather than to personally identifying information within documents to be overly broad); *Prows v. DOJ*, No. 90-2561, 1996 WL 228463, at *3 (D.D.C. Apr. 25, 1996) (concluding that rather than withholding documents in full, agency simply can delete identifying information about third-party individuals to eliminate stigma of being associated with law enforcement investigation).

Here, MPD has not asserted that the responsive records in its possession cannot be redacted. 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 MPD's decision. MPD shall conduct a reasonable search for responsive records and provide you with non-exempt responsive records, subject to redaction, 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)