GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

Office of the General Counsel to the Mayor

October 25, 2011

BY EMAIL

Mr. Joseph A. Davis, II
Youth Engaged for Success, Inc.
jdavisii@youthengaged.org

Re: Freedom of Information Act Appeal 2011-68/72

Dear Mr. Davis:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) ("DC FOIA"), dated September 19, 2011, and amended on September 26, 2011 (the "Appeal"). You ("Appellant") assert that the Office of the State Superintendent of Education ("OSSE") improperly withheld records in response to your request for information under DC FOIA dated July 18, 2011 (the "FOIA Request") by failing to recite the specific exemption for the redactions in the document produced and making redactions for documents that it is required to make public under 34 C.F.R. § 76.106(c).

Background

Appellant's FOIA Request sought records related to the resignation of Mr. Derrick Blue. By email dated July 19, 2011, OSSE acknowledged receipt of the FOIA Request and stated that it would respond on or before August 3, 2011. By email dated September 12, 2011, OSSE provided a response to Appellant. [1]

On Appeal, Appellant challenges the response to the FOIA Request as set forth above.[2] In its response, by email dated October 17, 2011, OSSE reaffirmed and elaborated upon its position.

[1] Appellant initiated an appeal when the response was not received by August 3, 2011. The appeal, Freedom of Information Act Appeal 2011-70, was dismissed as moot in light of the response dated September 12, 2011.

[2] Appellant has made multiple filings with respect to this and other matters. The original filing with respect to the FOIA Request was designated as Freedom of Information Act Appeal 2011-72. Appellant amended the appeal, but such amendment was designated as Freedom of Information Act Appeal 2011-68. As both Freedom of Information Act Appeal 2011-68 and Freedom of Information Act Appeal 2011-72 relate to the same FOIA request, they have been consolidated for the purpose of rendering a decision.

OSSE stated that the search produced nine responsive emails.[3] Two of the emails were Mr. Blue's resignation letter. The resignation letter was withheld based upon "DCMR § 3113.6, which expressly excludes information that is required to be included in an Official Personnel Folder from disclosure." The other emails were produced, with redactions for personal information whose disclosure would constitute a clearly unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2). OSSE states: "All of the redacted information related to the subject's new position including, but not limited to, where the new position is located, what his new duties will be, and what day he will start." OSSE states that upon review of the Appeal, it has reviewed the redactions and has proposed that some of the redacted information be disclosed, including the names of some District and federal government employees.

Discussion

It is the public policy of the District of Columbia (the "District") 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, DC FOIA creates the right "to inspect … and … copy any public record of a public body . . ." Id. at § 2-532(a). Moreover, in his first full day in office, the District's Mayor Vincent Gray announced his Administration's intent to ensure that DC FOIA be "construed with the view toward 'expansion of public access and the minimization of costs and time delays to persons requesting information.'" Mayor's Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. Id. at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and 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).

Appellant asserts that OSSE has failed to recite and, therefore, justify the specific exemption for the redactions in the document produced and has made redactions for documents that it is required to make public under 34 C.F.R. § 76.106(c).

First, we will address the contention of Appellant regarding the application of 34 C.F.R. § 76.106(c) to the FOIA Request. 34 C.F.R. § 76.106(c) provides: "A State shall make the following documents available for public inspection: . . . (c) All documents that the Secretary transmits to the State regarding a program."[4]

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[3] Although it is not material to the decision, as a matter of clarification of the administrative record, it appears from our examination that there were nine responsive documents produced and an additional two documents which were withheld.

[4] 34 C.F.R. § 76.106 provides: " § 76.106 State documents are public information.
A State shall make the following documents available for public inspection:
(a) All State plans and related official materials.

This argument fails for two reasons. First, none of the documents would appear to constitute "documents" within the meaning of the regulation. We interpret subsection (c) to refer to official documents of a formal nature. The emails between Mr. Blue and the Department of Education refer to status updates, the scheduling of conference calls, and the bullet points for a proposed conference call, none of which would be within the contemplation of this regulation. Second, the documents covered by the regulation are not within the scope of the FOIA Request. While the disclosure of such information is not improper, see *Larson v. Dep't of State*, 2005 U.S. Dist. LEXIS 35713, 49-50 (D.D.C. Aug. 10, 2005), an agency is not required to produce information that is not responsive to a FOIA request. *California ex rel. Brown v. Nat'l Highway & Traffic Safety Admin.*, 2007 U.S. Dist. LEXIS 36958 (N.D. Cal. May 8, 2007); *Wilson v. United States DOT*, 730 F. Supp. 2d 140, 156 (D.D.C. 2010). We note, as well, that the redactions are limited to a small portion of the records provided to Appellant.

Second, we will address the propriety of the redactions made pursuant to the exemptions asserted by OSSE. As to two of the documents, representing resignation letter, as well as certain redactions in other documents, OSSE contends that selection certificates are not permitted to be disclosed under 6 DCMR § 3112.8 (personnel rules). Accordingly, the contention of OSSE is that disclosure is exempt under D.C. Official Code § 2-534(a)(6), which provides an exemption for information specifically exempt from disclosure by statute if the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. In this instance, OSSE cites a rule under the District of Columbia Municipal Regulations for which there is no statutory counterpart. Accordingly, it is dubious that a personnel rule alone can support an exemption which requires statutory authority. However, that is not the end of the inquiry. The rule cited by DOC is rooted in personal privacy considerations, which considerations are addressed by exemptions under DC FOIA or disclosures would constitute a clearly unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2). OSSE has cited this exemption for other redactions.

D.C. Official Code § 2-534(a)(2) ("Exemption (2)") provides for 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." By contrast, D.C. Official Code § 2-534(a)(3)(C) ("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." It should be noted that the privacy language in this exemption is broader than in Exemption (2). While Exemption (2) requires that the invasion of privacy be "clearly unwarranted," the adverb "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 DOJ v. Reporters Comm. for Freedom of Press*, 489

(b) All approved subgrant applications.
(c) All documents that the Secretary transmits to the State regarding a program."

U.S. 749, 756 (1989). In this case, because it involves personnel records, not investigatory records compiled for law-enforcement purposes, the matter would be judged by the standard for Exemption (2).

An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether there is a sufficient privacy interest present.

> [A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. See *Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976); *Simpson v. Vance*, 208 U.S. App. D.C. 270, 648 F.2d 10, 14 (D.C. Cir. 1980); *Sims v. CIA*, 206 U.S. App. D.C. 157, 642 F.2d 562, 575 (D.C. Cir. 1980). That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. See *Simpson*, 648 F.2d at 14. But it also reflects the employee's more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has obtained and kept in the employee's personnel file.

Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984).

Moreover, it has been recognized that "while the privacy interests of public officials are 'somewhat reduced' when compared to those of private citizens, 'individuals do not waive all privacy interests . . . simply by taking an oath of public office.'[citation omitted.]" *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008).

The resignation letter, found in two different records, contains personal information such as job history, the effective date of the resignation, home address, and personal email address, in which Mr. Blue has a sufficient personal privacy interest. The redactions on the other documents involve the new position of Mr. Blue and the details regarding such position in addition to personal information of the type found in the resignation letter. There is a sufficient personal privacy interest in this information.

The redactions on the documents as originally provided to Appellant also included, as stated by OSSE in its response, the names of some District and federal government employees as well as some related identifying information. There is a personal privacy interest in such information as disclosure of the names of government employees in a file may result in further contact and questioning. For instance, the courts have found that a disclosure that a person was involved in conducting an underlying investigation prior to decision may result in further contact and questioning by third parties. See *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005); *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008). OSSE now proposes that some of these names now be disclosed. However, we believe, as OSSE did at the time that originally provided the records to Appellant, that there was a sufficient privacy interest in these names and the related identifying information.

As stated above, the second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the 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 about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773 (1989).

The redactions in this case relate to personal information such as job history, a new position outside government and related details, home address, personal email address, and the names of government employees. The disclosure of the records withheld, or the redactions in the other records, will not contribute anything to public understanding of the operations or activities of the government or the performance of OSSE. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). While there may be a public interest in revealing the identity of a high-level government official involved in wrongdoing, there is generally not such an interest when lower-level employees are involved. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984).

> In the usual case, we would first have identified the privacy interests at stake and then weighed them against the public interest in disclosure. See *Ray*, 112 S. Ct. at 548-50; *Dunkelberger*, 906 F.2d at 781. In this case, however, where we find that the request implicates no public interest at all, "we need not linger over the balance; something ... outweighs nothing every time." *National Ass'n of Retired Fed'l Employees v. Horner*, 279 U.S. App. D.C. 27, 879 F.2d 873, 879 (D.C. Cir. 1989); see also *Davis*, 968 F.2d at 1282; *Fitzgibbon v. CIA*, 286 U.S. App. D.C. 13, 911 F.2d 755, 768 (D.C. Cir. 1990).

Beck v. Department of Justice, 997 F.2d 1489, 1494 (D.C. Cir. 1993).

Accordingly, the public interest in disclosure here does not outweigh the individual privacy interest. With the exception noted below, we find that the decision of OSSE was correct.

D.C. Official Code § 2-534(b) provides, in pertinent part, that "any reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section." In this case, the fact that Mr. Blue has resigned is known and has been revealed by the records which have already been produced. Therefore, the portion of the resignation letter notifying

OSSE of his resignation does not sufficiently implicate a privacy interest and the letter can be produced, but with redactions. The redactions should be as follows: (1) Mr. Blue's home address, his telephone number, and his email address; (2) the name of the agency director of human resources; and (3) in the body of the letter, the resignation date in paragraph 1 and all of paragraphs 2 through 4.

Conclusion

Therefore, the decision of OSSE is upheld in part and reversed and remanded in part. OSSE shall provide the resignation letter with the redactions noted in the previous paragraph of this decision.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Tracey Langley