

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-016**

January 15, 2020

VIA ELECTRONIC MAIL

Mr. William Lennon

RE: FOIA Appeal 2020-016

Dear Mr. Lennon:

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 pursuant to DC FOIA.

Background

On September 16, 2019, you submitted a FOIA request to MPD for potential impeachment material provided to the U.S. Attorney's Office for the District of Columbia (“USAO”) regarding a named MPD officer, including information taken from the Personnel Performance Management System (“PPMS”) and the “officer supplement”. On October 2, 2019, MPD denied your request stating that the records you are seeking are considered personnel records and are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”).

On October 24, 2019, this Office received your appeal challenging MPD’s denial of your request. You argue that MPD’s withholding of the records was erroneous. Specifically, you argue that the requested records were gathered from the PPMS and related to a USAO misdemeanor theft case, which was ultimately covered by the Washington Post and the Washington City Paper. You also argue, broadly, that the disciplinary history of MPD officers should be accessible to District residents, whom they are sworn to protect.

This Office notified MPD of your appeal and requested its response. MPD provided its response on November 13, 2019.¹ In its response, MPD reaffirms its position that the responsive records are protected from disclosure pursuant to Exemption 2, and further asserts that the privacy exemption under D.C. Code §§ 2-534(a)(3)(C) (“Exemption 3(C)”) is also applicable. MPD argues that there is a substantial privacy interest in protecting the privacy of the requested records against public disclosure. Finally, MPD asserts that there is no public interest, in the context of DC FOIA, in favor of disclosing the records.

¹ A copy of 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. *See 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. *See 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 prevents disclosure of “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” Under Exemption 2, 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). 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]onstitute an unwarranted invasion of personal privacy.” D.C. Official Code § 2-534(3)(C). 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).

The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id.* A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. The instant matter concerns a request for materials regarding a named officer, which were retrieved from the PPMS and referenced in a notice filed by USAO in a criminal matter. According to MPD, PPMS is the system used by the agency to track internal investigations, as well as investigations conducted by the Internal Affairs Bureau. As such, these records constitute “investigatory records compiled for law enforcement purposes” under D.C. Code § 2-534(a)(3)(c), and find that the named officer has an interest in protecting the privacy of the requested records against public disclosure. *See Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981)(“[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)].”). 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. *See Bast v. DOJ*, 665 F.2d 1251, 1254 (D.C. Cir. 1981).

The second part of the privacy analysis examines whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. 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 this case, you argue that the officer's records from the PPMS should be disclosed because they were considered relevant by USAO in a case in which a particular defendant was charged with a misdemeanor. You also argue that because the case was covered by the Washington Post and Washington City Paper, it is clearly one of public interest. However, we find that disclosing the individual officer's records would not "contribute *significantly* to public understanding of the operations or activities of the government." *See Berger v. I.R.S.*, 487 F. Supp. 2d 482, 505; *see also Hines v. D.C. Bd. of Parole*, 567 A.2d 909, 912 (D.C. 1989) (noting that "courts are generally reluctant 'to give third parties access to the presentence investigation report prepared for some other individual or individuals'"). While the public may be interested in such information, it is unclear how providing this PPMS information would further the understanding of the public of MPD's performance of its statutory duties. As a result of the existence of a privacy interest and the lack of a relevant public interest in the records at issue, MPD was justified in withholding the records pursuant to Exemptions 2 and 3(C) of the DC FOIA.²

Conclusion

² MPD notes, and this office has considered, that the officer's PPMS records were never published or entered into evidence in open court and that the parties entered into a Consent Protective Order relating to the PPMS/CADRPTS Materials – both of which buttress the privacy implications at stake.

Based on the forgoing we affirm MPD's withholding of responsive records and dismiss your appeal.

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: Teresa Quon Hyden, Assistant General Counsel, MPD (via email)