GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-017

January 28, 2020

VIA ELECTRONIC MAIL

William Lennon

RE: FOIA Appeal 2020-017

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"), on the grounds that the Metropolitan Police Department ("MPD") improperly responded to your September 24, 2019 request for a copy of the body worn camera ("BWC") video of an arrest of an individual in a hotel lobby.

Background

On October 10, 2019, MPD responded to your September 24, 2019 FOIA request for public records denying your FOIA request. On October 25, 2019, you submitted an appeal challenging MPD's denial. On November 20, 2019, MPD submitted a response to your appeal.[1] In MPD's response, MPD states that the request for the BWC video was properly denied, pursuant to D.C. Official Code § 2-534(a)(2) and § 2-534(a)(3)(C), because disclosure of the BWC video would constitute an unwarranted invasion of personal privacy.

Discussion

It is the public policy of the District of Columbia 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." In aid of that policy, DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18).

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). Accordingly, decisions construing the

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[1] A copy of MPD's response to your appeal is attached to this decision.

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).

Exemption 2

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). The first part of the 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*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personally identifiable information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g*., *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994).

With regard to the privacy interest arising from investigative records of law enforcement agencies, the courts have long-recognized that "individuals, whether they be suspects, witnesses, or investigators" have a "strong interest" in "not being associated unwarrantedly with alleged criminal activity." *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Stern v. FBI*, 737 F.2d 84, 91- 92 (D.C. Cir. 1984)). Without a doubt, "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Branch v. FBI*, 658 F.Supp. 204, 209 (D.D.C.1987): *see also Roth v. DOJ*, 642 F.3d 1161, 1175 (D.C. Cir. 2011) (noting that "being associated with a quadruple homicide would likely cause [third parties] precisely the type of embarrassment and reputational harm that Exemption 7(C) is designed to guard against"), reh'g en banc denied, No. 09-5428 (D.C. Cir. Nov. 14, 2011); *Neely v. FBI*, 208 F.3d 461, 464-66 (4th Cir. 2000) (finding that FBI Special Agents and third-party suspects have "substantial interest[s] in nondisclosure of their identities and their connection[s] to particular investigations").

In this case, you contend that D.C. Code § 2-534(a)(2) and (a)(3)(C) do not apply because the BWC video was shown in open court. But as stated by the U.S. Supreme Court in *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), an individual may still have a privacy interest in identifying information "that might be found after a diligent search of courthouse files, county archives, and local police stations," but is not freely available to the public. *Id.* at 764. The information is thus "practically obscure." MPD notes in its appeal response that the BWC video of the arrest in question is not available on Courtview, the D.C. Superior Court's eAccess System. A search of the court's files would be required to locate the requested footage. Therefore, the footage of the arrest is "practically obscure" and the arrestee's privacy interest therein remains intact. We agree.

Therefore, we conclude that individual(s) depicted in the BWC video are entitled to the privacy protections afforded under D.C. Code § 2-534(a)(2) and (a)(3)(C).

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest in disclosure. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of "public interest" if it would shed light on an agency's conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

> 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.

Id. at 1492-93.

The U.S. Supreme Court in *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989), limited the public interest standard to the FOIA's "core purpose" of "contribut[ing] significantly to public understanding of the operations or activities of the government." *Id.* at 776. More succinctly put, the requested information must show "what the Government is up to" in order to satisfy the public interest requirement. *Id.* at 781. In this matter, you contend that the arrest was covered in the media and therefore there is a public interest in the arrest. However, mere media coverage of an arrest without more does not implicate the type of public interest required under FOIA (information that sheds light on an agency's conduct) that would outweigh the privacy interest.

<u>Conclusion</u>

Based on the foregoing, we believe MPD had sufficient authority under DC FOIA to withhold the requested BWC video of an arrest of an individual in a hotel lobby, and we hereby dismiss your appeal. This constitutes the final decision of this Office with respect to your appeal. 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, Assistant General Counsel
MPD (via email)