GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-031

January 22, 2020

VIA E-MAIL

Mr. Peter Spaulding

RE: FOIA Appeal 2020-031

Dear Mr. Spaulding:

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 challenge the response you received from the Metropolitan Police Department ("MPD") to your request for a record of call and written communications with MPD that prompted a visit on September 17, 2019 to a particular property in the District of Columbia.

Background

On November 14, 2019, MPD denied your FOIA request on the basis that MPD does not keep a record of 911 calls. On November 14, 2019, you responded by email and clarified that you were not looking for a 911 system call. Rather, you believe that the communication was an "anonymous tip" called into the MPD main switchboard -- most likely on September 17, 2019. On November 14, 2019, MPD responded to your email clarification, noting that the "anonymous tip" would not be disclosed in order to protect the privacy of the caller. In addition, MPD noted that the release of the information sought would constitute a clearly unwarranted invasion of personal privacy and therefore is exempt from disclosure under D.C. Official Code § 2-534(a)(2) ("Exemption 2") and D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3"). You appealed that decision on November 17, 2019, indicating that you did not necessarily know whether the call was an anonymous call. Further, you indicated that if the call were not anonymous, MPD would have no basis for asserting the privacy exemption. You also indicated that even if the call was anonymous, MPD had an obligation to reasonably segregate the non-exempt portions of the call.

On December 17, 2019, MPD provided a response to your appeal.[1] In its response to the appeal, MPD confirmed that the call was made by an anonymous source and confidential information disclosed by a confidential source would be exempt from production under D.C. Official Code § 2-534(a)(3)(D), D.C. Official Code § 2-534(a)(2) and (a)(3)(C). MPD also noted that the source's voice mail message no longer existed and there were no transcripts of the voice mail message or of the conversation between the officer and the confidential source. Therefore, the

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

only responsive records are the emails between the confidential source and the officer and between the officer and her supervisor. On December 19, 2020, MPD supplemented its response with a declaration from the MPD officer confirming that the information regarding activities at the property in question were provided in a confidential manner from a confidential source. The officer states that she received a voice mail message, followed up with an email. The officer then spoke with the source over the telephone. Based on the caller's comments to the officer, she concluded that the caller wanted to be treated as a confidential source and the officer agreed to treat the caller as a confidential source.

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." 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 . . ." 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.

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 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

Exemption 2 permits the withholding 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). 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*. The courts have found "as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . ." *Reporters Comm. For Freedom of Press*, 489 U.S. at 780. Here, we find that disclosing the emails from the confidential source to the officer and then from the officer to his supervisor, would constitute an unwarranted invasion of that person's personal privacy.

The second part of the Exemption 2 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. 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.

We conclude that the release to you of the emails between the source and the officer and the officer's supervisor would be an unwarranted invasion of privacy of the confidential source and 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'"). As a result of the existence of a privacy interest and the lack of a relevant public interest in the records at issue, MPD had sufficient authority under DC FOIA to withhold the records sought pursuant to Exemption 2 of the DC FOIA.[2]

Exemption 3 – Investigatory Records Compiled for Law-Enforcement Purposes

D.C. Official Code § 2-534(a)(3)(D) exempts from disclosure investigatory records compiled for law enforcement purposes [3] if production of the records would disclose: (1) "the identity of the a confidential source" and (2) "in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation . . . confidential information furnished only by the confidential source." Courts have held that express promises of confidentiality are protected under D.C. Official Code § 2-534(a)(3)(D) and its federal equivalent. *See, e.g., Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (finding information provided under express assurances of confidentiality to be exempt from disclosure); *Jones v. FBI*, 41 F.3d 238, 248 (6th Cir. 1994) (express confidentiality justified based on Court's in camera review); *Kortlander v. BLM*, 816 F. Supp. 2d 1001, 1014 (D. Mont. 2011) (finding names, identifiers, and information provided by confidential sources properly withheld because law enforcement agency provided express assurances of confidentiality). In this instance, the substance of the disclosure to the officer related to an illegal consignment store that was operating in the District. As such, we agree that MPD had sufficient authority to withhold emails documenting a conversation between a police officer and a confidential source about an alleged illegal consignment store under D.C. Official Code § 2-534(a)(3)(D).

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[2] Since we find a privacy interest under D.C. Official Code § 2-534(a)(2), we do not address the related privacy interest under D.C. Official Code § 2-534(a)(3)(C).

[3] Records are considered "investigatory records" under Exemption 3 if they were compiled pursuant to an investigation focused 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 FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 814-15

(D.C. 2014) ("the phrase 'investigatory records compiled for law enforcement purposes' in exemption 3 [of the District's FOIA] refers only to records prepared or assembled in the course of 'investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified [persons], acts which could, if proved, result in civil or criminal sanctions.'").

Segregability

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). In this case, deletion of the confidential email disclosures to the officer along with the information that could lead to the identification of the confidential source would produce an edited document with little or no informational value. Therefore, we conclude that redaction of the emails in question is not required.

Conclusion

Based on the forgoing, we affirm MPD's nondisclosure and dismiss your appeal. This constitutes 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, Assistant General Counsel, MPD (via email)