

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-034**

January 22, 2020

VIA ELECTRONIC MAIL

Ronetta Johnson

RE: FOIA Appeal 2020-034

Dear Ms. Johnson:

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 Office of Police Complaints (“OPC”) did not properly respond to your request for any complaints, bad cop information and disciplinary reports on 18 Metropolitan Police Department (“MPD”) police officers.

Background

In response to your request for the complaints, bad cop information and disciplinary reports on 18 MPD police officers, OPC responded indicating that it would neither admit nor deny that it was withholding the requested information because admitting that any records exist for an officer implies that the named officer was under investigation.¹ Along with the Glomar response, OPC also states that any responsive documents, if they exist, would be exempt under D.C. Official Code § 2-534(a)(2) (“Exemption 2”) and D.C. Official Code § 2-534(a)(3)(C) (“Exemption 3(C)"). You appealed that decision, and on November 22, 2019, OPC filed a response to your appeal reaffirming its decision to withhold the requested documents under Exemptions 2 and 3, if any such documents exist.²

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.

¹ We note that the use of the “Glomar” response has been previously supported by this Office. *See, e.g.,* FOIA Appeal 2019-84 (March 5, 2019); FOIA Appeal 2019-18 (November 6, 2018); FOIA Appeal 2016-09 (dated November 3, 2015) and FOIA Appeal 2015-58 (May 4, 2015).

² A copy of OPC’s response to your appeal is attached to this decision.

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 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).

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).

Records are considered “investigatory records” under Exemption 3(C) 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 *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.

Under both Exemption 2 and 3(C), 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)³. “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)).

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

Here, we find that there is a sufficient privacy interest associated with a police officer who is being investigated for wrongdoing based on allegations. “[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). An agency is justified in withholding 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. *Bast*, 665 F.2d at 1254.

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. We find that the same interest is present with respect to civil disciplinary sanctions that could be imposed on a law enforcement officer.

With regard to the second part of the privacy analysis under Exemptions 2 and 3(C), we examine whether the public interest in disclosure is outweighed by the individual privacy interest at issue. On appeal, you do not offer an argument concerning the public interest. Instead you argue solely that the requested records would be valuable to your client in his criminal case. Generally, the interest of a private litigant is not considered a public interest in the context of FOIA. *See, e.g., Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005).

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 the instant matter, while disclosing the records at issue might shed light on OPC’s performance of its statutory duty to investigate complaints against police officers, we find that this public interest does not outweigh the invasion of the individual police officer’s privacy

interests under Exemptions 3(C) and (2) of the DC FOIA.⁴ The records you seek may consist of mere allegations of wrongdoing, the disclosure of which could have a stigmatizing effect regardless of accuracy.

We say “may consist” because OPC has maintained that they will neither confirm nor deny whether complaint records exist relating to the law enforcement officer about whom you seek records. This type of response is referred to as a “Glomar” response, and it is warranted when the confirmation or denial of the existence of responsive records would, in and of itself, reveal information exempt from disclosure. *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 68 (2nd Cir. 2009). Glomar responses have been found appropriate when the requested records would reveal whether an employee was investigated for misconduct.⁵

We find the use of a Glomar response here to be justified because if a written complaint or subsequent investigation against the officer you have named exists, identifying the written records would likely result in the harm that the DC FOIA exemptions were intended to protect; no amount of redaction could protect the privacy interest at issue. *See Mueller v. U.S. Dep’t of the Air Force*, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, “deleting [her] name from the disclosed documents, when it is known that she was the subject of the investigation, would be pointless”).

Therefore, considering the data that OPC has made available to the public on its website concerning its sustained findings of misconduct against MPD officers and the aggregate data on the OPC complaint process overall, there is no public interest in the records in question that would outweigh the privacy interests at issue in this matter.

⁴ We also note that any public interest that would be served by disclosing the wrongdoings of police officers might be served by OPC’s annual, redacted, online report of all sustained findings of misconducts, along with extensive data regarding the type of allegations made and the demographics of complainants. *See Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). OPC’s annual reports may be found at <http://policecomplaints.dc.gov/page/annual-reports-for-OPC>. In addition, as to your client’s Fifth Amendment rights, OPC correctly notes that there are separate procedures in a criminal court case for your client to get documents to aid in his defense.

⁵ *See also Beck v. DOJ*, 997 F.2d 1489 (D.C. Cir. 1993) (affirming Glomar response to request for records concerning misconduct by two DEA agents); *Lewis v. DOJ*, 733 F. Supp. 2d 97, 112 (D.D.C. 2010) (“If an individual is the target of a FOIA request [for investigative records], the agency to which the FOIA request is submitted may provide a ‘Glomar’ response, that is, the agency may refuse to confirm or deny the existence of records or information responsive to the FOIA request on the ground that even acknowledging the existence of responsive records constitutes an unwarranted invasion of the targeted individual’s personal privacy.”); *Smith v. FBI*, 663 F. Supp. 2d 1, 5 (D.D.C. 2009) (“Because . . . confirmation of records concerning ‘[a]ny adverse action or disciplinary reports on [named] Agent . . .’ would necessarily reveal the precise information Exemption 6 shields, the Glomar response was proper.”).

Conclusion

Based on the foregoing, we conclude that MPD's response to your request for public records is in accordance with the requirements of DC FOIA, and we 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: Alicia Yates, Legal Counsel
OPC (via email)