GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-038

January 15, 2020

VIA ELECTRONIC MAIL

John McFarland

RE: FOIA Appeal 2020-038

Dear Mr. McFarland:

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 Department of Consumer and Regulatory Affairs ("DCRA") did not fully respond to your request for monthly reports prepared by two DCRA employees that were sent to another identified agency official.

Background

On October 2, 2019, you submitted a request to DCRA for any monthly reports submitted by two DCRA permit center employees to an identified DCRA official. On October 23, 2019, DCRA responded to your FOIA request indicating that the request had been granted, in part, and denied, in part. DCRA indicated that the job description of one of the two employees did not include preparing monthly reports and there were no monthly reports for that employee. However, the agency did provide you with the monthly reports of the second employee but redacted information from the reports. On November 25, 2019, you appealed DCRA's response to your FOIA request. Your appeal challenges the failure of DCRA to provide monthly reports for one of the two employees. You contend that the agency's statement that the specific employee did not prepare monthly reports did not make sense. On December 9, 2019, DCRA responded to your appeal describing the search. [1] The response indicates that 12 emails with responsive records were provided to you. The agency provided no monthly reports for the second employee because the agency represents that no such reports exist. In addition, a Vaughn Index was provided to this Office identifying the redactions in the documents that were produced to you. According to DCRA, the redactions were done under D.C. Official Code § 2-534(a)(2), which exempts from disclosure information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

[1] A copy of the DCRA response to your appeal is attached to this decision.

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. *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. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Adequacy of Search

In determining whether an agency conducted an adequate search in response to a records request, the test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. U.S. Dep't of Justice*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

> 'the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.' [*Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a 'reasonableness test to determine the 'adequacy' of a search methodology, *Weisberg v. United States Dep't of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

To conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of records requested; and (2) search for the records in those locations. *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). This first step includes determining the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

In this instance, you deem the response of DCRA to be deficient because no monthly reports for the second employee were provided to you. DCRA's response to your appeal details the steps

taken by the agency to search for responsive records. The search was conducted by a supervisor of the two employees. Indeed, this was the same supervisor mentioned in your request to whom the reports would have been sent. That supervisor located 13 records that were responsive to your request for one of the two employees at issue -- one of the 13 records was a duplicate. The agency produced 12 records for that employee to you. The reports were redacted if the record included the employee's reason for not being at work on a particular date. As to the second employee, DCRA stated that no reports exist for that employee because his responsibilities and job duties did not include preparing the monthly reports that were prepared by the other employee. The search confirmed that to be the case. Based on the foregoing, we find that this search was adequate.

Exemption 2

In this matter, DCRA provided a Vaughn Index identifying the basis for the redactions in the documents that were produced to you. In each instance, the redaction was limited to the reason the employee provided for being absent from work on a particular date. The redactions were done pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2").

We note that 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). 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*. Here, the agency deleted the reason the employee was absent from work. The personal reasons for an employee's absence from work triggers a privacy interest under Exemption 2. Moreover, 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). In this case, DCRA identified the employee (of the two employees in your request) who produced the responsive monthly reports. Therefore, the identity of the person preparing the reports was disclosed to you. This is an additional support for the redaction of the reason for that employee's absence from work in the monthly reports that DCRA provided to you.

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.

Based on the nature of your request, we find no public interest in the personal reason for an employee's absence from work on a particular date.

Conclusion

Based on the foregoing, we conclude that DCRA conducted an appropriate search and had sufficient authority under DC FOIA to justify the redactions made to the records produced in response to your FOIA request. Therefore, 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: Erin J. Roberts
FOIA Officer
DCRA (via email)