GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-045

January 23, 2020

VIA ELECTRONIC MAIL

Mr. Andrew Giambrone

RE: FOIA Appeal 2020-045

Dear Mr. Giambrone:

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 failure of the Department of Consumer and Regulatory Affairs ("DCRA") to properly respond to your request for subpoenas issued to DCRA in 2019.

Background

On November 6, 2019, you submitted a request to DCRA for "copies of any and all subpoenas, including grand jury subpoenas, from federal agencies or courts that were received by DCRA in 2019." On November 27, 2019, DCRA responded to your request. You were informed that the agency was releasing all subpoenas that it had located with the exception of grand jury subpoenas. You appealed that decision to this Office and on December 31, 2019, DCRA responded to your appeal.[1] In its response, DCRA indicated that it was withholding the grand jury subpoenas pursuant to D.C. Official Code § 2-534(a)(6)(A) and (B) ("Exemption 6"). Exemption 6 allows the withholding of "[i]nformation specifically exempted from disclosure by statute . . ." In addition, DCRA indicated that the grand jury subpoenas were withheld under D.C. Official Code § 2-534(a)((3)(A)(i) and D.C. Official Code § 2-534(a)((3)(C) because the release of the grand jury subpoenas would interfere with ongoing law enforcement procedures and constitute an unwarranted invasion of personal privacy. DCRA does not rely on D.C. Official Code § 2-534(a)(2) ("Exemption 2") for withholding the subpoenas. However, as discussed in this decision, we conclude that Exemption 2 applies to the grand jury subpoenas.

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

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

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. *See 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 6 - Disclosure Prohibited by Other Law

D.C. Official Code § 2-534(a)(6)(A) and (B) ("Exemption 6") authorizes the withholding of documents that are "specifically exempted from disclosure under other statutes" provided that the statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld." Exemption 6 therefore requires a separate statute that prohibits disclosure of the requested information. In its appeal response, DCRA does not identify any statute that mandates withholding grand jury subpoenas. However, DCRA withheld the subpoenas in their entirety relying on *Lopez v DOJ*, 393 F.3d 1346, 1350 (D.C. Cir. 2005). In *Lopez*, the D.C. Circuit determined that Rule 6(e) of the Federal Rules of Criminal Procedure satisfies the statutory exemption requirement for federal FOIA. *See also Fund for Constitutional Gov't v. Nat'l Archives & Records Serv*., 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Rule 6(e) of Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before grand jury, satisfies the federal equivalent of Exemption 6's "statute" requirement). And, in FOIA Appeal 2019-065, this Office also determined that Rule 6(e) qualifies as a statute that can authorize the withholding of records under Exemption 6.

We do not, however, as noted in FOIA Appeal 2019-065, agree that Rule 6(e) is applicable to grand jury subpoenas issued to agencies like the Office of the City Administrator ("OCA") or in this case, to DCRA. Indeed, the plain text of Rule 6(e)(2)(A) states that only those listed in Rule 6 (e)(2)(B) are bound by the secrecy requirements of Rule 6(e).[2] Therefore, we do not read *Lopez* as broadly as DCRA does. In *Lopez*, the agency that received the request for grand jury records was the Department of Justice ("DOJ"), the prosecutor in the related grand jury proceeding. As the prosecutor, the DOJ was bound by the secrecy obligations created by Rule 6(e) because the prosecutor falls under the enumerated category of "government attorney." *See* Fed. R. Crim. Proc. 6(e)(2)(B)(vi). Rule 6 (e)(2)(A) also specifies that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Since DCRA does not fit within any category listed under Rule 6(e)(2)(B), Rule 6 (e) (and therefore Exemption 6) cannot be used by DCRA to justify withholding the grand jury subpoenas in their entirety.

[2] *See* Fed. R. Crim. Proc. 6(e)(2)(A) ("No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).")

Exemption 2 – Unwarranted Invasion of Personal Privacy

D.C. Official Code § 2-534(a)((2) exempts from production under DC FOIA records containing personal information whose disclosure would "constitute an unwarranted invasion of personal privacy," Although DCRA does not rely on this privacy exemption, we conclude that the information contained in the subpoenas falls within Exemption 2.

Under Exemption 2, determining whether disclosure of a record would constitute an unwarranted 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). 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). The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id*.

> The privacy interest in the FOIA balancing analysis "encompasses the individual's control of information concerning his or her person," including names, addresses, and other identifying information. *Padou*, *supra*, 29 A.3d at 982. Moreover, individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature. *U.S. Dep't of State v. Washington Post Co*., 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).

District of Columbia v. FOP, 75 A.3d 259, 265-66 (D.C. 2013)

This Office has reviewed the grand jury subpoenas and confirmed that the subpoenas include the names of the government attorneys involved in the investigation, the names of agents with the Federal Bureau of Investigation ("FBI") handling the investigation and the names of persons or entities whose information or documents are being requested in the subpoenas. More importantly, the grand jury subpoenas identify the individuals or entities who may be witnesses or subjects of grand jury investigation. These individuals or entities have an interest in protecting the privacy of the requested records containing their names 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 do not argue or even show how disclosing the information in the grand jury subpoenas will "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). We therefore conclude that DCRA was justified in withholding the grand jury subpoenas pursuant to Exemption (a)(2) of the DC FOIA. [3]

Segregability

The last issue to be considered is whether DCRA can redact the withheld records to protect personal privacy interests. 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. However, we also note that a document need not be redacted if the agency can 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). Based on our review of the grand jury subpoenas, if the identifying information or specific factual details of the investigations are deleted from the grand jury subpoenas, the result would be subpoenas with only boiler-plate language which we conclude would have no informational value to you.

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[3] Because we find that Exemption 2 applies to the subpoenas, we do not need to address whether D.C. Official Code § 2-534(a)((3)(A)(i) and D.C. Official Code § 2-534(a)((3)(C) (Exemption 3) also applies to the grand jury subpoenas.

Conclusion

Based on the foregoing, we find that there is sufficient support under DC FOIA to permit DCRA to withhold the grand jury subpoenas that were issued to DCRA in 2019. 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.

Sincerely,

Mayor's Office of Legal Counsel

cc: Genet Amare, FOIA Officer
DCRA (via email)