GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-126

July 8, 2020

VIA ELECTRONIC MAIL

Mr. Christopher Bangs

RE: FOIA Appeal 2020-126

Dear Mr. Bangs:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 ("DC FOIA"). In your appeal, you assert that the Department of Employment Services ("DOES") improperly redacted records in response to three DC FOIA requests you submitted.

Background

On October 28, 2019, you filed a DC FOIA request to DOES for itemized reports maintained by DOES for Fiscal Year Q2 2019, which were submitted pursuant to the Tipped Wage Workers Fairness Amendment Act of 2018 by employers who pay the tipped minimum wage to employees ("Tipped Wage Reports"). *See* Request, 2020-FOIA-00701. DOES provided you with hardcopies of those reports that redacted employees' names but were otherwise unredacted. In an earlier appeal, you challenged the format in which you were provided these documents and DOES's redaction of employee names. DOES subsequently provided you with a searchable Excel file with the data from those reports, again with employee names redacted. The Mayor's Office of Legal Counsel denied your appeal as to the redactions, holding that employee names were protected from disclosure by DC FOIA Exemption 2. *See* FOIA Appeal Decision 2020-071.

You subsequently sought Tipped Wage Reports for Q3 2019. *See* Request, 2020-FOIA-02300. In addition, believing that DOES may have provided with you with Q1 data rather than Q2 data in response to your earlier request, you filed a new request seeking an electronic spreadsheet of data for either Q1 or Q2, whichever had not previously been provided to you. *See* Request, 2020-FOIA-3444. Finally, you requested an electronic spreadsheet of data for Q4 2019. *See* Request, 2020-FOIA-3445.

Not having received responses to those three requests, you appealed to the Mayor's Office of Legal Counsel on February 19, 2020. Later that day, DOES responded to your pending DC FOIA requests by providing you with the Tipped Wage Report data in electronic spreadsheet form for the three remaining FY 2019 quarters for which you submitted requests. The

spreadsheets contained the names of the employers submitting Tipped Wage Reports, along with various employer contact information, but omitted other information from the Tipped Wage Reports, including names of individual employees, the total hours worked and hourly rate without tips for each employee, total employer paid wages during the quarter, and each employee's average total hourly rate including tips ("Withheld Data"). The Tipped Wage Report data which you were provided on February 19, 2019, differed from the data which you were provided in response to Request No. 2020-FOIA-00701, where DOES omitted only the names of individual employees but left the other data in place.

In omitting the Withheld Data from the spreadsheets it provided you, DOES invoked D.C. Code § 2-534 (a)(2) ("Exemption 2"), which exempts certain information from disclosure if the disclosure would constitute an unwarranted invasion of privacy, and D.C. Code § 2-534 (a)(1) ("Exemption 1"), which exempts certain commercial or financial information in documents from disclosure, to the extent the disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained. According to DOES, releasing the Withheld Data would constitute an unwarranted invasion of privacy under Exemption 2. In addition, DOES argues that releasing the Withheld Data would result in substantial harm to the competitive position of the entities filing Tipped Wage Reports. You argue that neither of those exemptions applies to the Withheld Data.

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).

Exemption 2

Exemption 2 applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Determining whether disclosure of a record would constitute an unwarranted invasion of personal privacy requires a balancing of individual privacy interests against the public interest in disclosing the records. *See Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

The DC FOIA requires disclosure unless a privacy interest is implicated, meaning the first inquiry is "whether there is any privacy interest at stake in the information sought." *FOP v. District of Columbia*, 124 A.3d 69, 76 (2015) (internal quotation marks omitted). "The privacy interest that is entitled to protection encompasses the individual's control of information

concerning his or her person, including names, addresses, and other identifying information," *id.*, as well as "private financial information," *WP Co., LLC v. D.C.*, 2019 D.C. Super. LEXIS 6, *6. Moreover, "[w]hile disclosures of personal information may amount to only *de minimis* invasions of privacy when the identities of the individuals involved are withheld, the privacy interest that would be compromised by linking the personal information to particular, named individuals is greater than *de minimis*." *FOP*, 124 A.3d at 77 (internal quotation marks omitted).

On appeal, DOES maintains that the Withheld Data was omitted to prevent the unwarranted invasion of the personal privacy of employees and their employers. DOES argues that the amount of money an individual earns in private employment is personal, as are the salaries employers pay. DOES also suggests that it may be possible to learn the identities of specific employees based on certain knowledge of the employers and other unspecified publicly available information.

You argue, however, that any privacy interest implicated by disclosure of the Withheld Data is *de minimis* because the anonymized financial information cannot readily be connected to any individual employee. In support, you cite case law holding that certified payroll records submitted by government contractors are typically not exempt for personal-privacy reasons as long as employee names are redacted.

We agree that Exemption 2 does not exempt the Withheld Data from disclosure. As an initial matter, although DOES asserts that nondisclosure is justified in part to protect the personal privacy of employers, this exemption does not apply to corporations. *See FCC v. AT&T Inc.*, 562 U.S. 397, 402 (2011). Only the privacy interests of *individuals* are cognizable under Exemption 2. With respect to the privacy of individuals, there is no doubt that disclosing employee names along with personal financial information would implicate a privacy interest, as we held with respect to your first appeal. *See* Decision, FOIA Appeal 2020-071. As you note, however, it is unclear how the disclosure of pay data, stripped of employee names, would lead to the identification of individual workers, except perhaps in unusual circumstances.

Furthermore, we are persuaded by the weight of authority holding that payroll data, redacted for names and other personally identifiable information, generally is not exempt for personal-privacy reasons. *See*, *e.g.*, *Torres Consulting & Law Grp., LLC v. NASA*, 666 Fed. App'x 643, 645 (9th Cir. 2016). ("[A]ny privacy interest in payroll data after names, addresses, and social security numbers are redacted is trivial."); *cf. Hoskins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 83 (2d Cir. 1991) ("[A]lthough HUD released the certified payroll records, it first deleted all employee names, addresses, and social security numbers, citing the FOIA's principal privacy exemption.").

Because no protected privacy interest is at stake in the Withheld Data, we conclude that DC FOIA Exemption 2 cannot shield its disclosure.[1] Our conclusion differs, though, with respect to Exemption 1.

[1] The employee names themselves, of course, remain properly withheld under Exemption 2. *See* Decision, FOIA Appeal 2020-071.

Exemption 1

To withhold information under Exemption 1, the information must be: (1) a trade secret or commercial or financial information; (2) that was obtained from outside the government; and (3) the disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained. *See* D.C. Code § 2-534(a)(1). The D.C. Circuit has instructed that the terms "commercial" and "financial" as used in the federal FOIA statute should be accorded their ordinary meanings. *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

There is no dispute that the Withheld Data—including the total hours worked by employees, hourly rate without tips for employees, total employer paid wages, and each employee's average total hourly rate including tips—constitute commercial or financial information received from outside the government. The only dispute, then, is whether the disclosure of that information would result in substantial harm to the competitive position of the entity from whom that information was obtained, *i.e.*, the employers that filed Tipped Wage Reports with DOES.

Exemption 1 has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); s*ee also Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). However, in construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010); *see also McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so.") (internal citations omitted).

With respect to the Withheld Data, we believe the disclosure of the confidential financial information provided to DOES by private employers would likely expose those employers to competitive injury or economic harm from competitor restaurants and hotels. For each employer, the Withheld Data can be used to determine how much particular employer pay employees, how many employees they maintain, their total overall labor costs, and total revenue collected in the form of tips. This information, most of which employers typically do not share, could give competitors a view of the financial strength of the employers or financial problems those employers may be facing. This information would also give competitors significant insight into how these employers structure their business operations, which the kind of information generally protected by this exemption. *See, e.g.*, *People for Ethical Treatment of Animals v. U.S. Dep't of Agric.*, No. CIV. 03 C 195-SBC, 2005 U.S. Dist. Lexis 10586, at *7 (D.D.C. May 24, 2005) ("[I]nsights into the company's operations, give competitors pricing advantages over the company, or unfairly advantage competitors in future business negotiations."); *see also Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (finding that insights into the operational strengths and weaknesses of a business allow others to engage in "[s]elective

pricing, market concentration, expansion plans, . . . take-over bids[,] . . . bargain[ing] for higher prices . . . unregulated competitors would not be similarly exposed.").

We thus conclude that release of the Withheld Data is likely to lead to substantial harm to the competitive position of the listed employers and is therefore protected from disclosure under Exemption 2.[2]

Conclusion

Based on the forgoing, we find that DOES's decision to omit the Withheld Data from the spreadsheets it produced to you was not justified under Exemption 2. However, we agree with DOES that Exemption 1 protects the Withheld Data from disclosure and affirm its decision on that basis.

This shall constitute 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 DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Tonya A. Robinson, General Counsel/FOIA Officer
DOES (via email)

[2] You are correct that, in response to an earlier request, DOES previously provided you with a spreadsheet that included the type of data that DOES now seeks to withhold with respect to your current requests. However, as DOES explained in response to your appeal, it previously provided that information in error.