

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-138**

September 2, 2020

VIA ELECTRONIC MAIL

Ms. Tiffany Montgomery

RE: FOIA Appeal 2020-138

Dear Ms. Montgomery:

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 Board of Ethics and Government Accountability (“BEGA”) improperly denied access to records you requested under the DC FOIA.

Background

On December 22, 2019, you filed a DC FOIA request to BEGA for records of all training, courses, or educational activity undertaken by a specific program support assistant at BEGA since his date of hire. On December 24, 2019, BEGA denied your request, asserting Exemption 2 under the DC FOIA. In particular, BEGA claimed that releasing an “individual employee’s personnel and training records would constitute a ‘clearly unwarranted invasion of personal privacy.’”

You then appealed to the Mayor’s Office of Legal Counsel. In your appeal, you appear to complain about the employee you identify, based on your time as an employee at BEGA yourself. You also criticize certain supervisors and management employees in the agency.

In responding to your appeal, BEGA maintains that disclosing the records you request would constitute a clearly unwarranted invasion of personal privacy without a countervailing public benefit.¹ BEGA further points out that you do not explain why disclosing the information you seek about a named employee would not be a clearly unwarranted invasion of personal privacy, and you do not identify the public interest to be served by releasing the information

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

¹ A copy of BEGA’s response is attached.

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).

In your request, you seek what are effectively personnel records about a particular employee, which generally implicate personal privacy interests. For that reason, courts have held, for instance, that government employees have a personal privacy interest in personnel records like times sheets, which reveal an employee’s “sick leave, vacation time, *training*,” and similar information. *Berger v. IRS*, 487 F. Supp. 2d 482, 504 (D.N.J. 2007) (emphasis added) (internal citation and quotation marks omitted). Indeed, courts have grouped “performance appraisals and training” information together as personnel information that generally implicates a privacy interest. *Bell v. DOD*, 2018 U.S. Dist. LEXIS 166101, at *41 (D.D.C. 2018).

Moreover, it is well-established that “[d]isclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial intrusions into privacy.” *Cameranesi v. United States DOD*, 856 F.3d 626, 638 (9th Cir. 2017); *see also id.* at 639 (“We have similarly held that the potential for harassment from third parties gives rise to a privacy interest.”). Based on your appeal, it appears that the information you request may well be used to harass or embarrass a specific employee.

Against that privacy interest, you have identified no public interest served by the disclosure of this employee's educational or training records such that disclosure would be justified.² Nor do we see such a public interest. As a result, we believe that BEGA was justified in denying your request.

Conclusion

Based on the forgoing, we affirm BEGA's decision to deny your FOIA request under DC FOIA Exemption 2.

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: Rashee Raj, General Counsel
BEGA (via email)

² To be sure, we have ordered the release of specific and limited training records in appropriate circumstances. In FOIA Appeal 2017-48, for example, we directed the MPD to release the radar training certification of a police officer, where that officer issued the requestor a citation and the officer was required to hold a specific certification in order to issue that type of citation. We did not find any stigma or personal privacy interest implicated by the disclosure of a specific certification that the officer was required to have. By contrast, your request seeks all training, courses, and education completed by an employee since he was hired and appears likely to be used for harassment or embarrassment of that employee.