

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-214**

October 25, 2022

**VIA ELECTRONIC MAIL ONLY**

Mr. Fritz Mulhauser

RE: FOIA Appeal 2020-214

Dear Mr. Mulhauser:

This letter is in response to the administrative appeal that you have submitted to the Mayor pursuant to the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531, *et seq.* In your appeal, you have challenged the response of the Metropolitan Police Department ("MPD") to your June 18, 2020 FOIA request, identified as 2020-FOIA-06021, which sought the following:

[A]ll FOIA requests for video from body worn cameras worn by MPD members deployed in or near Lafayette Square on June 1, 2020, from noon to midnight. (The requested date range was from June 1, 2020 to June 18, 2020).

On June 24, 2020, MPD responded to your request by providing a listing of requests received for body worn camera footage from June 1, 2020 through June 24, 2020. Citing the personal privacy exemption of FOIA, D.C. Code § 2-534(a)(2), MPD redacted certain information falling under the following categories: "Requester Name", "Organization", "Request Description", "Comments" and "Primary User."

In your appeal, you have asserted that MPD's response is incomplete because "it was created as a display of some parts of the requests...", as opposed to "[s]ome additional elements of all or many FOIA requests such as requester address, fee waiver request, etc. [that] are not displayed in the table." Moreover, you have challenged the propriety of the redactions MPD made, pursuant D.C. Code § 2-534(a)(2), to the various categories of information contained within the produced document.

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. 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. Code § 2-532(a). The right to inspect a public record, however, is subject to exemptions. D.C. Code § 2-534.

D.C. 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).

### *Adequacy of Request*

As an initial matter, there is reasonable ambiguity in the interpretation of your request for “[A]ll FOIA requests for video from body worn cameras...” While this could be interpreted as one for the individual components of each request, e.g. emails, correspondence, and other documents or information that could be contained in a file, as you have asserted, it could also rationally be one for the categorical “Request Description”, as MPD has provided.

FOIA requires that requests describe the records sought with sufficient detail to allow an agency employee familiar with the subject area of the request to locate the records following a reasonable search. More specifically, 1 DCMR § 402.4 states that:

A request shall reasonably describe the desired record(s). Where possible, the specific information regarding names, places, events, subjects, dates, files, titles, file designation or other identifying information shall be supplied.

Here, this Office agrees with MPD’s response in the context of the description of the records sought, as provided, versus a request for more particularized or specific information about each request, e.g. please provide the entirety of information about any request for video from body worn cameras...

### *D.C. Code § 2-534(a)(2) (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 Dep’t 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 D.C. 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). In general, there is a sufficient privacy interest in personal identifying 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).

Even if a substantial privacy interest exists, Exemption 2 can be overcome if a FOIA requester can establish a greater public interest in disclosure of the records. *See NARA v. Favish*, 541 U.S. 157, 172 (2004). If there is a privacy interest in non-disclosure and a public interest in disclosure, the competing interests must be balanced to determine whether disclosure “would constitute a clearly unwarranted invasion of personal privacy.” *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982). This balancing of private and public interests must be conducted with respect to the purpose of FOIA, which is “to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-61 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Official information that sheds light on an agency’s performance of its statutory duties falls squarely within the statutory purpose of FOIA. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct. *Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773.

#### *Requester’s Name; Primary User*

When weighing the privacy interest of the names of requesters and the “primary user[s]”, which is understood to be the name of the MPD employee processing the request, versus the public interest in disclosure, it is unclear how the withheld information has any bearing on the conduct of MPD as an agency. In the absence of any countervailing public interest, we find that MPD was justified in withholding this information.

#### *Organization*

The Supreme Court in a unanimous decision has determined that under federal FOIA corporations do not have “personal privacy” that is protected by the privacy exemptions. *FCC v. AT&T Inc.*, 562 U.S. 397, 409-410 (2011). The Court reached this conclusion despite the fact that the definition of “person” in the federal FOIA includes a corporation. *Id.* Although corporations are entitled to certain protections under FOIA through the trade secrets and commercial information exemption, they do not have a personal privacy interest as it is contemplated in the associated FOIA exemption. *Id.* at 408-40309 (“[W]e far more readily think of corporations as having “privileged or confidential” documents than personally private ones.”). To the extent MPD has redacted the name of a private corporation under the “Organization” category, this information should be released.

#### *Request Description*

Upon a review of a selection of the requests for which the “Request Description” has been redacted, it appears that MPD has redacted this information, in part, because it is non-responsive to the FOIA request, i.e. these are not requests for video from body worn cameras worn by MPD members deployed in or near Lafayette Square on June 1, 2020. The practice of withholding non-responsive portions of responsive documents is not permissible under D.C. FOIA. *See e.g., Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016). To the extent that MPD has redacted purely non-responsive information, it should be released. However, the information contained therein may

still be subject to other FOIA exemptions.

### *Comments*

Although the redactions made to the “Comments” may not be justified under D.C. Code § 2-534(a)(2), they would be properly withheld under D.C. Code § 2-534(a)(4) (Exemption 4). Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]" The deliberative process privilege rests "on the policy of protecting the 'decision making process of government agencies' . . . and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *Id.* at 152. According to the legislative history accompanying the federal FOIA, the purpose of FOIA Exemption 4 is to encourage the "frank discussion of legal and policy issues." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

It is well established that an internal letter, memorandum, or other form of written communication is protected from disclosure under the deliberative process privilege if it is both "predecisional" in nature and "deliberative" in character. A record in the possession, custody, or control of a public body is "predecisional" when it is "prepared in order to assist an agency decision maker in arriving at [a] decision," *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184-85 (1975), such as "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. A record maintained by a public body contains information that "reflects the give-and-take of the consultative process", it is of a "deliberative" character. *Id.*

As such, MPD should reevaluate the information redacted under the category of “Comments” and release any that is not otherwise exempt under Exemption 4, or any of the other D.C. FOIA exemptions.

### Conclusion

Based on the foregoing, we affirm MPD’s decision, in part, but remand this matter to disclose any non-exempt information designated under the categories of “Organization”, “Request Description”, and “Comments”. This constitutes the final decision of this Office. You may challenge any subsequent response to your request by separate appeal to this Office. If you are dissatisfied with this decision, you may commence a civil action in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Brandynn Reaves, MPD FOIA Officer (via email only)