

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-073**

September 28, 2022

VIA ELECTRONIC MAIL ONLY

Mr. Jeffrey Light

RE: FOIA Appeal 2021-073

Dear Mr. Light:

This letter is in response to the administrative appeal that you have submitted on behalf of your client Jason Leopold 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 the January 25, 2021 FOIA request of Mr. Leopold, identified as 2021-FOIA-02360, which sought the following:

[A] copy of the firearm/gun permit issued to Representative Lauren Boebert.

On January 1, 2020, MPD denied your request asserting the release of any records would constitute a clearly unwarranted invasion of privacy and is exempt from disclosure pursuant to D.C. Official Code § 2-534 (a)(2) and (a)(3)(C).

D.C. Official Code § 2-534(a)(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." In 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).

D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3") is more expansive than Exemption 2, and protects from public disclosure information contained in an investigatory file that "would constitute an unwarranted invasion of privacy." Exemption 3 lacks the key word "clearly" that is contained in Exemption 2, and therefore is a broader privacy privilege.

In assessing MPD's decision to withhold the requested information, the first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under 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 D.C. Circuit has readily found a privacy interest in information related to an individual. *See, e.g., Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006) (names and

addresses of individuals associated with abortion medication); *National Association of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) (parcel numbers where pygmy owls were spotted); *Painting & Drywall Work Preservation Fund, Inc. v. Department of Housing & Urban Development*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (names and addresses of construction contractors); *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (names and addresses of employees eligible to vote); *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (names and addresses of third parties mentioned in witness interviews); *FLRA v. Department of Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989) (names and addresses of agency employees); The Supreme Court has said the same. See *Department of Defense v. FLRA*, 510 U.S. 487, 501, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994) (“it is clear that [civil service employees] have some nontrivial privacy interest in nondisclosure” of their addresses). “In the context of an individual residence, the court has recognized that ‘the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant.’ ” *Norton*, 309 F.3d at 35 (internal citation omitted).

The second part of a 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. In the context of D.C. 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; 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. *Id.*

When there is a privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *Beck*, F.2d at 1494.

Here, disclosing records from MPD about an individual—generally and in the context of “firearm/gun permits”, which could vary in meaning, and would also presumptively be a part of an investigation file—who is not yourself, and from whom you have not provided written authorization, would constitute an invasion of the individual’s personal privacy. While you have raised many issues which may have an implication on an individual’s right to privacy in possessing a “firearm/gun permit”, they do not diminish any concerns to the point where they should be disregarded, i.e. at the very least the issue of safety and identification alone present a concern. Further, whether or not an individual person maintains a “firearm/gun permit” reveals very little, at most, about an agency’s conduct—neither in arriving at the decision to issue the same nor with respect to any ongoing obligations as a law enforcement agency. Any viable premise would likely necessitate more than one type of record about one individual.

In your appeal, you have asserted the named individual does not have a right to privacy because she has made certain social media statements. Citing, *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) (“In this case, however, Perot himself has made several public statements indicating that he has offered to aid the federal government

in hostage rescue and drug interdiction operations. Redaction of Perot's name from any responsive documents in the TECS files that involve the subject matter of those disclosures, if those records are not otherwise exempt from disclosure under Exemption 7(C) or other exemptions set forth in in § 552(b)(7), would not serve any useful purpose in protecting his privacy.”)

However, the public nature of information does not necessitate the subsequent release of related documents. *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Long v. United States DOJ*, 450 F. Supp. 2d 42, 68 (D.D.C. 2006) (“the fact that some of the personal information contained in these records already has been made public in some form does not eliminate the privacy interest in avoiding further disclosure by the government.”); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 53 (D.D.C. 2003) (finding that media identification of persons mentioned in a law enforcement file “does not lessen their privacy interests or ‘defeat the exemption,’ for prior disclosure of personal information does not eliminate an individual’s privacy interest in avoiding subsequent disclosure by the government”).

Consistent with this principle, is that only the individuals whose privacy interests are threatened can waive those privacy interests when they are threatened by a FOIA request. *Sherman v. U.S. Dept. of Army*, 244 F.3d. (5th Cir. 2001). Whether or not an official acknowledgement has been made remains an issue. *See e.g., Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)(examining whether the information was previously released, the information matches information previously disclosed and the information requested has already been made public through an official and documented disclosure).

Finally, D.C. Code § 2-534(a)(6) provides for the withholding of “information specifically exempted from disclosure by statute...” (“Exemption 6”). Under D.C. Official Code § 7-2502.11a, “Any record regarding a person who has applied for, received, or had revoked any [firearm] registration [certificate] issued pursuant to this subchapter shall not be made available as a public record under § 2-532.” Similarly, D.C. Official Code § 7-2509.09 provides in pertinent part, “Any record regarding a person who has applied for, received, or had revoked a license shall not be made available as a public record under § 2-532...” Both statutory provisions explicitly state the information sought is exempt from disclosure.

Based on the foregoing, we affirm MPD’s decision.

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)