

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-097**

October 27, 2022

VIA ELECTRONIC MAIL ONLY

Qing Lu

RE: FOIA Appeal 2021-097

Dear Qing Lu:

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 Board of Ethics and Government Accountability ("BEGA") to your January 6, 2021 FOIA request, identified as 2021-FOIA-02388, which sought the following:

[A] copy of the completed investigations of whether D.C. employee Silroy Brown in 2016 improperly sought or obtained paid family/parental leave. The investigations were conducted by D.C. OIG and D.C. Board of Ethics and Government Accountability (BEGA). Please do not deny on basis of this being for an open investigation as OIG's was completed no later than May 2017 and BEGA's no later than July 2017...

On January 22, 2021, BEGA denied your request, in full, pursuant to D.C. Code § 1-1162.12(d) and § 2-534(a)(3)(C).

In your appeal, you have challenged BEGA's withholding pursuant to D.C. Code § 2-534(a)(3)(C) because the right to access should "be generously construed," while "the statutory exemptions from disclosure are to be narrowly construed with ambiguities resolved in favor of disclosure." You have also asserted the segregable portions of the withheld records should be disclosed and the documents would contribute to "the public understand[ing] of the operations or activities of the government."

D.C. Code § 2-534(a)(3)(C) ("Exemption 3") protects from public disclosure information contained in an investigatory file that "would constitute an unwarranted invasion of privacy."

In assessing BEGA'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). 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, personal 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). An employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. *See Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976); *Simpson v. Vance*, 208 U.S. App. D.C. 270, 648 F.2d 10, 14 (D.C. Cir. 1980); *Sims v. CIA*, 206 U.S. App. D.C. 157, 642 F.2d 562, 575 (D.C. Cir. 1980). That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. *See Simpson*, 648 F.2d at 14.

Here, we find that there is a sufficient privacy interest associated with information contained within a BEGA investigatory file. 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. *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981).

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.*

In balancing the privacy interest of an individual named in a BEGA investigation versus any public interest in disclosure, it is unclear how disclosing the requested information is relevant to BEGA's conduct as an agency. When there is a privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). Since the records you seek may consist of allegations or other information that could have a stigmatizing effect, and as they are related to a specifically named individual, BEGA was justified in withholding the records, if any, in their entirety.

Based on the foregoing, we affirm BEGA's decision.

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 in accordance with D.C. Code § 2- 537.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Sheree DeBerry, BEGA FOIA Officer (via email only)