GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-013

April 11, 2023

VIA U.S. REGULAR MAIL

Mr. Omar Rimmer

RE: FOIA Appeal 2022-0013

Dear Mr. Rimmer:

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 August 4, 2021 FOIA request, identified as 2021-FOIA-07073, which sought the following:

> [P]olice, reports associated with case number: 11 OJ 5790, and SXII-23 created by detective Ingrid Harkins[;]
>
> [A]ll police reports or investigative reports associated with case number: 11015 790 that was created by Wallace Carmichael[;]
>
> [A]ll police reports or investigative reports associated with case number: 11055790, and SXII-23[;]
>
> [A]ll email communications from Meghan McNamara email [address omitted] that was sent to Detective Ingrid Harkins, Detective Wallace Carmichael, Anne Harler, government email address and any attachments"

On September 13, 2021, MPD granted your request, in part, and denied it, in part. Specifically, citing D.C. Code §§ 2-534(a)(2) and (a)(3)(c), MPD provided you with a copy of responsive documents that had been redacted to protect the names and other identifying information of third-part individuals. Further, MPD withheld other documents in their entirety because the disclosure of "sexual assault cases, absent authorization from the victim, or proof of representation from the victim's attorney(s)…would constitute as a clearly unwarranted invasion of personal privacy."

D.C. 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. 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 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, 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). Moreover, the D.C. Circuit has held individuals have a "strong interest" in not being associated with unwarrantedly with alleged criminal activity whether they be suspects, witnesses, or investigators. *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990).

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; *see also Ray,* 112 S. Ct. at 549. 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. *See Reporters Committee,* 489 U.S. at 773.

Id. at 1492-93.

In balancing the privacy interest of individuals named in an incident report and that of a victim in a sexual assault case, it is unclear how disclosing this limited, focused information, is relevant to MPD'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. *Beck*, 997 F.2d 1489 at 1494.

In your appeal, you have asserted MPD's response is vague, in that it does not summarize the work done on your FOIA request, the search for records has not been detailed, a Vaughn index was not provided and there is no protectable privacy interest because the withholding are part of the "public domain."

FOIA only requires that, under the circumstances, a search is reasonably calculated to produce

the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

Agencies are not required to create a *Vaughn* index at the initial administrative denial stage. *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) ("Agencies need not provide a *Vaughn* Index until ordered by a court after the plaintiff has exhausted the administrative process."), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996)." The *Vaughn* index is a mechanism to organize FOIA litigation for judges. *Vaughn v. Rosen*, 484 F.2d 820, 827 (1973) ("the District Judge may examine and rule on each element of the itemized list.").

Finally, 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").

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

This constitutes the final decision of 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)