

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-072**

April 25, 2022

VIA ELECTRONIC MAIL

Ms. Denette Mason

RE: FOIA Appeal 2022-072

Dear Ms. Mason:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Office of Human Rights (“OHR”) improperly denied your request for public records under DC FOIA.

Background

On January 25, 2022, you submitted a request to OHR for “[a]ll submissions to/from the The [sic] Respondent” for a particular OHR complaint number. On January 26, 2022, OHR denied your request in full pursuant to D.C. Official Code § 2-534 (a)(6)(A) (“Exemption 6”). The agency stated that “the D.C. Human Rights Act provides that complaints filed with OHR are to be confidential, and only made available to the parties after the case has closed and the reconsideration has passed.” OHR informed you that, as a party to the case, you could resubmit your request after the 30-day reconsideration period passed.

On February 24, 2022, you appealed to this Office stating that “I am the Claimant in this case. During the investigation I was not provided documentation during the progress (response statement, etc.) relating to the case. Now that it is closed [sic] and I am requesting a copy of the files and associated notes for my records.”

On March 7, 2022, OHR responded to your appeal and asserted that it was moot because you had the right to submit a new FOIA request following the close of the matter.¹ Additionally, OHR claimed that it properly denied your request pursuant to Exemption 6. The agency cited D.C. Code § 2-1402.52(c) for the proposition that complaints filed with OHR are confidential and 4 DCMR §§ 723 and 110.4, which state that documents in a complaint file cannot be disclosed until after final resolution of the complaint.

OHR also claimed that “the investigative files at issue, collected as part of OHR’s enforcement of the District’s non-discrimination statute, were exempt from disclosure [pursuant to] D.C.

¹ A copy of OHR’s response to your appeal is attached.

Code § 2-534(a)(3)(A)-(B)[("Exemption 3")].” Finally, OHR contended that your FOIA appeal potentially interfered with OHR’s enforcement duties, and such interference was punishable by fine and imprisonment pursuant to D.C. Official Code § 2-1402.64(a).

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. 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 6

DC FOIA Exemption 6 protects from disclosure “information specifically exempted from disclosure by statute (other than [DC FOIA]), provided that such statute: (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue.” D.C. Official Code § 2-534 (a)(6). The statute upon which OHR relies, D.C. Official Code § 2-1402.52(c), provides that “[t]he identities of persons and properties contained in reports submitted to [OHR]... shall not be made public.

D.C. Official Code § 2–1401.02(16) defines “make public” as “disclosure to the public or to the news media of any personal or business data obtained during the course of an investigation of a complaint... [but does not] include access to such data by... parties to a proceeding.” OHR’s disclosure or information to a requester who was party to the proceedings would not run afoul of the provision.

Exemption 3

We also note that federal courts have consistently held that Exemption 3 of federal FOIA (the equivalent of Exemption 6 of DC FOIA) pertains to statutes, not regulations. *See Anderson v. HHS*, 907 F.2d 936, 950, 951 n.19 (10th Cir. 1990) (regulations, constituting agency’s interpretation of statute, are not entitled to deference in determining whether statute qualifies as exemption under Exemption 3 of federal FOIA); *see also Zanoni v. USDA*, 605 F. Supp. 2d 230, 236 (D.D.C. 2009) (holding that “[w]hen determining whether FOIA Exemption 3 applies, the court ‘must first determine whether the statute is a withholding statute . . . that . . . specifically exempt[s] matters from disclosure’” by “look[ing] at the language of the statute on its face”).

Exemption 3 protects from disclosure “[i]nvestigatory records compiled for law-enforcement purposes... but only to the extent that the production of such records would interfere with

enforcement proceedings, deprive a person of their right to impartial adjudication, and other similar scenarios. In asserting the investigatory records exemption, it is impermissible for an agency to issue a “blanket exemption” of all records in a file by virtue of the records’ location in an investigatory file. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 66 (D.C. Cir. 1986). Here, OHR has not articulated how releasing investigative files during the 30-day reconsideration period interferes with investigation proceedings.

Finally, we note that OHR’s contention that your FOIA appeal may constitute criminal misconduct pursuant D.C. Official Code § 2-1402.64(a) is without basis. By itself, your attempt to exercise your right to submit an administrative appeal to the Mayor in accordance with D.C. Official Code 2-537 demonstrates no misconduct. We would be reluctant to conclude that exercising FOIA appeal rights could ever be considered to “willfully resist, prevent, impede or interfere with” OHR’s enforcement of the District’s Human Rights Act.

Conclusion

Based on the foregoing, we remand this matter to OHR and direct it to promptly disclose to you non-exempt portions of the responsive records or provide a reasonable explanation of the basis for withholding in accordance with DC FOIA.

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 government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Charles Abbott, Alternate FOIA Officer, OHR (via email)
Alexis Applegate, FOIA Officer, OHR (via email)