

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-137**

February 8, 2023

VIA ELECTRONIC MAIL ONLY

Mr. Shawn Musgrave

RE: FOIA Appeal 2022-137

Dear Mr. Musgrave:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the Metropolitan Police Department (“MPD”) to the DC FOIA request of Dhruv Mehrotra.

Background

On October 19, 2021, Mr. Mehrotra submitted a DC FOIA request to MPD, identified as 2022-FOIA- 00471, which sought the following:

A) Transcripts of the Adverse Action Hearing for [MPD Officer R.H.] that began on Wednesday May 25, 2016. The relevant case numbers are: DRB #277-16, IS # 5-003114

B) The government exhibits for this Adverse Action Hearing, which include but are not limited to CD Recordings

MPD denied Mr. Mehrotra’s request on October 26, 2021 for the following reasons:

Upon review, we are unable to locate an authorization or other signed statement allowing the release of any personal privacy data, to the extent that there may be responsive records. The release of such material, if any, would be exempt from release under D.C. Official Code § 2-534 (a)(2) [(“Exemption 2”)]and (a)(3)(C)[(“Exemption 3(C)”)], of the FOIA, which protects information the release of which would constitute an (a clearly) unwarranted invasion of personal privacy, which includes names/personal identifiers and other personal privacy information, including that which would lead to the identity of one or more individuals, including third-parties.

On May 3, 2022, you filed an appeal with this Office asserting “MPD has not demonstrated that *any* of the requested records have a nexus to *any* criminal investigation, as Exemption 3(C) requires. Certainly, MPD cannot use Exemption 3(C) to withhold the requested hearing

transcripts, nor can it withhold any of requested hearing exhibits lacking a demonstrable connection to a criminal investigation.” You also asserted that “[u]nder Exemption 2, the public’s interest in a transparent and accountable police disciplinary system outweighs any de minimis privacy interests.”

Discussion

It is the public policy of the District of Columbia 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 created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. D.C. Code § 2-534.

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).

D.C. Code § 2-534(a)(2) (“Exemption 2”)

Under Exemption 2, 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under DC 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). Government employees generally have a substantial privacy interest with respect to their disciplinary actions and performance evaluations. *See, e.g., Smith v. Dep’t of Labor*, 798 F. Supp. 2d 274, 283-85 (D.D.C. 2011); *see also Bonilla v. DOJ*, 798 F. Supp. 2d 1325, 1332 (S.D. Fla. 2011).

This Office has consistently held there is a sufficient privacy interest associated with an officer’s personnel records and disciplinary history. *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984). (“[A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures.”).

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. The “public interest” in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

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.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

Here, with respect to balancing the privacy interest of the named individual, it is unclear how disclosing the requested material is relevant to MPD’s conduct as a whole. While this Office has previously found a countervailing public interest in information related to an “Adverse Action Hearing” of an MPD officer, this matter is distinguished, not only by-way-of the result of the underlying hearing itself, but also in that the officer for which you seek information is still an active MPD employee. In this circumstance, his privacy interest is not outweighed by any public interest in the disclosure of materials related to a disciplinary review decision that did not amount to his removal.

In the absence of any identified countervailing public interest, we find that MPD may withhold the identified information. Any discussion of D.C. Code § 2-534(a)(3)(C) is reserved at this time.

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.

Conclusion

Based on the foregoing, we affirm MPD’s decision and hereby dismiss your appeal. 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 Superior Court in accordance with D.C. Code § 2-537.

Sincerely,

Mayor’s Office of Legal Counsel

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