

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-187**

April 11, 2023

VIA U.S. MAIL

Kevone Newson

RE: FOIA Appeal 2022-187

Dear Mr. Newson:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 (“DC FOIA”). In your appeal, you have challenged the response of the Metropolitan Police Department (“MPD”) to your DC FOIA request.

Background

On May 31, 2022, you submitted a DC FOIA request to MPD, identified as 2022-FOIA-06992, which sought the following:

[A]ny and all records pertaining to Earl Risby, a paid informant for MPD and DEA. Risby acknowledge that he was a paid informant and that he received money during his testimony in the second trial of US v Andrew Daniels case # F-4633-02 in DC Superior Court before Judge John H. Bayley.

On June 9, 2022, MPD denied your request pursuant to D.C. Code § 2-534 (a)(2) (“Exemption 2”) and D.C. Code § 2-534 (a)(3)(C) (“Exemption 3(C)”) because you did not provide a “signed waiver...or signed authorization for the release of personal privacy records” and therefore the disclosure would constitute a clearly unwarranted invasion of personal privacy.

You filed an appeal with this Office on June 18, 2022 asserting disclosure of the requested records would not constitute an unwarranted invasion of personal privacy because Risby testified in a public criminal proceeding and acknowledged he was a paid informant for MPD.

On July 20, 2022, we notified MPD of your appeal and requested a response. MPD responded on September 15, 2022 reiterating that it properly denied your request pursuant to D.C. Code §§ 2-534 (a)(2) and (a)(3)(C) because there is “no public interest” in disclosure and any release without a waiver would constitute a clearly unwarranted invasion of personal privacy.

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.” 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 the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Code § 2-534. Under DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Code § 2-502(18).

DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

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 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 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 the named individual versus any public interest in disclosure, it is unclear how disclosing the requested 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. *Id.* at 1494.

In your appeal, you have asserted there is a diminished privacy interest because some of the information and testimony is part of the public record. However, under the applicable case law, 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”).

Conclusion

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.

Respectfully,

Mayor’s Office of Legal Counsel