GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-188

April 11, 2023

VIA U.S. MAIL

Kevone Newson
RE: FOIA Appeal 2022-188

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 June 8, 2022, you submitted a DC FOIA request to MPD, identified as 2022-FOIA-06999, which sought the following:

> [A]ny and all benefits, payments, monies, or other assistance paid to Judd. any and all information that Judd was a confident source, informant, and/or special employee for MPD and all other pertinent information. Any and all records and information that Judd was placed in witness protection program/witness security program and related records.

On June 9, 2022, MPD denied your request pursuant to D.C. Code § 2-534(a)(2) and D.C. Code § 2-534(a)(3)(C) because the release of such records without "a signed waiver…or signed authorization for the release of personal privacy records from any individual(s) who may be the subject of, who may otherwise be identified within, or who may have a personal privacy interest in the disposition of such records" would constitute a clearly unwarranted invasion of personal privacy. Further, MPD noted that "no information has been provided that demonstrates that the release of this type of personal privacy information would shed light on the operations and activities of the government."

On June 18, 2022, you filed an appeal with this Office asserting disclosure of the requested records would not constitute an unwarranted invasion of personal privacy because Judd is deceased, Judd testified in a public criminal proceeding, federal prosecutors already disclosed some of the requested information, and "there is a strong public interest in uncovering wrongdoing by the government."

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 Exemption 2 and Exemption 3(C) because there is no public interest in disclosing the requested information 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.

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

Two provisions of DC FOIA provide exemptions relating to 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.

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). The Supreme Court has held "as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . ." *Reporters Comm. For Freedom of Press*, 489 U.S. at 780.

And the D.C. Circuit has held individuals have a "strong interest" in not being associated unwarrantedly with alleged criminal activity whether they be suspects, witnesses, or investigators. *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990). Additionally, the public nature of information does not necessitate the subsequent release of related documents. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762; *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"). Here, we find that there is a cognizable privacy interest in the requested records because third parties have a substantial interest in not being associated with alleged criminal activity.

In considering the privacy rights of the deceased, courts have found that "one's own ... interest in privacy ordinarily extend beyond one's death." *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001). Rather, the privacy interest of an individual may only be diminished, not eliminated, if that individual is deceased. *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) ("We have recognized that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased"); *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) ("The fact of death, therefore, while not requiring the release of identifying information, is a relevant factor to be taken into account in the balancing decision whether to release information").

The second part of the analysis examines whether an individual privacy interest is outweighed by the public interest in disclosure. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC 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 this case, you have not articulated any viable public interest in favor of disclosure. Although you assert that releasing the requested information will shed light on MPD's failure to disclose exculpatory material, you have not provided evidence of government misconduct. Bare allegations of misconduct do not satisfy the public interest requirement under FOIA. *NARA v. Favish*, 541 U.S. 157, 175 (2004). When there is a privacy interest in a record and no countervailing public interest, the protected information may be withheld from disclosure. *See,*

e.g. Beck, 997 F.2d at 1494.

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").

Conclusion

Based on the foregoing, we affirm MPD's decision to withhold the requested records, and we 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 in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel