

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-194**

February 8, 2023

**VIA ELECTRONIC MAIL ONLY**

Ms. Maggie Abernethy

RE: FOIA Appeal 2022-194

Dear Ms. Abernethy:

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 your DC FOIA request.

Background

On May 13, 2022, you submitted a DC FOIA request to MPD, identified as 2022-FOIA-06352, which sought the following:

[A]ll records, defined to include all memorialized information in any form (including, but not limited to, notes, documents, photographs, tape recordings, computerized messages), in the custody and control of the Metropolitan Police Department related to the homicide of Adrian Smith, which took place on August 4, 1993, near 4957 G Street, SE, Washington, DC...

MPD responded to your request on June 2, 2022 as follows:

A search located the enclosed 334 pages of records responsive to your request. I have determined to deny portions of the released records under D.C. Official Code § 2-534 (a) (2) and (a)(3)(C), which cover information of a personal nature where the public disclosure thereof would constitute a(n) (clearly) unwarranted invasion of personal privacy. In this case, the withheld information reflects individuals’ names/personal identifiers and other personal privacy information, including that which would lead to individuals’ identities.

A small portion is withheld under D.C. Official Code § 2-534 (a)(4)[(“Exemption 4”)], as it consists of inter or intra-agency material which reflects the deliberative process, which includes personal opinions, recommendations, and advice of staff members, and were used to arrive at a final agency decision. The disclosure of such material would inhibit the open

and candid expression of such views in similar future deliberations, could confuse the public as to the official agency position on an issue, and have a detrimental effect on our decision making process.

On July 28, 2022, you filed an appeal with this Office asserting MPD's redactions were overly broad because, "[t]he privacy exemptions do not...permit MPD to...redact the *substance* of what a witness informed MPD during the course of MPD's investigation." You also state that, for witnesses who testified at the homicide trial, "it was...not appropriate for MPD to...redact the witness's name" and the public interest "in correcting wrongful convictions and shedding light on police practices that lead to wrongful convictions" outweighs the privacy interest of "what a particular witness told police almost three decades ago." Finally, you have challenged MPD's withholding pursuant to the deliberative process privilege because, "MPD has provided no explanation for how the 'draft material' it identified as exemption-worthy under D.C. Code § 2- 534(a)(4) is permissible." Moreover, "when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable."

On August 11, 2022, we notified MPD of your appeal and requested a response. To date, this Office has not received a response.

### 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 FOIA statute. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute 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."

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 Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-773 (1989). 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, 109 S.Ct. at 1482; *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, 109 S.Ct. at 1482.

*Id.* at 1492-93.

An individual who is a witness has a sufficient privacy interest in his or her name and other identifying information which is in a government record. Disclosure may lead to unwanted contact and harassment. *See Lahr v. NTSB*, 569 F.3d 964 (9th Cir. 2009) (privacy interest found for witnesses regarding airplane accident); *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1023 (9th Cir. 2008)(privacy interest found for government employees who were cooperating witnesses regarding wildfire); *Lloyd v. Marshall*, 526 F. Supp. 485 (M.D. Fla. 1981) (“privacy interest of the witnesses [to industrial accident] and employees is substantial . . .” *Id.* at 487); *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984)(privacy interest found for witnesses regarding industrial accident); *Codrington v. Anheuser-Busch, Inc.*, 1999 U.S. Dist. LEXIS 19505 (M.D. Fla. 1999) (privacy interest found for witnesses regarding discrimination charges). An individual does not lose his privacy interest because his or her identity as a witness may be discovered through other means. *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984); *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 501 (1994). (“An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”).

In balancing the privacy interest of witnesses (and their personally identifiable information), it

is unclear how disclosing this information is relevant to MPD's conduct as an agency. As such, MPD's decision to redact this information is affirmed.

With respect to your contention as to the propriety of the other redactions made by MPD pursuant to D.C. Code §§ 2-534(a)(2) and (a)(3)(C), MPD has not provided the documents at issue for our *in-camera* review or addressed the arguments you have raised in your appeal. As such, this Office is unable to make a determination on this issue.

*D.C. Code § 2-534(a)(4) ("Exemption 4")*

Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]" This exemption has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). As a result, Exemption 4 encompasses the deliberative-process privilege, see *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011), as well as the attorney-client and attorney work-product privileges. The deliberative-process privilege protects agency documents that are both pre-decisional and deliberative. *Coastal States Gas. Corp. v. Dep't of Energy*, 617 F. 2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it was generated before the adoption of an agency policy, and it is deliberative if it "reflects the give-and-take of the consultative process." *Id.* The point is to encourage open, frank discussions on matters of policy between subordinates and superiors; protect against premature disclosure of proposed policies before they are finally adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

With respect to your dispute as to the applicability of Exemption 4, MPD has not provided the documents at issue for our *in-camera* review or addressed the arguments you have raised in your appeal. As such, this Office is unable to make a determination on this issue.

Conclusion

Here, MPD's redactions with respect to names and personal identifying information are affirmed. With respect to the other redactions, we are unable to make a determination as to the applicability of the exemptions asserted by MPD, i.e. D.C. Code §§ 2-534(a)(2),(a)(3)(C), and (a)(4). For this reason, we remand this matter back to MPD to provide you with the requested records with only the names and personal identifying information redacted.

This constitutes the final decision of this Office with respect to your appeal. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in Superior Court in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

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