**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**EXECUTIVE OFFICE OF THE MAYOR**

**Mayor's Office of Legal Counsel**

October 27, 2017

VIA E-MAIL

Mr. Paul Wagner

RE: FOIA Appeal 2018-14

Dear Mr. Wagner:

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 Metropolitan Police Department ("MPD") improperly withheld record you requested pertaining to a named police officer.

Background

You submitted a FOIA request to the MPD for records related to an investigation of a named officer who was involved in a police shooting incident that occurred on September 11, 2016.

MPD denied your request, stating that disclosure of the record would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) ("Exemption 2") and D.C. Official Code § 2-534(a)(3)(C) ("Exemption 3(C)"). MPD's response noted that your request had not attached authorization from the officer named in your request.

On appeal, you challenge MPD's response, asserting that "[t]he public has the right to know what kind of officers are patrolling their streets." Additionally, you rhetorically ask: "Since adverse action Trial Boards are open to the public why wouldn't the public also have the right to see the evidence against [the named officer]?" Lastly, you request that a redacted copy of the investigatory report be made available to you.

MPD sent this Office a response to your appeal on October 20, 2017,[1] reaffirming its earlier position that under Exemption 3(C) the record is exempt in its entirety because disclosure would constitute an unwarranted invasion of privacy. Finally, MPD argues that you have not asserted wrongdoing on the part of the department, and that release of the investigative report would not shed light on the department's actions in carrying out its responsibilities. As a result, MPD argues that the public interest applicable under DC FOIA is not present to balance against the privacy interests of the individual involved in the record sought.

[1] A copy of the MPD's response is attached.

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 stature 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).

*Information Already Made Public*

Your appeal rhetorically asks: "Since adverse action Trial Boards are open to the public why wouldn't the public also have the right to see the evidence against [the named officer]?" Under the applicable case law, your argument that the public nature of an adverse action necessitates the release of related documents is not persuasive. *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."); *See also* FOIA Appeal 2017-53 (finding that media coverage of an incident that took place in a pizza parlor does not void the privacy interests of individuals involved.). As a result, the fact that an adverse action is a public proceeding is not dispositive of the privacy interest analysis here.

*Exemptions 2 and 3(C)*

Exemptions 2 and 3(C) of the DC FOIA relate to personal privacy. Exemption 2 applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Exemption 3(C) provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy." While Exemption 2 requires that the invasion of privacy be "clearly unwarranted," the word "clearly" is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption 2. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

Records pertaining to investigations conducted by the MPD are subject to Exemption 3(C) if the investigations focus on acts that could, if proven, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (The exemption "applies not only to criminal enforcement actions, but to records compiled for civil enforcement

purposes as well."). Since the record you seek relate to investigations that could result in civil or criminal sanctions, Exemption 3(C) applies to your request.

Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of one's individual privacy interests against the public interest in disclosing the disciplinary files. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 756. On the issue of privacy interests, the D.C. Circuit has held:

> [I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity. Protection of this privacy interest is a primary purpose of Exemption 7(C)[2]. "The 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators."

*Stern v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (quoting *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)).

Here, we find that there is a sufficient privacy interest associated with the named police officer investigated. "[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under [(3)(C)]." *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981). An agency is justified in not disclosing documents that allege wrongdoing even if the accused individual was not prosecuted for the wrongdoing, because the agency's purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *Bast*, 665 F.2d at 1254.

As discussed above, the D.C. Circuit in the *Stern* case held that individuals have a strong interest in not being associated with alleged criminal activity and that protection of this privacy interest is a primary purpose of the investigatory records exemption. *Stern*, 737 F.2d at 91-92. We find that the same interest is present with respect to disciplinary sanctions that could be imposed on police officers. Even if records consist of mere allegations of wrongdoing, disclosure of the record could have a stigmatizing effect regardless of accuracy.

With regard to the second part of the privacy analysis under Exemption 3(C), we examine whether the individual privacy interest here is outweighed by the public interest, therefore warranting disclosure. On appeal, you assert that "The public has the right to know what kind of officers are patrolling their streets." The public interest in the disclosure of a public employee's disciplinary files was addressed by the court in *Beck v. Department of Justice, et al*., 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held:

---

[2] Exemption 7(C) under the federal FOIA is the equivalent of Exemption 3(C) under the DC FOIA.

> The public's interest in disclosure of personnel files derives from the purpose of the [FOIA]--the preservation of "the citizens' right to be informed about what their government is up to." *Reporters Committee,* 489 U.S. at 773 (internal quotation marks omitted); *see also Ray,* 112 S. Ct. at 549; *Rose,* 425 U.S. at 361. This statutorypurpose 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. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.

*Id*. at 1492-93.

In the instant matter, disclosing the investigatory file you are seeking would not shed light on MPD's performance of its statutory duties and would constitute an invasion of the individual police officer's privacy interests under Exemptions 3(C) and (2) of the DC FOIA.

*Segregability*

The last issue to be considered is whether MPD can redact the withheld record to protect personal privacy interests. D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009).

MPD asserts that redaction would not protect privacy interests here because your request identifies the officer who is the subject of the investigatory report. As a result, no amount of redaction made to the investigatory file would sufficiently protect the officer's identity. We agree with MPD and find that it was justified in withholding the responsive record in its entirety.

Conclusion

Based on the forgoing, we affirm the MPD's decision and dismiss your appeal.

This shall constitute 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)