

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



Mayor's Office of Legal Counsel



February 1, 2018

VIA ELECTRONIC MAIL

Ms. Mary Sabio

RE: FOIA Appeals 2018-68, 2018-69

Dear Ms. Sabio:

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”), on the grounds that the Office of the Chief Financial Officer (“OCFO”) improperly responded to your requests under the DC FOIA.

Background

On December 15, 2017, OCFO denied a FOIA request you had submitted¹ for records relating to sexual harassment and discrimination complaints filed against a named employee. OCFO asserted that the records were withheld pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”).²

On December 19, 2017, you filed a subsequent request to OCFO for similar documents, along with salary history records. On January 12, 2018, OCFO responded to your second request by providing responsive salary history records, and by reiterating your appeal rights as to the previously denied complaint records.

On January 18, 2018, you filed these appeals challenging the December 15, 2017 denial of complaint records, and the formatting of salary history records provided in the January 12, 2018 response. Although you filed two appeals, because the issues are related this decision will address both. You argue that because the target of the complaint records you seek is deceased that no privacy interest exists that can justify OCFO’s withholding.

This Office notified OCFO of your appeals on January 18, 2018. OCFO responded to this Office on January 25, 2018, reaffirming its position that the complaint was properly withheld pursuant

¹ There was not a dated copy of this request attached to your appeal.

² Exemption 2 prevents disclosure of “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

to Exemption 2.³ OCFO's response asserts that death diminishes but does not completely remove a privacy interest. OCFO further argues that there is no public interest in disclosing allegations made against an individual employee, as it does not shed light on the agency's performance of its statutory duties.

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. Official 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. Official 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. Official Code § 2-534.

The 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).

The record at issue here is a withheld sexual harassment and discrimination Equal Employment Opportunity ("EEO") complaint, made against a named employee. The responsive record constitutes an allegation and does not represent a formal finding. 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). In general, there is a sufficient privacy interest in EEO complaints. *Wilson v. Dep't of Transp.*, 730 F. Supp. 2d 140, 156 (D.D.C. 2010) (concluding that "[b]ecause [Equal Employment Opportunity] charges often concern matters of a sensitive nature, an EEO complainant has a significant privacy interest"), *aff'd*, No. 10-5295, 2010 WL 5479580 (D.C. Cir. Dec. 30, 2010); *Ferrigno v. DHS*, No. 09-5878, 2011 WL 1345168, at *8 (S.D.N.Y. Mar. 29, 2011) (determining that "the Supervisor, the Investigator, and the interviewees whose statements are recorded in the memoranda at issue all have a more than de minimus privacy interest in these memoranda, as being identified as part of Plaintiff's [employment-related harassment] complaint could subject them to embarrassment and harassment").

On appeal, you argue that the named employee:

³ A copy of OCFO's response is attached. OCFO's response indicates that it will be providing to you the salary histories in the format that you requested. As a result, we consider your appeal regarding formatting to be moot and will not address it further.

is deceased and therefore it is improper for these materials to be withheld by asserting the exemption protecting private personnel information. If [the employee] was alive, an argument could be made that the balancing test of privacy interest versus the operations of the DC lottery has been made and that the privacy interest was greater. But this obviously is not the case here since [the employee] is deceased. . . a privacy exemption cannot be exerted for a deceased person.

On this point, we find OCFO's citations to be persuasive, that:

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").

That the named employee is deceased is not dispositive of whether the documents must be released. Instead, we find that the deceased employee does have at least a *de minimis* privacy interest in the complaint records, which consist of allegations, pursuant to Exemption 2. *See Wilson*, 730 F. Supp. 2d at 156. Additionally, privacy interests can be held for sensitive records by a decedent's surviving close family relatives. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004).

The second part of the Exemption 2 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 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.

Aside from arguing that no personal privacy interest is associated with personnel records of a deceased employee, you have not articulated a public interest in favor of disclosure that is relevant to DC FOIA. You argue that the deceased employee was not effective as his job and terminated employees who were effective, but it is unclear how this ties to the withheld record. Further, it is unclear how the contents of a complaint made against the employee's individual conduct would reveal anything about the agency's performance of its statutory duties. In the absence of a relevant countervailing public interest, we find that the complaint is protected from disclosure pursuant to Exemption 2.

Conclusion

Based on the foregoing, we affirm OCFO's decision. 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 government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

Mayor's Office of Legal Counsel

cc: Chaia Morgan, Assistant General Counsel, OCFO (via email)