GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT

Transmitted via email

January 8, 2018

Appeals FOIA
Office of Legal Counsel
1350 Pennsylvania Avenue, N.W.
Suite 419
Washington, D.C. 20004

Re: FOIA Appeal 2018-63 (Christopher Schiano)

Dear Sir or Madame:

This is in response to the direction to provide a response to the Freedom of Information Act appeal filed by Christopher Schiano on behalf of Unicorn Riot. Mr. Schiano appeals the department's denial of his request for the time records for an identified detective from January 21, 2017 up to the present. The department denied the request pursuant to D.C. Official Code § 2-534 (a)(2) on the basis that release of these personnel related records would constitute a clearly unwarranted invasion of personal privacy of the employee. The department maintains its position on this request.

A person does not lose all privacy rights upon being employed by the department or a contractor who provides a service for the government pursuant to a contract. An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether there is a sufficient privacy interest present.

> [A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. See *Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976); *Simpson v. Vance*, 208 U.S. App. D.C. 270, 648 F.2d 10, 14 (D.C. Cir. 1980); *Sims v. CIA*, 206 U.S. App. D.C. 157, 642 F.2d 562, 575 (D.C. Cir. 1980). That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. See *Simpson*, 648 F.2d at 14. But it also reflects the employee's more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has obtained and kept in the employee's personnel file.

Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984).

Moreover, it has been recognized that "while the privacy interests of public officials are 'somewhat reduced' when compared to those of private citizens, 'individuals do not waive all privacy interests . . . simply by taking an oath of public office.'[citation omitted.]" *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008).

As stated above, the second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the purpose of FOIA, which is

> 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773 (1989).

The Supreme Court has held that

> where there is a privacy interest protected by Exemption 7(C)[the federal equivalent of Exemption (3)(C)] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004). The Court explained that there is a presumption of legitimacy accorded to the official conduct of the government and

> where the presumption is applicable, clear evidence is usually required to displace it. . . . Allegations of government misconduct are 'easy to allege and hard to disprove,' *Crawford-El v. Britton*, 523 U.S. 574, 585, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998), so courts must insist on a meaningful evidentiary showing.

Id. at 174-175. The Court also indicated considerations involved in evaluating the public interest.

> First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the

citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

Mr. Schiano has not alleged any wrongdoing by the government or anyone acting on the government's behalf. As such, there is no identifiable public interest in overriding the privacy of the employee in question. An individual's personal interest in the actions of a government employee is not sufficient to outweigh his or her personal privacy. Accordingly the appeal should be denied.

Sincerely,

Ronald B. Harris
Deputy General Counsel