

THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

_____))
 In the Matter of))
))
 Jefferson Grill, Inc.))
 t/a Macombo Lounge))
 Holder of a Retailer's License))
 Class "CN" – at premises))
 5335 Georgia Avenue, N.W.))
 Washington, D.C.))
))
 Respondent))
 _____)

Case No.: 8699-02/030C
Order No.: 2005-01

BEFORE: Charles A. Burger, Chairperson¹
Vera M. Abbott, Member²
Audrey E. Thompson, Member
Judy A. Moy, Member
Peter B. Feather, Member²
Albert G. Lauber, Member²
Eartha Isaac, Member²

ALSO PRESENT: Fred P. Moosally, III, General Counsel
Alcoholic Beverage Regulation Administration

William Bennett, Assistant Attorney General, on behalf of
the District of Columbia

Simon Osnos, Esquire, on behalf of the Respondent

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

On June 21, 2002, the Alcoholic Beverage Control Board ("Board"), pursuant to D.C. Official Code § 25-447(c) (2001) and Title 23 of the District of Columbia Municipal

¹ Current ABC Board Chairperson Charles A. Burger participated as a member of the ABC Board during both the November 13, 2002 and December 4, 2002 proceedings. Former ABC Board Chairperson Roderic L. Woodson, Esquire, who chaired both the November 13, 2002 and December 4, 2002 proceedings is no longer a member of the ABC Board.
² ABC Board member Vera M. Abbott did not participate in all of the proceedings. As a result, Ms. Abbott did not vote on this matter. ABC Board members Peter Feather, Albert Lauber, and Eartha Isaac were not members of the Board when these proceedings were initiated and did not participate or vote on this matter. Pursuant to D.C. Official Code § 25-431(b) (2001), three members of the Board constitute a quorum.

Regulations ("DCMR") § 1502.1 (1997)³, scheduled a show cause hearing on the Retailer's License Class "CN" held by Jefferson Grill, Inc., t/a Macombo Lounge ("Respondent"), at premises 5335 Georgia Avenue, N.W., Washington, D.C., based upon investigations conducted by Alcoholic Beverage Regulation Administration Auditor and Financial Investigator D'Maz Lumukanda and Department of Consumer and Regulatory Affairs Investigator Clement A. Stokes, III. The grounds for the show cause hearing were set forth in the Notice to Show Cause, dated June 21, 2002, which was served upon the Respondent.

The case came before the Board for show cause proceedings held on November 13, 2002 and December 4, 2002 based upon the charge set forth in the June 21, 2002 Notice to Show Cause, as described below. At the conclusion of the December 4, 2002 show cause hearing, the Board took its decision in this matter under advisement.

The Board considered in making its decision the evidence addressed at the hearings, the testimony of the witnesses, the arguments of counsel, exhibits admitted in the hearings, and the documents comprising the Board's official file in making the following:

FINDINGS OF FACT

1. The Respondent's establishment holds a Class "CN" Retailer's License and is located at 5335 Georgia Avenue, N.W., on the corner of Jefferson Street, N.W., and Georgia Avenue, N.W. (Tr. 11/13/02 at 11; Respondent's Exhibit No. 4.) The establishment's current approved hours of operation are Sundays from 6 p.m. to 2 a.m.; Monday through Thursday from 2 p.m. through 2 a.m.; and Friday and Saturday from 2 p.m. until 3 a.m. (Tr. 12/04/02 at 40; See Application File No. 8699.) The Respondent is permitted to operate a nightclub that offers nude performances, pursuant to D.C. Official Code § 25-371 (2001), as the Respondent regularly provided entertainment by nude dancers prior to December 15, 1993. (See Application File No. 8699.)

2. The Board issued the Notice to Show Cause, dated June 21, 2002, to the Respondent, based upon investigations conducted by Alcoholic Beverage Regulation Administration ("ABRA") Auditor and Financial Investigator D'Maz Lumukanda and Department of Consumer and Regulatory Affairs ("DCRA") Investigator Clement A. Stokes, III. (See Show Cause File No. 8699-02/030C.) The Notice to Show Cause, dated June 21, 2002, charges the Respondent with allowing entertainers, employees and customers to perform or simulate the performance of acts of oral, anal, or vaginal sexual intercourse, masturbation, flagellation, or bestiality, and to fondle in an erotic manner the breasts, buttocks, anus, or genitals of another person on the licensed premises, in violation of 23 DCMR § 904.3 (1997).⁴ (See Show Cause File No. 8699-02/030C.)

³ The ABC Board adopted a new version of Title 23 of the District of Columbia Municipal Regulations ("DCMR") as published in the D.C. Register at 51 DCR 4309 (April 30, 2004). The Board's show cause authority can now be found at 23 DCMR § 1604.1 (2004) as well as D.C. Official Code § 25-447 (2001).

⁴ It should be noted that 23 DCMR § 904.3 (1997) was not adopted as part of the current April 30, 2004 version of Title 23 of the DCMR. However, the Board's show cause hearing on this matter concluded prior to the adoption of the April 30, 2004 version of Title 23 of the DCMR, with only the Board's written decision left to be issued.

3. D'Maz Lumukanda is employed by ABRA as an Auditor and Financial Investigator. (Tr. 11/13/02 at 6-7, 61.) Investigator Lumukanda visited the Respondent's establishment as an undercover investigator on Friday, April 26, 2002. (Tr. 11/13/02 at 7; Government's Exhibit No. 2.) He entered the establishment at approximately 10:45 p.m. with a Metropolitan Police Department ("MPD") officer who was also undercover. (Tr. 11/13/02 at 7, 14.) Investigator Lumukanda was inside of the location for approximately one and a half hours. (Tr. 11/13/02 at 14, 22, 53.)

4. With respect to the operations of the establishment, Investigator Lumukanda observed a woman in her forties or fifties who appeared to be managing the establishment because she handled the money. (Tr. 11/13/02 at 33-36, 43-44, 59-60.) Investigator Lumukanda observed all of the Respondent's dancers wearing two-piece bikinis and noted that the establishment's waitresses were dressed differently than the dancers. (Tr. 11/13/02 at 42, 48, 55-59.) He noted that a security guard was located at the front door of the establishment and that the security guard conducted a weapons search and checked identification prior to admitting him into the establishment. (Tr. 11/13/02 at 43, 51.) Investigator Lumukanda found the establishment well lit, with the exception of the dancers' stage performances when the lights were dimmed. (Tr. 11/13/02 at 52.) Investigator Lumukanda observed the dancers perform on two (2) stages. (Tr. 11/13/02 at 52.) Investigator Lumukanda witnessed approximately six (6) dancers in bikinis performing and noted that the dancers would remove their bikinis during their performance. (Tr. 11/13/02 at 42, 47-48, 55-56; Government's Exhibit No. 1.) He noted that one dancer performed on the stage at a time and that during the dance the dancer was completely nude, but put her bikini back on at the conclusion of the performance. (Tr. 11/13/02 at 57.) Investigator Lumukanda did not observe dancers on stage being touched by patrons while performing. (Tr. 11/13/02 at 55.)

5. With respect to conduct occurring on the licensed premises, Investigator Lumukanda observed the dancers constantly walking around the premises in bathing suits "shaking hands and giving hugs" and "sitting on patron's laps and accepting tips." (Tr. 11/13/02 at 12, 17, 22, 58.) Investigator Lumukanda also witnessed the Respondent's patrons put money in the dancers' "leg belt" when the dancers were on stage. (Tr. 11/13/02 at 12.) Investigator Lumukanda also observed dancers seated with patrons in a booth where the dancers allowed patrons to "liberally touch their bodies," including their arms and legs. (Tr. 11/13/02 at 12, 30, 45-46.) Investigator Lumukanda also observed on several occasions -- while positioned approximately fifteen (15) feet away -- a dancer clothed in an "American print bikini" who would lead a patron into an enclosed area, located adjacent to the booth, for a private dance where the patron would "have his back against the wall" and she would dance in front of the patron and allow him to touch her arms, legs, buttocks, and breasts. (Tr. 11/13/02 at 13-14, 21-23, 27-32, 47-49, 54; Government's Exhibit Nos. 1 and 2.) Investigator Lumukanda observed the patrons fondle the dancer's breasts, buttocks, and genital area in an erotic manner and noted that they were "grinding and caressing" in a manner that exceeded a mere touch. (Tr. 11/13/02 at 54; Government's Exhibit No. 2.) Investigator Lumukanda found the dancer to be the Respondent's employee as she: (1) accepted money from patrons for her private

JAN 28 2005

dance; (2) was being provided change by the bartender just like the rest of the establishment's dancers; and (3) was dressed like the rest of the dancers as she was only wearing a bikini. (Tr. 11/13/02 at 13, 23-24.) This was the only dancer that Investigator Lumukanda observed giving a private dance. (Tr. 11/13/02 at 22.) Investigator Lumukanda also observed that the dancers were soliciting payments and tips from patrons and that the patrons were located less than three (3) feet from the stage on which the dancers completed their performance. (Tr. 11/13/03 at 39-40.)

6. Investigator Clement A. Stokes, III, is employed by DCRA, Office of Investigations, and visited the establishment on five (5) occasions with the establishment closed during two (2) of his visits. (Tr. 11/13/02 at 63-64, 113, 117.) The show cause hearing focused on Investigator Stokes' visits to the establishment on January 19, 2002, at approximately 8:00 p.m., on February 1, 2002, at approximately 7:30 p.m., and on May 31, 2002, at approximately 7:00 p.m. (Tr. 11/13/02 at 65-68, 77-80, 82, 84.)

7. With respect to the establishment's operations, Investigator Stokes observed a security guard positioned at the front door of the establishment and he was patted down prior to his entering the establishment. (Tr. 11/13/02 at 80.) Investigator Stokes was not charged a cover for admission. (Tr. 11/13/02 at 80.) He stated that the clientele was predominantly male and patrons appeared to be over the age of twenty one (21). (Tr. 11/13/02 at 124.) Investigator Stokes observed that security was located only at the front door and nowhere else on the premises. (Tr. 11/13/02 at 123.) Investigator Stokes noted that the establishment became crowded as the evening progressed during his visits. (Tr. 11/13/02 at 113.) With regard to who was managing the establishment, Investigator Stokes observed a female individual with a badge around her neck, which he assumed was an Alcoholic Beverage Control ("ABC") manager's license, was watching the bar, collecting money, and giving money to the dancers. (Tr. 11/13/02 at 114-116, 126-127.) He stated that neither the manager, security, or other employees of the establishment tried to prevent patrons from touching the dancers. (Tr. 11/13/02 at 102-103, 116.) He also never witnessed anyone from the establishment trying to discourage lap dancing from taking place, which appeared to be a regular way of doing business at the establishment. (Tr. 11/13/02 at 116-117, 121.)

8. With respect to the dancer's conduct, Investigator Stokes observed African-American female dancers on stage wearing bikinis. (Tr. 11/13/02 at 80-81.) Investigator Stokes noted that the dancers would perform on stage for approximately fifteen (15) minutes each and that seven (7) dancers were present during his February 1, 2002 visit and eight dancers present during his May 31, 2002 visit. (Tr. 11/13/02 at 82, 84, 92-93, 103-104.) Investigator Stokes stated that he observed dancers on stage dancing "in a sexual nature while removing their clothes until they were fully nude." (Tr. 11/13/02 at 81, 85.) Specifically, Investigator Stokes noted that during his January 19, 2002 visit, a dancer on stage was "fondling her breast nipples" on three (3) different occasions in an erotic manner during the dance. (Tr. 11/13/02 at 81, 91-92; Government's Exhibit No. 3.) Investigator Stokes observed on his February 1, 2002 visit that during the dance each performer would "lie on their back facing the audience with their legs wide open exposing their vagina." (Tr. 11/13/02 at 92-93.) Investigator Stokes observed that each

dancer would stimulate their vagina with their hand during the performance. (Tr. 11/13/02 at 82, 93.) On February 1, 2002, Investigator Stokes also observed one dancer, with the stage name "Silhouette", who was receiving tips from male patrons while she was on stage with her legs open and vagina exposed and that patrons would "rub between [the dancer's] legs" and touch her vagina as they put money into her garter belt. (Tr. 11/13/02 at 83-84, 99-104.) Investigator Stokes did not observe the performance or simulation of the performance of oral, anal, or vaginal sexual intercourse while on stage. (Tr. 11/13/02 at 92, 98-102.) During his May 31, 2002 visit, Investigator Stokes observed each dancer stimulating their breast nipples and vagina. (Tr. 11/13/02 at 86, 104; Government's Exhibit No. 5.) Investigator Stokes observed the dancers move from stage to stage and observed this activity conducted by eight (8) different female dancers over a period of four (4) hours between two (2) stages. (Tr. 11/13/02 at 107-108.)

9. With respect to illegal conduct, Investigator Stokes noted that a customer remarked during his February 1, 2002 visit that he wanted to have sex with one of the dancers, with the stage name "Silhouette". (Tr. 11/13/02 at 82-83, 95, 104; Government's Exhibit No. 4.) The patron later propositioned the dancer for sexual intercourse stating that he had "one thousand dollars, a Master Card, and Visa." (Tr. 11/13/02 at 82-83.) The patron told the dancer, "Silhouette", "he could pay her more money than she would make on stage" and he gave the dancer his telephone number and told her that "he wanted to meet her" and pulled out his wallet. (Tr. 11/13/02 at 82-83, 95-98, 104-105.) Investigator Stokes also questioned a male patron about whether he could "buy sex" from one of the dancers and that the patron responded affirmatively. (Tr. 11/13/02 at 88.) The patron identified two (2) dancers, with the stage names of "Dallas" and "Reds", employed by the Respondent and present during his May 31, 2002 visit, from whom he could "buy sex." (Tr. 11/13/02 at 88-89.) Investigator Stokes later propositioned one of the dancers, "Reds", by asking how much does she charge and by telling her that he wanted sexual intercourse. (Tr. 11/13/02 at 89-90, 110-111; Government's Exhibit No. 5.) He stated that the dancer, with the stage name "Reds", replied that she charges two hundred dollars (\$200.00) an hour. (Tr. 11/13/02 at 89-90, 110-111; Government's Exhibit No. 5.)

10. With respect to prohibited conduct on the licensed premises, Investigator Stokes observed a dancer with the stage name "Dallas" giving "lap dances" to patrons and "grinding" with patrons in an enclosed area. (Tr. 11/13/02 at 86-88, 91, 106-108, 121-122.) He stated that "Dallas" was "giving stand up lap dances using her buttocks grinding on the ... male patrons ... they [male patrons] were grinding back." (Tr. 11/13/02 at 86.) On May 31, 2002, Investigator Stokes also observed dancers with the stage names of "Reds" and "Shiver" performing a grinding motion using their buttocks on the patrons' crotch area seated around the stage while receiving a tip. (Government's Exhibit No. 5.) Investigator Stokes also noted that on May 31, 2002 he observed the dancer, with the stage name "Reds", take her breasts and rub them in the face of patrons, including in the enclosed area, while receiving tips. (Tr. 11/13/02 at 90-91, 105-106; Government's Exhibit No. 5.) Investigator Stokes observed "Reds" giving approximately four (4) or five (5) "lap dances" in an enclosed area to five (5) different patrons for approximately one (1) or two (2) minutes per session. (Tr. 11/13/02 at 108-109.) He noted that on several occasions a waitress would "[w]alk past the enclosed area where the

dancers were performing ... with [the patron's] genital area pressed against the buttocks of the dancer ... [with both] moving simultaneously in an erotic manner." (Tr. 11/13/02 at 109-110.) Investigator Stokes noted that money was exchanged after the "lap dance." (Tr. 11/13/02 at 120.) Investigator Stokes stated that a dancer, "Dallas", approached him and offered him a "lap dance," but he declined. (Tr. 11/13/02 at 119-120.)

11. James Adkins is the President of Jefferson Grill, Inc. (Tr. 11/13/02 at 3-4, 133.) He has a Bachelor of Science degree in Physics from the University of Missouri and a Master of Science/Technology Management degree from the University of Maryland. (Tr. 11/13/02 at 139-142.) Mr. Adkins retired from the United States Department of Defense after forty-one (41) years of service where he served as a Senior Scientist. (Tr. 11/13/02 at 135, 139-143.) He has owned the establishment since 1967. (Tr. 11/13/02 at 143-144.) The establishment was originally a "Gay Nineties Club" with a piano player and began with single dancers wearing bikinis, but later featured nude dancing. (Tr. 11/13/02 at 139-142.) Mr. Adkins has been involved with the management of the club since 1967 and is present there several times per week, when he is in town. (Tr. 11/13/02 at 144, 179.)

12. With respect to the establishment's operations, Mr. Adkins testified he manages the establishment and his sons, Gerard and James, also manage the establishment. (Tr. 11/13/02 at 144-145.) In January 2002 and part of February 2002, Mr. Adkins had an acting manager in her twenties named Shana Reynolds. (Tr. 11/13/03 at 159-162, 171.) Shana Reynolds was the establishment's manager during the January 19, 2002 and February 1, 2002 incidents. (Tr. 11/13/02 at 162.) Ms. Reynolds was terminated in February 2002 because "she was too chummy with the girls," did not enforce the rules, and did not always open the establishment on time. (Tr. 11/13/02 at 162-163, 170-171, 194-197.) Additionally, Shana Reynolds' mother tended bar at the establishment two (2) to three (3) times a week during January 2002 and February 2002. (Tr. 11/13/02 at 159-161.) Gerard Adkins took over for Shana Reynolds as manager and is now responsible for the establishment's day-to-day operations. (Tr. 11/13/02 at 162, 168, 203.) Gerard Adkins was the manager for the establishment on May 31, 2002. (Tr. 11/13/02 at 162.) The establishment's managers are tasked with ensuring that the dancers follow the rules, including not engaging in any physical touching contact with customers. (Tr. 11/12/02 at 161, 172.)

13. Mr. Adkins stated that the establishment has three (3) video cameras, with a video camera located by: (1) the front door; (2) the bottom right corner of the bar; and (3) the front stage, which are used to "observe patrons and dancers." (Tr. 11/13/02 at 146-147, 150-151, 172-173; Respondent's Exhibit No. 2.) The establishment contains two (2) stages -- a center or front stage, and a back stage. (Tr. 11/13/02 at 149-151; Respondent's Exhibit No. 2.) Mr. Adkins stated that he employs two (2) security persons who generally stay near the door but circulate around the establishment. (Tr. 11/13/02 at 163-166.) Mr. Adkins testified that the security must often tell people to "sit down from the stage" because patrons get around the stage to get close to see the dancers. (Tr. 11/13/02 at 163-167.) The establishment only has one (1) booth. (Tr. 11/13/02 at 151-152.)

14. With respect to the dancer's conduct on the licensed premises, Mr. Adkins stated that the establishment has a notice titled "All Dancers Will Observe The Following:" that contains procedures that the dancers must follow, which were recently added within the last four (4) or five (5) months, that is posted on the stages and the dressing room. (Tr. 11/13/02 at 134, 152; Respondent's Exhibit No. 5.) Mr. Adkins also provides a document titled "Rules Concerning Dancer's Conduct" that is provided to the dancers and has been in place for about five (5) years. (Tr. 11/13/02 at 134, 164, 172; Respondent's Exhibit No. 6.) Mr. Adkins noted that these rules are posted in the dressing room and each dancer is provided with a copy. (Tr. 11/13/02 at 134, 152-153; Respondent's Exhibit No. 6.) He testified that he cautioned the dancers that patrons cannot "hug them" or otherwise touch them and that it is a violation of the establishment's rules of conduct. (Tr. 11/13/02 at 155.) Mr. Adkins noted that dancers have been terminated for breaking the rules, including touching customers. (Tr. 11/13/02 at 157.) He stated that the dancer, with the stage name, "Reds" was terminated in April 2002 or May 2002, for violating the establishment's rules and allowing customers to touch her genital area. (Tr. 11/13/02 at 156-157.) Mr. Adkins testified that he cautioned her "about lying on the floor." (Tr. 11/13/02 at 156-157.) He stated that his son, Gerard, reported to him on two (2) or three (3) occasions that "Reds" was a problem as she was not listening to him or following the rules. (Tr. 11/13/02 at 156-158.) Mr. Adkins testified that he was not aware of any rule violations by the dancer with the stage name of "Dallas". (Tr. 11/13/02 at 158.) Mr. Adkins collected several hundred dollars in fines from dancers violating the establishment's rules of conduct during the year. (Tr. 11/13/02 at 184.)

15. The establishment has a banner on the back stage that says "[d]o not touch the dancers." Tr. 11/13/02 at 148-149.) Mr. Adkins testified that if a patron improperly touches a dancer, the patron would be removed from the establishment. (Tr. 11/13/02 at 156-157.) He further stated that if his employee observes a patron improperly touching a dancer, the employee tells the patron, "no touching, please move back from the stage" or "tip and move; don't stand." (Tr. 11/13/02 at 166-167.) Mr. Adkins was not aware of any of the dancers being arrested for prostitution. (Tr. 11/13/02 at 164.) He testified that he did not learn about the incidents until a month later. (Tr. 11/13/02 at 170.)

16. Gerard Adkins has an ABC manager's license and is the General Manager of the establishment and son of James Adkins. (Tr. 12/4/02 at 3-5, 22.) He is forty-one (41) years old and graduated from Calvin Coolidge in 1979 and has been working at the establishment, on and off, for twenty (20) years. (Tr. 12/4/02 at 10-11.) Mr. Adkins is the establishment's primary full time manager now -- since starting back to work at the establishment on February 21, 2002 -- and works thirteen (13) hour shifts. (Tr. 12/4/02 at 11, 21-22.) His duties include set up, stocking liquor and beer, paying employees, and monitoring activity inside the establishment. (Tr. 12/4/02 at 12, 26.) Mr. Adkins is also responsible for hiring and firing the dancers. (Tr. 12/4/02 at 13.) Mr. Adkins' brother also has an ABC manager's license and works at the establishment approximately five (5) times a week. (Tr. 12/4/02 at 22, 25, 64.)

17. With respect to the dancer's conduct, Mr. Adkins stated that each dancer is required to sign a contract to obey the establishment's rules and regulations, which are provided to each dancer. (Tr. 12/4/02 at 62-63.) He noted that under the establishment's rules, a dancer is only allowed to stand up and dance during the dancer's performance. (Tr. 12/4/02 at 31, 71.) Mr. Adkins testified that the dancers are not allowed to touch themselves in any sort of manner, they're not allowed to lay down on the stage or after they get off the stage, they're not allowed to get up and walk around and dance in front of the customers at any time. (Tr. 12/4/02 at 31, 71.) He noted that dancers are permitted "to walk around the club and shake patrons hands, but not to dance around the customers." (Tr. 12/4/02 at 16, 72.) The establishment's fine range is generally between fifteen (15) and thirty (30) dollars. (Tr. 12/4/02 at 17.) Mr. Adkins stated that he intended to change in writing the establishment's existing written fine policy. (Tr. 12/4/02 at 42-43, 53-54.) The dancers work on "tips only" and must pay the establishment a "dance fee", which is five dollars (\$5.00), at the end of their shift. (Tr. 12/4/02 at 48, 59-60, 71.)

18. With respect to prohibited conduct, Mr. Adkins stated that the dancer "Reds" was terminated in June 2002 and told not to return as she was always "trying to sneak around and do certain things" with patrons of the establishment. (Tr. 12/4/02 at 12-17.) He witnessed the dancer "Reds" take patrons into the enclosed vestibule area. (Tr. 12/4/02 at 14-16, 18.) Mr. Adkins testified that he did not see the dancer "Reds" engaging in lewd or sexual acts with customers, but that after she finished her dance on stage she was "dancing around the tables to collect more money" in violation of the establishment's rules and that she was "fined on several occasions and given warnings." (Tr. 12/4/02 at 15-17.) He testified that he was not aware that the dancer "Reds" allowed customers to touch and fondle her private parts. (Tr. 12/4/02 at 18.)

19. Mr. Adkins stated that the dancer named "Dallas" was fined for the same violations as the dancer "Reds" and left the establishment two (2) months ago. (Tr. 12/4/02 at 19-20.) Specifically, she was fined for dancing around the tables and trying to engage in lewd contact with patrons after she finished dancing. (Tr. 12/4/02 at 20-21.)

20. With respect to the establishment's operations, Mr. Adkins testified that subsequent to the November 13, 2002 hearing, the establishment installed a camera to view the vestibule area, which is turned on during business hours, near the stage to monitor dancer's conduct, specifically to ensure that dancers do not take customers to the vestibule area. (Tr. 12/4/02 at 18-19, 65-66.)

21. Mr. Gerard Adkins goes outside of the establishment approximately four (4) to five (5) times during his shift onto Georgia Avenue, N.W., to check "whether girls are in cars with customers", "throwing bottles on the neighbor's lawns", and for "drug selling." (Tr. 12/4/02 at 22-25, 32-33.) He noted that the establishment has a policy that after work the dancers are required to leave the vicinity of the establishment. (Tr. 12/4/02 at 23-24, 67-68.)

22. Mr. Adkins stated that he was on duty on May 31, 2002 but did not observe any violations. (Tr. 12/4/02 at 28.) He noted that when the establishment is busy it is difficult for him to watch what is occurring inside of the establishment. (Tr. 12/4/02 at 64.) Mr. Adkins was on duty on April 26, 2002 and several times dancers were fined for the evening, including a dancer named "Dynamite" who he caught with a patron in the vestibule area with a camera. (Tr. 12/4/02 at 29.) The dancer, "Dynamite", was terminated for the same violations as "Reds" and "Dallas", including going into the vestibule area with customers. (Tr. 12/4/02 at 30.) The establishment has one (1) doorman whose duties include checking identification, monitoring the establishment, and providing security. (Tr. 12/4/02 at 34-35, 37-38.)

23. Officer Edward A. Miller, MPD, is a Patrol Officer with the Fourth District. (Tr. 12/4/02 at 92-94.) The establishment is located in the Fourth District with the Fourth District MPD station located approximately seven (7) blocks away from the establishment. (Tr. 12/4/02 at 93-94, 100, 107.)

24. With respect to the establishment's operations, Officer Miller stated that he tries to stop by the establishment once a day after closing because "sometimes stuff gets out of hand." (Tr. 12/4/02 at 95.) Specifically, Officer Miller noted that robberies sometimes occur as people exit the establishment and that an MPD presence lowers the threat level. (Tr. 12/4/02 at 104.) Officer Miller stated that the establishment has a nice working relationship with MPD's Fourth District. (Tr. 12/4/02 at 97.) Officer Miller noted that police officers stop through the establishment from time to time. (Tr. 12/4/02 at 98-99.) Officer Miller testified that the level of security in the establishment is pretty sound and that they employ "enough people to handle situations." (Tr. 12/4/02 at 98.)

25. With respect to the dancer's conduct, Officer Miller has observed the dancers shaking hands with customers and observed patrons touching and tipping the dancers by placing money in their garter belt or throwing money on stage. (Tr. 12/4/02 at 112-114.) He stated that as to whether the dancers simulated sexual intercourse, it depended on the perspective of the observer whether the dancer's conduct constituted simulated sexual activity. (Tr. 12/4/02 at 114.)

26. With respect to criminal activity, Officer Miller has not observed prostitution or criminal activity at the establishment. (Tr. 12/4/02 at 99.) He testified that in his professional opinion the establishment is not a problem and that he is not aware of a pattern of criminal activity connected to the establishment. (Tr. 12/4/02 at 101-102.) Officer Miller noted that there is an "open air drug market" on Jefferson Street, near the establishment but that it was not related to the establishment. (Tr. 12/4/02 at 102.)

CONCLUSIONS OF LAW

27. The Board has the authority to suspend or revoke the license of a licensee who violates any provision(s) of Title 25 of the D.C. Official Code or Title 23 of the DCMR pursuant to D.C. Official Code § 25-823(1) (2001). In this instance, the Board finds that the Respondent's violation of 23 DCMR § 904.3 (1997) warrants a fifteen (15) day

suspension with seven (7) consecutive days to be served before February 15, 2005 and eight (8) days stayed for one (1) year from the date of this Order. The Board also finds that requiring the Respondent to provide the Board with a security plan will assist the establishment in preventing future ABC violations by its dancers and patrons from occurring. Specifically, the Board is requiring the Respondent to submit a security plan within thirty (30) days of the date of this Order that includes details regarding the following: (1) the maintenance and monitoring of a security camera in the establishment's enclosed vestibule area; (2) restricting patron access to the enclosed vestibule area; (3) the maintenance of a police log detailing all calls made to MPD reflecting the date, time, and nature of service requested; (4) the monitoring of the interior of the establishment for possible ABC violations by the establishment's dancers and patrons; and, (5) the maintenance of an incident log detailing violations committed by the establishment's dancers. Furthermore, the Board believes that not permitting patrons to have access to the establishment's enclosed vestibule area will significantly reduce or eliminate the illegal private dancing that was occurring in this area between the establishment's dancers and patrons. Additionally, the Board is requiring that the oral changes made by Mr. Gerard Adkins to the establishment's written rules concerning dancer conduct, including the establishment's revised fine policy for violations committed by dancers, be submitted to the Board within thirty (30) days of this Order. Finally, the Board finds that requiring the Respondent to post a legible sign or banner in a conspicuous area on each stage of the licensed premises that states: "Do not touch the dancers" on both stages can only help to prevent patrons from touching the establishment's dancers. The Board notes that it possesses the authority to place these conditions on the establishment pursuant to D.C. Official Code § 25-447(f) (2001).

28. With regard to Charge I, the Board must determine whether the Respondent allowed entertainers, employees or customers to perform or simulate the performance of acts of oral, anal, or vaginal sexual intercourse, masturbation, flagellation, or bestiality, or to fondle in an erotic manner the breasts, buttocks, anus, or genitals of another person on the licensed premises, in violation of 23 DCMR § 904.3 (1997). In this case, the testimony of Investigator Lumukanda and Investigator Stokes revealed that the Respondent did permit violations of 23 DCMR § 904.3 (1997) on February 1, 2002, April 26, 2002, and May 31, 2002, as described in the Notice to Show Cause, dated June 21, 2002, to occur on the licensed premises. Specifically, the testimony of Investigator Lumukanda revealed that on April 26, 2002, he observed on several occasions, a dancer clothed in an "American print bikini" who would lead a patron into an enclosed area for a private dance and allow him to fondle the dancer's breasts, buttocks, and genital area in an erotic manner and noted that they were "grinding and caressing" in a manner that exceeded a mere touch. In finding that the Respondent permitted this activity, the Board would note that: (1) the dancer in the "American print bikini" was provided change by the establishment's bartender -- just like the rest of the establishment's dancers after completing her private dances; and (2) the private dancing occurred on several occasions and was visible to Investigator Lumukanda from the first floor of the establishment. Additionally, the testimony of Investigator Stokes revealed that on February 1, 2002, he observed a dancer, with the stage name "Silhouette", who was receiving tips from male patrons while she was on stage with her legs open and vagina exposed and that patrons

would "rub between [the dancer's] legs" and touch her vagina as they put money into her garter belt. Finally, the testimony of Investigator Stokes revealed that on May 31, 2002, he observed dancers with the stage names of "Reds" and "Shiver" performing a grinding motion using their buttocks on the patrons' crotch area seated around the stage while receiving a tip. Additionally, on May 31, 2002 he observed the dancer, with the stage name "Reds", take her breasts and rub them in the face of patrons, including in the enclosed area, while receiving tips. Furthermore, he observed "Reds" give four (4) or five (5) "lap dances" in the enclosed area with the patron's genital area pressed against the buttocks of the dancer, with both moving in an erotic manner. It is worth noting that the testimony of Investigator Stokes revealed that during his visits employees of the establishment did nothing to prevent patrons from touching the dancers and that lap dancing appeared to be a regular way of doing business at the establishment with waitresses walking by the enclosed area where dancers were performing. Additionally, the testimony of James and Gerard Adkins also revealed that violations of 23 DCMR § 904.3 (1997) had taken place between the establishment's dancers and patrons on the licensed premises. Based upon the above, the Board finds that the Respondent permitted violations of 23 DCMR § 904.3 (1997) to occur at the licensed premises on February 1, 2002, April 26, 2002, and May 31, 2002.

29. In finding violations of 23 DCMR § 904.3 (1997) to have occurred, including the "fondling in an erotic manner" of the breasts, buttocks, anus, or genitals on February 1, 2002, April 26, 2002, and May 31, 2002, between the establishment's dancers and patrons, based upon the testimony set forth above, it is worth noting that the enumerated prohibited activities set forth in 23 DCMR § 904.3 (1997) mirror the definition of "specified sexual activities" established in the District of Columbia Zoning Regulations, which characterize the activities of a sexually oriented business establishment. Specifically, Zoning regulation Title 11 DCMR § 199.1 defines specified sexual activities as "[a]cts of human masturbation, sexual intercourse, sexual stimulation or arousal, sodomy, or bestiality ... [f]ondling or other erotic touching of human genitals, pubic region, buttock, or breast." Given this statutory scheme, the Board of Zoning Adjustment's ("BZA") analysis of particular conduct, which rises to the level of "specified sexual activities," provides guidance for the Board in determining whether similar such conduct violates 23 DCMR § 904.3 (1997). As such, the BZA case In re California Steak House, BZA Appeal No. 13967, decided on November 22, 1983, provides the Board with guidance on the issue of whether the conduct at issue in this case violates 23 DCMR § 904.3 (1997). In California Steak House, the BZA held that the conduct of dancers involving "sexual stimulation or arousal" should be construed as "specified sexual activities" in that the activities "clearly go beyond dancing in the nude." Such activities were described as follows:

[W]omen [in the sexually oriented business establishment], while nude, engaged in dancing and other bodily movements on tables in close proximity to the customers. In the course of dancing, these women would lay on the tables with their legs spread apart ... Customers would place

money on the tables and the women would turn their backs to the customers, bend over in a manner exposing the anus and vagina to the customers and pick up the money ... In addition to the activities engaged in while dancing, each woman, while nude, would walk on the table in a gliding or "sashaying" fashion from customer to customer. Id. at 7.

In this case, the incidents observed by Investigator Lumukanda on April 26, 2002 and by Investigator Stokes on February 1, 2002 and May 31, 2002, as described above, clearly consist of conduct that is more overtly sexual than the dancers' conduct in California Steak House. For example, the testimony of Investigators Lumukanda and Investigator Stokes revealed that the Respondent's dancers engaged in "lap dancing" and permitted patrons of the establishment to fondle the dancer's breasts, genital region, and buttocks while stimulating the patron's genitals with their buttocks. Additionally, the testimony of Investigator Stokes revealed that Respondent's dancers also permitted patrons of the establishment to fondle their breasts and buttocks while circulating among the patrons for the purpose of collecting tips. Furthermore, the testimony of Investigator Stokes revealed that on February 1, 2002, one of the Respondent's dancers would lay on their back on stage with their legs open such that their vagina was exposed, stimulate their own vagina in plain view, and permit male patrons to fondle their vagina. The Board finds that such conduct, as described above, is "specified sexual activity" that constitutes a violation of 23 DCMR § 904.3 (1997), including "fondling in an erotic manner", within the meaning of this provision.

30. In making its decision to suspend and place conditions on the Respondent's license, rather than revoke the Respondent's license, the Board took into account the efforts made by the Respondent, as described in the testimony of James Adkins and Gerard Adkins, to address ABC violations committed by its dancers and patrons. Specifically, the testimony of Gerard Adkins revealed that after the November 13, 2002 show cause hearing, the establishment installed a camera to view the vestibule area to help ensure that dancers do not take patrons to this area. Additionally, the testimony of James and Gerard Adkins revealed that the establishment does possess rules and regulations that dancers are required to sign a contract to obey and has fined several of its dancers for committing violations.

ORDER

THEREFORE, it is hereby **ORDERED** on this 5th day of January 2005, that the Retailer's Class "CN" license held by Jefferson Grill, Inc., t/a Macombo Lounge, 5335 Georgia Avenue, N.W., Washington, D.C., be **SUSPENDED** for a period of fifteen (15) days, with seven (7) consecutive days served before February 13, 2005 and eight (8) days stayed for one (1) year from the date of this Order.

It is **FURTHER ORDERED** that the Respondent shall operate its establishment with the following conditions imposed on its Retailer's Class "CN" license:

JAN 28 2005

1. Respondent must provide the Board with a security plan within thirty (30) days of the date of this Order that includes details regarding the following:
 - (a) The maintenance and monitoring of a security camera in the establishment's enclosed vestibule area;
 - (b) Restricting patron access to the enclosed vestibule area;
 - (c) The maintenance of a police log detailing all calls made to MPD reflecting the date, time, and nature of service requested;
 - (d) The monitoring of the interior of the establishment for possible ABC violations by the establishment's dancers and patrons; and
 - (e) The maintenance of an incident log detailing violations committed by the establishment's dancers;
2. Respondent must submit to the Board revised written rules concerning dancer conduct, which shall include the establishment's revised fine policy for violations committed by dancers, within thirty (30) days of this Order;
3. Respondent shall not permit patrons to have access to the establishment's enclosed vestibule area; and
4. Respondent must post a legible sign or banner in a conspicuous area on each stage of the licensed premises that states: "Do not touch the dancers".

JAN 2

Jefferson Grill, Inc.
t/a Macombo Lounge
January 5, 2005

District of Columbia
Alcoholic Beverage Control Board

Charles A. Burger, Chairperson

Vera M. Abbott, Member

Audrey E. Thompson, Member

Judy A. Moy, Member

Peter B. Feather, Member

Albert G. Lauber, Member

Eartha Isaac, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).

JAN 28 2005

DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE

**Judicial Tenure Commission Begins Reviews Of Judges John H. Bayly, Jr.,
Kaye K. Christian, José M. López, Linda D. Turner and Joan Zeldon**

This is to notify members of the bar and the general public that the Commission has begun inquiries into the qualifications of Judges John H. Bayly, Jr., Kaye K. Christian, José M. López, Linda D. Turner, and Joan Zeldon of the Superior Court of the District of Columbia. Judges Bayly, Christian, López, Turner, and Zeldon are declared candidates for reappointment as Associate Judges upon the expiration of their terms on August 6, 2005.

Under the provisions of the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 796 (1973), §443(c) as amended by the District of Columbia Judicial Efficiency and Improvement Act, P.L. 99-573, 100 Stat. 3233, §12(1) provides in part as follows:

"...If a declaration (of candidacy) is so filed, the Tenure Commission shall, not less than sixty days prior to the expiration of the declaring candidate's term of office, prepare and submit to the President a written statement of the declaring candidate's performance during his present term of office and his fitness for reappointment to another term. If the Tenure Commission determines the declaring candidate to be well qualified for reappointment to another term, then the term of such declaring candidate shall be automatically extended for another full term, subject to mandatory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be qualified for reappointment to another term, then the President may nominate such candidate, in which case the President shall submit to the Senate for advice and consent the renomination of the declaring candidate as judge. If the President determines not to so nominate such declaring candidate, he shall nominate another candidate for such position only in accordance with the provisions of subsections (a) and (b). If the Tenure Commission determines the declaring candidate to be unqualified for reappointment to another term, then the President shall not submit to the Senate for advice and consent the nomination of the declaring candidate as judge and such judge shall not be eligible for reappointment or appointment as a judge of a District of Columbia Court."

The Commission hereby requests members of the bar, litigants, interested organizations, and members of the public to submit any information bearing on the qualifications of Judges Bayly, Christian, López, Turner, and Zeldon which it is believed will aid the Commission. The cooperation of the community at an early stage will greatly aid the Commission in fulfilling its responsibilities. The identity of any person submitting material shall be kept confidential unless expressly authorized by the person submitting the information.

All communications shall be mailed or delivered by **April 4, 2005**, and addressed to:

District of Columbia Commission on Judicial
Disabilities and Tenure
Building A, Room 312
515 Fifth Street, N.W.
Washington, D.C. 20001
(Telephone: (202) 727-1363)
(Fax: (202) 727-9718)

The members of the Commission are:

William P. Lightfoot, Esquire, Chairperson
Hon. Gladys Kessler, Vice Chairperson
Mary E. Baluss, Esquire
Gary C. Dennis, M.D.
Eric H. Holder, Jr., Esquire
Ronald Richardson

BY: /s/ William P. Lightfoot
Chairperson

JAN 28 2005



SECRETARY OF THE
DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Final Decision

Appeal of: D.C. Prisoners' Legal Services Project, Inc.

Matter No: MCU 429500

Date: January 12, 2005

Arnold R. Finlayson, Esq., Director, Office of Documents and Administrative Issuances, participated in the preparation of this decision.

INTRODUCTION

The above-captioned matter, commenced pursuant to section 207(a) of the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C. Official Code § 2-537(a) (2001),¹ is before the Secretary of the District of Columbia for a decision on appellant D.C. Prisoners' Legal Services Project, Inc.'s formal administrative appeal to

¹ Pursuant to section 207(a) of the D.C.-FOIA, "[a]ny person denied the right to inspect a public record of a public body *may petition the Mayor* to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a) (emphasis added)

the Mayor from the District of Columbia Department of Corrections' denial of its request for records pertaining to the alleged sexual assault of a 19-year-old male prisoner by a male correctional officer at the Central Detention Facility in Southeast, Washington, D.C.²

In its denial letter, DCDC's FOIA Officer generally asserted that all responsive documents that were located during the conduct of DCDC's search for records within the scope of DCPLSP's D.C.-FOIA request were protected from disclosure under subcategories (A), (B), and (C) of D.C. Official Code § 2-534(a)(3) (2001 and 2004 Supp.) ("D.C.-FOIA Exemption 3"). D.C.-FOIA Exemption 3 is commonly referred to as the law enforcement exemption.

Following a brief summary of the relevant background facts and procedural posture leading up to this appeal, and a general overview of the legal principles underlying the D.C.-FOIA, this office, in the discussion below, considers the propriety of DCDC's decision to withhold responsive records, in their entirety, from disclosure to the

² By Mayor's Order 97-177, dated October 9, 1997, the Secretary of the District of Columbia was delegated the authority vested in the Mayor to render decisions on administrative appeals and petitions for review under the D.C.-FOIA.

JAN 28 2005

appellant pursuant to its D.C.-FOIA request.

FACTUAL AND PROCEDURAL BACKGROUND

D.C. Prisoners' Legal Services Project, Inc.'s ("DCPLSP") stated "mission . . . is to advocate for the humane treatment and dignity of all persons convicted or charged - or formerly convicted - with a criminal offense under District of Columbia law . . . and to encourage progressive criminal justice reform." www.dcprisonerhelp.org/

One of DCPLSP's primary goals is "to ensure that conditions of confinement are safe and humane, and to prevent acts of violence, sexual assault and torture[.]" Id.

By letter dated December 16, 2003, DCPLSP made a written request to the FOIA Officer of the District of Columbia Department of Corrections ("DCDC") which sought copies of the following records:

- Any disciplinary reports, serious incident investigations, reports, inmate grievances and official responses, or other writings, in relation to an October 28, 2003 altercation between [a correctional officer] and inmate [name redacted]. The altercation occurred in CTF in the hole.
- Any reports, inmate grievances, administrative communications, official responses, hearing decisions, or other writings and investigative reports involving Correctional Officer [name redacted].

Letter dated December 16, 2003 from M. L. Starks, Paralegal to P. Fornaci, Executive Director, DCPLSP to Segun Obebe, FOIA Officer, DCDC.

The subject D.C.-FOIA request was denied by DCDC's FOIA Officer by letter dated January 13, 2004 in which he advised DCPLSP as follows:

Staff persons have conducted a due diligence search and have found records that are responsive to your request. Records found, however, were compiled in the process of investigating a complaint of harassment an/or [sic] sexual misconduct against an employee. These records are reports of personnel investigation of an employee that allegedly violated civil or criminal law and constitute "records or information compiled for law enforcement purposes." Accordingly, the records are exempt from disclosure under the D.C. Official Code §2-534(a) (3) (A) (B) &(C).

Letter dated January 13, 2004 from O. Obebe to M. L. Starks.³

Subsequently, DCPLSP wrote a letter to the Mayor, dated January 27, 2004, which, in relevant part, stated that:

This letter is to serve your office notice of our intent to appeal the FOIA decision that we received earlier this month regarding [name redacted], an officer at the Central Detention Facility (CTF), located at 1901 E Street, S.E., Washington, D.C. 20003. The FOIA involves an investigation by our office into an alleged sexual assault by [name redacted] against 19 year-old inmate [name and prisoner identification number redacted].

Letter dated January 27, 2004 from M. Starks to Mayor Anthony Williams.

Instead of following up on the January 27, 2004 letter

³ The DCDC FOIA Officer's letter did not provide any "explanation of how each exemption applie[d] to the record[s] withheld and a statement of the public interest considerations which establish the need for withholding [any] record[s]," as specifically required by 1 DCMR § 407.2 (b) (June 2001).

JAN 28 2005

giving notice of its intent to appeal by subsequently filing a formal administrative appeal with the Mayor, DCPLSP elected to file a complaint in the Superior Court of the District of Columbia in a civil action captioned *D.C. Prisoners' Project, Inc. v. District of Columbia*, Civil Action No. 04-1610.

In a "Memorandum Opinion Denying Motion For Summary Judgment," dated October 19, 2004, the Honorable Michael L. Rankin found that DCPLSP failed to exhaust its administrative remedies and entered an order which stayed the proceedings in D.C. Superior Court for sixty (60) days in order to allow DCPLSP to pursue an administrative appeal.

The present appeal ensued.

In its appeal letter, dated October 26, 2004, DCPLSP raises four (4) principal contentions in support of its position that DCDC improperly withheld responsive documents and provides argument under separate headings in the aforesaid letter as follows:

- (1) "FURTHER DOCUMENTS EXIST - THE SEARCH WAS INCOMPLETE";
- (2) "DCDC IMPROPERLY RELIES ON ONE EXEMPTION";
- (3) "INAPPLICABILITY OF § 2-535(a)(3)" [sic];⁴ and

⁴ The argument under the third contention appears to address the legal framework applicable to D.C. Official Code § 2-534(a)(3) (emphasis added).

- (4) "EVEN IF THERE IS SOME BASIS FOR EXCLUSION, THE DISTRICT HAS A DUTY TO SEGREGATE AND REDACT".

As more fully explained in the discussion below, this office is unable to reach a decision on the merits of DCPLSP's contentions (which are addressed to some degree in seriatim below) because the administrative record (i.e., DCDC's denial letter) does not contain any information upon which a meaningful analysis can be made as to whether DCDC properly applied governing legal standards in making its determination to withhold responsive records in their entirety.

Accordingly, it is necessary to remand this appeal to DCDC with instructions for the department to provide additional information via sworn affidavit(s) which address(es) the governing legal standards applicable to the exemptions from disclosure it invoked to deny DCPLSP's D.C.-FOIA request.

DISCUSSION

General Overview of the D.C.-FOIA

The D.C.-FOIA, like the federal FOIA upon which it was modeled, was enacted in 1976 to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the

receipt of a request for information. See Subcommittee on Administrative Practice & Procedure of the Senate Committee on Judiciary, 95th Cong., 2d. Sess., *Freedom of Information: A Compilation of State Laws* (Comm. Print 1978); see also Washington Post v. Minority Business Opportunity Commission, 560 A.2d 517, 521 (D.C. 1989). In this regard, the D.C.-FOIA was "designed to promote the disclosure of information, not inhibit it." Id.

The D.C.-FOIA embodies "[t]he public policy of the District of Columbia . . . that all persons are entitled to full and complete disclosure of 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; see Donahue v. Thomas, 618 A.2d 601, 602 n.2 (D.C. 1992); Newspapers, Inc. v. Metropolitan Police Department, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Company, 529 A.2d 319, 321 (D.C. 1987).

In order to accord full force and effect to the spirit and intent of the D.C.-FOIA, officials of District of Columbia public bodies are required to construe its provisions "with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." D.C. Official Code § 2-531; see

JAN 28

Washington Post, 560 A.2d at 521; Newspapers, Inc., 546 A.2d at 993. Thus, the policy underlying the D.C.-FOIA favors the broad disclosure of official records in the possession, custody or control of public bodies of the government of the District of Columbia, unless such records (or portions thereof) fall squarely within the purview of one or more of the eleven (11) categories of information which are expressly exempted from the disclosure mandate. See Washington Post, supra; Newspapers, Inc., supra. The statutory exemptions enumerated in the D.C.-FOIA, which protect certain types of confidential and/or privileged information from disclosure, "are to be construed narrowly, with ambiguities resolved in favor of disclosure." Washington Post, supra.

D.C.-FOIA's Broad Disclosure Mandate and Exemption Scheme

Section 202(a) of the D.C.-FOIA provides that "[a]ny person has [the] right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534." D.C. Official Code § 2-532(a) (emphasis added). Section 2-534 of the D.C. Official Code, conspicuously entitled "Exemptions from disclosure," in turn, enumerates the eleven (11) categories of information which "may be exempt from

disclosure under the provisions of [the D.C.-FOIA]."

D.C. Official Code § 2-534(a)(1)-(11) (emphasis added).⁵

Taken together, sections 2-532(a) and 2-534 of the D.C. Official Code clearly mandate full disclosure of all public records maintained by District public bodies, to the extent that such records (or any reasonably segregable portions thereof), do not fall within the ambit of any of the statutory exemptions. See Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987) ("The [D.C.-FOIA] provides for full disclosure unless the information requested is exempted under a specific statutory provision").

Contention 1

Adequacy of the Search

In the present matter, DCPLSP questions whether DCDC has made a full disclosure of all responsive documents and challenges the adequacy of the search for documents within

⁵ In the legal sense, the "use of the word 'may' in a statute ordinarily denotes discretion." In re Langon, 663 A.2d 1248 (D.C. 1995). Indeed, the federal FOIA has been interpreted by federal courts to permit agencies to make discretionary disclosures of records otherwise exempt under at least four of the exemptions to the federal FOIA. See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

the scope of its D.C.-FOIA request. In this regard, DCPLSP, in its appeal letter, alleges that a number of documents were being improperly withheld by DCDC, including grievances filed by the inmate, a Cease and Desist Order mandated by DCDC policy, a log of sexual misconduct complaints, a written report by the employee who received the information about the alleged sexual misconduct, a statement detailing each witness's testimony, an investigator's notes of witness interviews and a written report thereof, and a significant incident report. Appeal Letter p. 2, ¶ 2-3.

As a preliminary matter, there does not appear to be any binding case precedent from the D.C. Court of Appeals which addresses whether a public body's assertion in a denial letter that it has exercised diligence in its search for records may be challenged on appeal. However, binding D.C. Court of Appeals case precedent instructs that under circumstances where, as here, a "statute is borrowed extensively from a federal statute, as the D.C.-FOIA was from the federal Freedom of Information Act . . . the decisions of the (federal) court of last resort are normally adopted with the statute." Donahue v. Thomas, 618 A.2d 601, 602 n. 3 (D.C. 1992) (quoting Lenaetts v. District of Columbia Dep't of Employment Services, 545 A.2d 1234,

1238 n.9 (D.C. 1988)). Accordingly, "except where the two acts differ, . . . case law interpreting the federal FOIA [is] instructive authority with respect to our own Act."

Washington Post v. Minority Business Opportunity

Commission, 560 A.2d 517, 521 n.5 (D.C. 1989).

As a general matter, a federal FOIA requester may challenge the adequacy of an agency's search under the appeal provisions of the federal FOIA. See Wilbur v. Central Intelligence Agency, 273 F. Supp. 2d 119, 124 (D.D.C. 2003); see also Oglesby v. United States Department of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990) (a federal "FOIA requester, dissatisfied with the agency's response that no records have been found, may . . . challenge the adequacy of the agency's search"); accord Valencia-Lucena v. United States Coast Guard, FOIA/PA, 180 F.3d 321, 326 (D.C. Cir. 1999).

The legal standard for evaluating a federal agency's "claim of compliance with [federal] FOIA disclosure obligations" appears to be well established in federal case law. Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In this regard, the federal courts have consistently held that in order to meet its burden that it has complied with its obligations to

disclose under the federal FOIA, "an agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents.'" Weisberg, supra, at Id. (quoting Weisberg v. Department of Justice, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983)).

In determining whether an agency has satisfied its records disclosure duties and responsibilities under the federal FOIA, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Id. "In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." Id. An affidavit is "reasonably detailed" if it sets "forth the search terms and the type of search performed, and avers that all files likely to contain responsive materials (if such records exist) were searched." Oglesby v. United States Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); see also Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate

compliance with the obligations imposed by the FOIA");
Trans Union, LLC v. Federal Trade Commission, 141 F.Supp.2d
62, 67 (D.D.C. 2001).

Although the standards enunciated in the federal FOIA cases cited above apply to the consideration of motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56, this office is of the opinion that the aforesaid legal principles are likewise germane to a determination as to whether D.C.-FOIA appeals should be subject to summary disposition via final decision at the administrative agency level.

Because there is insufficient evidence in the record for this office to make a reasoned determination on the propriety of the adequacy of DCDC's search of its records in response to DCPLSP's D.C.-FOIA request, the Secretary of the District of Columbia concludes that it is necessary for DCDC to provide additional information via sworn affidavit(s) to supplement the record.

Accordingly, this matter is remanded to DCDC on the issue of the adequacy of its search for responsive records with instructions for the department to submit a reasonably detailed affidavit, attested to by DCDC's FOIA Officer (or other cognizant officials and employees) within seven (7)

JAN 28 7

days of the receipt of this final decision, which describes (1) the scope and method of the search that was conducted, (2) what search terms were used if an automated search was conducted, (3) what documents and files were examined or inspected if a manual search was performed, and (4) what offices and employees were consulted. Each affidavit shall also aver that, to the best of the affiant's knowledge and belief, all files in the possession, custody, or control of DCDC which were likely to contain responsive documents were searched and that the search did not result in the discovery of any of the records that were within the scope of the subject D.C.-FOIA request, if applicable.

Contentions 2 and 3

Applicability of D.C.-FOIA Exemptions 3(A), (B), and (C)

In the instant matter, DCDC invoked subcategories (A), (B) and (C) of D.C.-FOIA Exemption 3, D.C. Official Code § 2-534(a)(3)(A), (B), & (C), to deny DCPLSP's request for records pertaining to the alleged sexual assault of a male prisoner by a male correctional officer.

In the *Appeal of Mark W. Howes, Esq.*, Matter No. 00-10587, 48 D.C. Reg. 7827 (Aug. 17, 2001), this office applied a two-step analysis in considering the propriety of a public body's decision to withhold records in a D.C.-FOIA

JAN 28 2001

Exemption 3 case. This office opined that the first part of the relevant inquiry required a determination as to whether the documents withheld by the public body were "investigatory records compiled for law enforcement." Id. at 7835. If the answer to the threshold inquiry was "yes" the remaining, and dispositive, question is whether the record evidence compels the conclusion that the disclosure of such investigative records would cause one or more of the specific harms listed under D.C. Official Code § 2-534(a)(3).

In addressing the first part of the relevant two-part test, this office was guided by the logic of the D.C. Court of Appeal's decision in Barry v. Washington Post, supra.

In Barry v. Washington Post, the D.C. Court of Appeals construed the import of the phrase "investigatory records compiled for law enforcement purposes" contained in D.C. FOIA Exemption 3. The D.C. Court of Appeals, relying on an oft-cited decision of the U.S. Court of Appeals for the District of Columbia Circuit interpreting verbatim statutory language in the corresponding federal FOIA exemption, opined that the phrase "refers only to records prepared or assembled in the course of 'investigations which focus directly on specifically alleged illegal acts,

JAN 28

illegal acts of particular identified [persons], acts which could, if proved, result in civil or criminal sanctions.'" Id. at 321-22 (quoting Rural Alliance v. United States Department of Agriculture, 162 U.S.App. D.C. 122, 130, 498 F.2d 73, 81 (1974)).

Applying the definitional standard adopted by the court in Barry v. Washington Post in analyzing whether the records sought by DCPLSP from DCDC satisfy the first part of the relevant inquiry, it is abundantly clear that such documents are "investigative records compiled for law enforcement purposes" and, therefore, satisfy the first prong of the D.C.-FOIA Exemption 3 two-part test inasmuch as the withheld records were compiled or obtained by DCDC during the course of its ongoing investigation of "a specifically alleged illegal act," sexual assault, "of [a] particular identified person," the accused correctional officer, which, if proven, could reasonably be expected to lead to civil or criminal sanctions.

Having determined that the first part of the relevant inquiry was satisfied, this office must consider whether the records at issue are protected under subcategories (A), (B) and (C) of D.C.-FOIA Exemption 3, respectively.

During the course of addressing the second part of the D.C.-FOIA Exemption 3 inquiry in administrative appeals

previously filed with the Mayor discussing the applicability of the law enforcement exemption, this office has noted that Barry v. Washington Post, supra, did not address that part of the relevant test because the court in that case held that the records under consideration did not qualify as "investigatory records compiled for law enforcement purposes," and the D.C. Court of Appeals had not issued any other published opinions interpreting the exemption.

Like D.C.-FOIA Exemption 3, federal FOIA Exemption 7 exempts from mandatory disclosure certain "[i]nvestigatory records compiled for law enforcement purposes". 5 U.S.C. § 552(b) (7) (1994 & Supp. IV 1998).

The United States Supreme Court, in addressing the second part of the inquiry, directed its focus on the harm or interference that could result from the release of investigatory records compiled for law enforcement purposes. See Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 619 (1982) ("Exemption 7 authorizes disclosure of law enforcement records unless the agency can demonstrate one of six specific harms").

D.C.-FOIA Exemption 3(A)

DCPLSP contends that DCDC's claim that D.C.-FOIA

Exemption 3(A) applies to the withholding of responsive records was improper because, after an investigation was conducted, it "concluded that no crime occurred. Thus, there is no criminal trial forthcoming to enforce the law against sexual assault." Appeal Letter p. 2, ¶ 4.

D.C.-FOIA Exemption 3(A) protects from disclosure "[i]nvestigatory records compiled for law-enforcement purposes," but only under the limited circumstances where the release thereof would "interfere with enforcement proceedings." D.C. Official Code § 2-534(a)(3)(A).

In North v. Walsh, 881 F.2d 1088, 1098 (D.C. Cir. 1989), the D.C. Circuit opined that "Exemption 7(A) . . . is designed to block the disclosure of information that will genuinely harm the government's case . . . or impede an investigation." accord Alyeska Pipeline Service Co. v. U.S. E.P.A., 856 F.2d 309, 311 (D.C. Cir 1988) (quoting 5 U.S.C. § 552(b)(7)(A) ("FOIA's disclosure requirements do not apply to 'records or information compiled for law enforcement purposes . . . to the extent that [their] production . . . could reasonably be expected to interfere with enforcement proceedings'")); see Accuracy in Media, Inc. v. United States Secret Service, 1998 U.S. Dist. LEXIS 5798, *7 (D.D.C. Apr. 16, 1998) (the "government has the

burden of demonstrating the specific ways in which disclosure of the withheld information would interfere with a prospective or ongoing law enforcement proceeding or investigation"); Butler v. Department of Air Force, 888 F. Supp. 174, 183 (D.D.C. 1995) (court held that because "release of requested documents would interfere with pending investigations, Exemption 7(A) was a proper basis . . . to deny Plaintiff access to the requested information"); see also Service Employees International Union, AFL-CIO, supra.

Pertinent federal court decisions illustrate the type of specific harms which would justify the nondisclosure of documents pursuant to the counterpart federal FOIA exemption, 5 U.S.C. § 552(b)(7)(A).

For example, in Solar Sources, Inc. v. United States, 142 F.3d 1033 (7th Cir. 1998), the Seventh Circuit affirmed the trial court's grant of summary judgment in favor of the Department of Justice ("DOJ") which invoked federal FOIA Exemption 7(A) to withhold records from a FOIA requester. The court in Solar Sources held that the trial court properly determined that the requested materials were exempt based on the DOJ's proffer that "[p]ublic disclosure of [the] information could result in destruction of

evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." Id. at 1039.

Similarly, in Alyeska Pipeline, supra, the D.C. Circuit held that the trial court properly granted summary judgment in favor of the U.S. Environment Protection Agency in an Exemption 7(A) case where an agency official's affidavit stated that the disclosure of requested information could "prematurely reveal[] to the subject of [the] ongoing investigation the size, scope and direction of [the] investigation," "allow for the destruction or alteration of relevant evidence," and "discourage witnesses from providing information." 856 F.2d at 312.

Likewise, in Barney v. I.R.S., 618 F.2d 1268, 1273 (8th Cir. 1980), the Eighth Circuit held that an agency's affidavits "adequately demonstrated that the release of . . . documents would 'interfere with enforcement proceedings' within the meaning of exemption 7(A)" where agency officials attested that access to records would disclose "the direction of the investigation, and the scope and limits of the Government's investigation," "allow the [subject(s)] to construct defenses or tamper with evidence," and result in "prematurely revealing the substance of the investigation to the subjects"); see

North v. Walsh, supra, 881 F.2d at 1097 (citing, as examples, federal cases which have variously held that federal FOIA Exemption 7 was properly invoked to protect materials which, if disclosed, could: (1) enable targets to "construct defenses which would permit violations to go unremedied;" (2) "reveal the scope and direction of [an] investigation;" (3) "allow the target(s) to destroy or alter evidence;" (4) discourage witnesses from providing information; (5) "hinder an agency's ability to shape and control investigations;" or (6) "prematurely reveal[] the government's case") (citations omitted); see also Service Employees International Union, AFL-CIO, supra, *27

("Release of the investigatory file would have 'identified the individuals who OIG has interviewed or who may have relevant information,' . . . 'provided clues about the nature and scope of the OIG investigation,' . . . 'provided the target(s) of the investigation with a road map through the OIG's case, thereby affording critical insights into the investigators' thinking and strategy,' . . . [and] 'enabled the target(s) to interfere with the investigation by fabricating defenses or harassing witnesses.'").

As noted above, due to the dearth of binding D.C. Court of Appeals' case precedent interpreting D.C.-FOIA Exemption 3, the decisions of the U.S. Supreme Court and

federal appellate courts interpreting the corresponding federal FOIA provision provide authoritative guidance as to the proper construction to be given to the provision at issue. See Washington Post, supra.

Based on the evidence of record, the Secretary of the District of Columbia is unable to render an informed decision as to whether any of the information withheld by DCDC was protected from disclosure under D.C.-FOIA Exemption 3(A) because its denial letter did not contain any information regarding what specific harm(s) would result from the release of the information requested by DCPLSP.

Accordingly, it is necessary to remand this matter to DCDC for additional information in order to supplement the administrative record.

D.C.-FOIA Exemption 3(B)

Similar to federal FOIA Exemption 7(B), D.C.-FOIA Exemption 3(B) shields from disclosure "*[i]nvestigatory records compiled for law-enforcement purposes,*" where the disclosure thereof would "[d]eprive a person of a right to a fair trial or an impartial adjudication[.]" D.C. Official Code § 2-534(a)(3)(B)(2001).

On appeal, DCPLSP contends that DCDC's reliance on

JAN 28 2008

D.C.-FOIA Exemption 3(B) is improper because "there is no upcoming trial or adjudication with which to interfere."

Appeal Letter p. 2, ¶ 4.

In Washington Post Company v. U.S. Department of Justice, 863 F.2d 96 (D.C. Cir. 1988), the issue as to "[w]hat is required to establish that production of a document being sought under FOIA would deprive a person of a right to a fair trial [was] a question of first impression." Id. at 101. After observing that "[f]ew courts have decided 7(B) questions and the legislative history on the provision is scant," the D.C. Circuit, in its construction of the wording of the exemption, held "that to withstand a challenge to the applicability of 7(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." Id. at 101-102.

Here again, the record before the Office of the Secretary is devoid of any relevant information upon which a reasoned determination can be rendered regarding the applicability of D.C.-FOIA Exemption 3(B) to any withheld records because DCDC's denial letter does not indicate

JAN 28 2

DISTRICT OF COLUMBIA REGISTER

whether any judicial or quasi-judicial proceedings were pending or appeared imminent.

Accordingly, it is necessary to remand this appeal to DCDC for additional information to supplement the record on the issue as to whether D.C.-FOIA Exemption 3(B) was properly invoked to withhold any records in response to DCPLSP's D.C.-FOIA request.

D.C.-FOIA Exemption 3(C)

D.C.-FOIA Exemption 3(C) safeguards from disclosure the following:

Investigatory records compiled for law-enforcement purposes, but only to the extent that the production of such records would:

* * * *

(C) Constitute an unwarranted invasion of personal privacy[.]

D.C. Official Code 2-534(a)(3)(C).

With respect to the applicability of D.C.-FOIA Exemption 3(C), DCPLSP contends that "[f]or both procedural and substantive reasons, D.C. Code § 2-535(a)(3) [sic] does not shield the Department of Corrections from releasing the documents in question." Appeal Letter p. 2, ¶ 5. In this regard, DCPLSP contends "that three basic requirements [must] be met in order to sustain a claim of law

enforcement privilege:

There must be a formal claim of privilege by the head of the department having control over the requested information; the assertion of the privilege must be based on actual personal consideration by that official; and the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege."

Appeal Letter p. 3, ¶ 1.

In support of its position, DCPLSP primarily relies upon cases interpreting the contours of the law enforcement evidentiary/investigatory privilege. See In re Sealed Case, 856 F.2d 268 (D.C. Cir. 1988); Kay v. Pick, 711 A.2d 1251 (D.C. 1998); Cobell v. Norton, 213 F.R.D. 1 (D.D.C. 2003).

While there are many parallels in the factors that must be considered in determining whether information gathered for law enforcement purposes is protected under the law enforcement investigatory privilege vis-à-vis the law enforcement exemption of the D.C.-FOIA, they are not coextensive, as DCPLSP seems to suggest, because the legal standards enunciated in the case law are different. In that regard, this office, during its research of federal FOIA Exemption 7(C) cases, did not discover any reported decisions which held (1) that the head of the agency having control over responsive documents must invoke the exemption

JAN 28

DISTRICT OF COLUMBIA REGISTER

or (2) that the determination that the exemption applies to withhold records from disclosure must be based on actual personal consideration by the head of the agency.

Therefore, this office is not persuaded by DCPLSP's argument that Exemption 7(C) is inapplicable because the DCDC FOIA Officer, and not the head of DCDC, made the determination to invoke the aforesaid exemption to withhold responsive documents. Instead, the office is of the opinion that the propriety of a public body's decision to withhold personal information from disclosure to a third party should be considered in light of the decision in Hines v. Board of Parole, 567 A.2d 909 (D.C. 1989), where the D.C. Court of Appeals relied on the U.S. Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), a federal FOIA Exemption 7(C) case.⁶

Based on the rationale of Reporters Committee, the D.C. Court of Appeals opined that the determination as to whether personal information contained in public records was protected from disclosure required a balancing of "the

⁶ Reporters Committee appears to be directly on point because the U.S. Supreme Court specifically dealt with the privacy rights implicated in the disclosure of law enforcement records under federal FOIA Exemption 7(C), the counterpart provision to D.C.-FOIA Exemption 3(C).

privacy interest of those who are the subject of the documents in question or those who may be harmed by their release against the public interest in the release of the documents." Id. at 912.

In Reporters Committee, the U.S. Supreme Court reaffirmed several relevant principles enunciated in its earlier decisions interpreting the extent to which the public interest in certain information warrants an invasion of the personal privacy interests of an individual.

First, the court stated that it "must balance the public interest in disclosure against the interest Congress intended the exemption to protect." Id. at 776. Second, the Court intimated that "whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information was made." Id. at 771. In this regard, the court remarked that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document.]'" Id. (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)). Finally, the court stated that disclosure is in the public interest when it achieves "the core purposes of the FOIA [which is] to contribut[e] significantly to public understanding of the operations or activities of the government." Id. at 775. In elaborating

upon this final principle, the court found its decision in Department of Air Force v. Rose, 425 U.S. 352 (1965) to be illustrative.

In Rose, at issue was whether the U.S. Air Force properly redacted the names of cadets from disciplinary hearing summaries disclosed pursuant to a federal FOIA request. Commenting on its decision in Rose, the U.S. Supreme Court in Reporters Committee remarked that "[t]he summaries obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were the appropriate subject of a FOIA request." Id. at 773. Regarding the redaction of the "information that would identify the particular cadets to whom the summaries related," the court opined:

The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a "clearly unwarranted" invasion of privacy.

Id. at 773-74.

Applying the legal principles enunciated by the court in Reporters Committee to the instant matter, it is necessary to balance the individual privacy interests of the correctional officer who is the subject of the sexual assault allegations and other individuals who provided

JAN 28 2005

DISTRICT OF COLUMBIA REGISTER

information during the course of DCDC's investigation into the allegation that a prisoner was sexually assaulted by the accused correctional officer against the extent to which the public disclosure of the requested information "would 'she[d] light on [DCDC's] performance of its statutory duties' or otherwise let citizens know 'what [DCDC] is up to.'" United States Department of Defense v. Federal Labor Relations Authority, (DoD v. FLRA), 510 U.S. 487 (1994) (quoting Reporters Committee, supra, at 773).

The record in this matter is barren of any evidence or information upon which a meaningful balancing of the relevant interests can be weighed by this office. Therefore, it is necessary to remand this appeal to DCDC with instructions for the department to provide additional information which provides an appropriate balancing of the interests in disclosure versus nondisclosure consistent with the U.S. Supreme Court's opinion in Reporters Committee as followed by the D.C. Court of Appeals' decision in Hines.

Contention 4

Segregability of Non-Exempt Information

As a final matter, DCPLSP contends that "DCDC has an affirmative duty to review each responsive document and segregate releasable portions and redact non-releasable

JAN 28 2

DISTRICT OF COLUMBIA REGISTER

portions." Appeal Letter p. 4, ¶ 5. This office agrees.

D.C. Official Code § 2-534(b) provides as follows:

Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

In the *Appeal of Dan Keating, Database Editor, The Washington Post*, Matter No: FY0412 (February 23, 2004), 51 D.C. Reg. 2540, 2548 n. 4 (March 5, 2004), this office opined, based on federal FOIA jurisprudence, that D.C. Official Code § 2-534(b) permits the withholding of the entire contents of a document only where non-exempt material is "inextricably intertwined" with exempt portions of such document. See, e.g., Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977) (D.C. Circuit held that "it has long been the rule . . . that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions."); see also Rugiero v. United States

Department of Justice, 257 F.3d 534, 553 (6th Cir. 2001) ("Under th[e] principle of segregability, an agency cannot justify withholding an entire document simply because it contains some material exempt from disclosure"); see also Kimberlin v. Department of Justice, 139 F.3d 944 (D.C. Cir. 1998).

Apart from the conclusory assertion in the DCDC FOIA Officer's denial letter that "the records are exempt from disclosure under the D.C. Official Code §2-534(a) (3) (A) (B) &(C)," the administrative record before the Office of the Secretary does not contain "an adequate explanation for the non-segregability" of the requested documents. See Armstrong v. Executive Office of the President, 97 F.3d 575, 578 (D.C. Cir. 1996).

Because this appeal necessitates a remand on other substantive issues, if DCDC continues to take the position that the documents requested by DCPLSP are not subject to disclosure in their entirety, DCDC must show, via reasonably detailed affidavit(s), why the entire contents of such documents could not be reasonably segregated and disclosed to DCPLSP.

CONCLUSION

For all of the foregoing reasons, it is the decision

of the Secretary of the District of Columbia that the present appeal is required to be remanded to DCDC for a proper analysis of the legal standards applicable to D.C.-FOIA Exemptions 3(A), 3(B) and 3(C), which it invoked to withhold responsive documents, and a determination as to whether any information in any such records may be reasonably segregated and disclosed to DCPLSP.

DCDC is further directed to file an affidavit or, if more than one person is involved in the determination on the disclosure or nondisclosure of responsive records, affidavits required by this decision with the Office of the Secretary of the District of Columbia within seven (7) working days of the receipt of a copy of this decision, and provide a courtesy copy to the Mayor via the General Counsel to the Mayor. Such sworn affidavits shall be reasonably detailed and provide specific information which addresses the legal standards set forth in the discussion above regarding D.C.-FOIA Exemptions 3(A), 3(B) and 3(C).

DCDC shall further determine whether any reasonably segregable information may be segregated and disclosed to DCPLSP consistent with all of the requirements of D.C. Official Code § 2-534(b).

To the extent that DCDC on remand determines that additional documents exist which are responsive to DCPLSP's

D.C.-FOIA request that relate to this appeal, DCDC is instructed to comply with the following directives:

DCDC is directed to provide a written response to the Office of the Secretary, with a courtesy copy to DCPLSP, within seven (7) working days of the date of this decision which comports with the following:

1. When a requested record has been identified and is available, the public body shall notify the requester as to where and when the record is available for inspection or copies will be available. The notification shall advise the requester of applicable fees.
2. A response denying a written request for a record shall be in writing and shall include the following information:
 - (a) The identity of each person responsible for the denial;
 - (b) A reference to the specific exemption or exemptions authorizing the withholding of the record with a brief explanation of how each exemption applies to the record withheld and a statement of the public interest considerations which establish the need for withholding the record. Where more than one record has been requested and is being withheld, the foregoing information shall be provided for each record withheld;
 - (c) After deletion of any reasonably segregable portion of a public record which may be withheld from disclosure, justification shall be explained fully in writing and the extent of the deletion shall be indicated on the record which is made available, unless

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Mayor's Correspondence Unit

that indication would harm an interest protected by any exemption under the D.C.-FOIA. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made;

- (d) If a requested record cannot be located from the information supplied or is known to have been destroyed or otherwise disposed of, DCPLSP shall be so notified; and
- (e) A statement of the appeal rights provided by the Act.

DCDC is further instructed to submit a written certification to the Mayor of the District of Columbia (via the General Counsel to the Mayor) that the department has complied with all of the requirements of this final decision or any reasons as to why the department did not comply with any of the requirements.

This constitutes the final decision of the Secretary of the District of Columbia on this appeal.

SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

CHANGE IN FEBRUARY 2005 MONTHLY MEETING DATE

The Zoning Commission of the District of Columbia, in accordance with § 3005.1 of the District of Columbia Municipal Regulations, Title 11, Zoning, hereby gives notice that it has rescheduled the **February** monthly meeting from February 14, 2005, at 6:30 P.M., to **February 24, 2005, at 6:30 P.M.**

For additional information, please contact Clifford Moy, Secretary to the Zoning Commission at (202) 727-6311.

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