SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CHRISTOPHER BANGS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 2020 CA 3799 B**
	:	**Judge Todd E. Edelman**
DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES,	:	
	:	
Defendant.	:	

ORDER

As part of the Tipped Wage Workers Fairness Amendment Act of 2018, D.C. Law 22-196, the District of Columbia Council enacted various requirements relating to the payment of workers who receive tipped wages. Among those requirements, employers must file quarterly wage reports with the District of Columbia Department of Employment Services certifying that all employees have been paid the required minimum wage and providing detailed information regarding employee compensation. *See* D.C. Code § 32-1009.01. In early 2020, Plaintiff – "as part of an effort to uncover and combat wage theft," Compl. ¶ 5 – made a series of requests pursuant to the Freedom of Information Act ("FOIA") for the wage reports submitted by District employers pursuant to this statute. When the District rebuffed Plaintiff's efforts in part, he filed this action.

This case comes before the Court upon the parties' opposing Motions for Summary Judgment. Defendant, the District of Columbia Department of Employment Services ("the District"), [1] filed its Motion for Summary Judgment on January 7, 2021.

[1] The defense argues that judgment should be entered in its favor because the defendant named in the Complaint, the District of Columbia Department of Employment Services ("DOES"), exists as a *non sui*

Plaintiff Christopher Bangs filed a brief combining his Opposition to Defendant's Motion for Summary Judgment and his own Motion for Summary Judgment on February 19, 2021. Defendant filed its Response to Plaintiff's Opposition and Motion for Summary Judgment on February 25, 2021, to which Plaintiff filed his Reply on March 4, 2021. The Court heard oral arguments as to these motions on April 21, 2021. For the reasons set forth *infra*, the Court finds that the District improperly invoked two FOIA exemptions in withholding materials from Plaintiff; accordingly, the Court grants judgment in favor of Plaintiff.

I. Factual and procedural background

This FOIA dispute began when Plaintiff sent three FOIA requests to the District's Department of Employment Services ("DOES") in January and February 2020 requesting quarterly tipped minimum wage reports for Fiscal Year 2019 ("Tipped Wage Reports"). Pl. Statement of Undisputed Material Facts ¶ 1 (hereinafter "Pl. SOMF"). These reports are collected from District of Columbia employers and payroll processors pursuant to D.C. Code § 32-1009.01.[2] *Id.*

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juris entity that cannot be sued. Def. Mem. Mot. for Summ. J. at 3. While Plaintiff contends that he can bring a FOIA action against a subordinate governmental agency such as DOES, the Court sees no reason to resolve this question of law: both parties agree that the Court can simply add the District of Columbia (a party against whom a FOIA action can unquestionably be maintained) as a defendant in this case, and defense counsel from the Office of the Attorney General of the District of Columbia raised no objection to the Court doing so at the April 21, 2021 motions hearing. Accordingly, the Court will add the District of Columbia as a defendant in this matter, mooting the theoretical question of whether a FOIA case could proceed only against DOES.

[2] Under D.C. Code § 32-1009.01(a), "the third-party payroll businesses required pursuant to § 32-1008(a-1) to process payroll for an employer that employs a tipped worker . . . shall submit a quarterly wage report . . . [that] shall certify that each tipped worker was paid at least the required minimum wage, including gratuities, and shall include the following [i]temized, for each tipped worker, the worker's: name; [a]verage hourly wage received per week during the quarter; [t]otal hours worked at or above the minimum hourly wage . . . [g]ross wages . . . and [t]otal gratuities received." The Tipped Wage Workers Fairness Amendment Act of 2018 focuses on creating user-friendly sources of information on wage-and-hour laws, and means for employees to contact DOES to notify an alleged wage-theft violation. D.C. Law 22-196.

The District granted in part and denied in part Plaintiff's FOIA requests for the Tipped Wage Reports. Pl. SOMF ¶ 2; Def. Undisputed Response to Pl. SOMF at 2. The Tipped Wage Reports produced by the District contained each employer's account number, name, and contact information, and an indication of whether the employer had complied with the laws for that quarter of 2019. Def. Statement of Undisputed Material Facts ¶ 3 (hereinafter "Def. SOMF"); Pl. SOMF ¶ 3. Specifically, the District produced to Plaintiff four spreadsheets for the fiscal year 2019 with one spreadsheet per quarter. Pl. SOMF ¶ 3; Def. Undisputed Response to Pl. SOMF at 2. The District's response did not include all of the information reported to DOES and requested by Plaintiff. Pl. SOMF ¶ 4-5; Def. SOMF ¶ 4-5; Def. Undisputed Response to Pl. SOMF at 2. Specifically, the District withheld information regarding the tipped wage hours, employer paid hourly rate, wage amount, tipped wages amount, average total hourly rate, average hourly tips received, and the total number of employees reported for each employer pursuant to FOIA's trade secret and commercial information exemption, codified at D.C. Code § 2-534(a)(1). Def. SOMF ¶ 4; Pl. SOMF ¶ 4; Def. Undisputed Response to Pl. SOMF at 2. The District also withheld information regarding the names of and number of employees for each employer from the disclosed spreadsheets under FOIA's personal privacy exemption. *See* D.C. Code § 2-534(a)(2). Def. SOMF ¶ 5; Pl. SOMF ¶ 5; Def. Undisputed Response to Pl. SOMF at 2. The District withheld the requested information regarding the number of employees by redacting from the spreadsheets submitted by

Tipped Wage Workers Fairness Amendment Act of 2018. As a part of that effort, it requires businesses with tipped workers to use a third party to create payroll documents and to report information to DOES on a quarterly basis. *Id.*

employers the individual rows that break down the reported information on an employee-by-employee basis. Def. Mem. Mot. for Summ. J. at 9; Def. Response at 12-13.

II. Legal standard

Under Superior Court Rule of Civil Procedure 56(c), summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *District of Columbia v. Fraternal Order of Police Metro. Police Dep't Labor Comm.*, 75 A.3d 259, 264 (D.C. 2013) ("*F.O.P.*") ("Summary judgment is appropriate only when the record, including pleadings together with affidavits, indicates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."). "'In the FOIA context, this requires that [the court] ascertain whether the agency has sustained its burden of demonstrating the documents requested are exempt from disclosure under the FOIA.'" *Id.* (quoting *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008)); *see also Center for Auto Safety v. Nat'l Highway Traffic Safety Admin*, 93 F. Supp. 2d 1, 33-34 (D.D.C. 2000). Whether or not the agency has sustained its burden is a question of law. *F.O.P.*, 75 A.3d at 264 (citing *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (D.C. 2005); *Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005)).

III. Analysis

The District's FOIA premises its disclosure requirements on the policy "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Code § 2-531; *Fraternal Order of Police, Metro. Police Dep't Labor Committee v. District of Columbia*, 79 A.3d 347, 353-54 (D.C. 2013). Like the federal FOIA statute, our local law seeks to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, "FOIA's provisions are to 'be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting the information.'" *Fraternal Order of Police, Metro. Police Dep't Labor Committee*, 79 A.3d at 354 (citing D.C. Code § 2-531). Specifically, those provisions "'giving citizens the right of access are to be generously construed, while the statutory exemptions from disclosure are to be narrowly construed, with ambiguities resolved in favor of disclosure.'" *Id.* at 354 (quoting *Riley v. Fenty*, 7 A.3d 1014, 1018 (D.C. 2010)).

The District invokes two of FOIA's disclosure exemptions—the trade secrets and financial information exemption, D.C. Code § 2-534(a)(1)), and the personal privacy exemption, D.C. Code § 2-534(a)(2))— to justify its non-disclosure of the materials sought by Plaintiff.[3] When asserting a privilege against disclosure, the government

[3] As an initial matter, the District also asserts that Plaintiff's claims are moot. In general, "a case is moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803,813 (D.C. 2014) (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 904-05 (D.C. 2006)). In the FOIA context, "once a government produces all the documents that a plaintiff requests, the claim for relief under FOIA becomes moot." *Id.* (quoting *Walsh v. United States Dept. of Veterans Affairs*, 400 F.3d 535, 536 (7th Cir. 2005) (other citations omitted)). If "an agency has released documents, but other related issues remain unresolved," courts often will not dismiss the action as moot. *Id.* (quoting *McKinley v.*

agency cannot simply declare that all responsive documents are exempt. Instead, when claiming an exemption:

> a government agency must do so in a manner that permits adequate adversary testing of the agency's claimed right to an exemption, and enable the trial court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves and without thwarting the claimed exemption's purpose.

Id. at 355 (internal citations and punctuation omitted). The agency has met its burden if its submission "describes the documents and the justifications for non-disclosure with reasonably specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* at 355-56 (quoting *Military Audit Project v. Casey*, 565 F.2d 724, 738 (D.C. Cir. 1981)); *see also Fraternal Order of Police, Metro. Police Dep't v. District of Columbia*, 82 A.3d 803, 817 (D.C. 2014). When examining government assertions of exemption, courts must keep in mind that the statute "is designed to promote the disclosure of information, not to inhibit it." *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 521 (D.C. 1989). Just as courts must broadly interpret the statute's public access and disclosure requirements, the enumerated statutory exemptions "must be approached with a jaundiced eye." *Id.* "[T]hese exemptions are to be narrowly construed, with ambiguities resolved in favor of disclosure . . . the burden is on the agency to sustain its action." *Id.*

Federal Deposit Ins. Corp., 756 F. Supp. 2d 105, 110 (D.D.C. 2010) (other citations omitted)). As acknowledged at oral argument, the mootness argument in this case turns entirely on the Court's decision as to the application of the statutory exemptions: in other words, if the Court finds as a matter of law that the District properly relied on these exemptions in refusing to turn over the requested documents, it prevails in this case and the Plaintiff's request for a declaratory judgment becomes moot; if the Court finds to the contrary, Plaintiff's request for additional disclosure cannot be deemed moot.

(internal citations omitted); *see also Dunhill v. Director, Dist. of Columbia Dep't of Transp.*, 416 A.2d 244, 247 n.5 (D.C. 1980) (citing Comm. on the Judiciary and Criminal Law, Report on Bill No. 1-119, the "D.C. Freedom of Information Act of 1975," at 6 (Sept. 1, 1976)) ("[t]he general policy underlying the D.C. FOIA favors disclosure of information about governmental affairs . . . including a narrow reading of the exemptions from disclosure . . . [t]his policy was 'placed in the legislation to make clear that any actions should serve the purpose of access.'").

A. Trade secrets and commercial information exemption

The District relies upon FOIA's trade secrets and commercial information exemption, D.C. Code § 2-534(a)(1), to justify its non-disclosure of much of the material that Plaintiff continues to request. Specifically, the District contends that this exemption authorizes its refusal to provide Plaintiff with the requested materials regarding tipped wage hours; hourly rate; rate amount; tipped wages amount; average hourly tips received; and total number of employees per employer. Def. Mot. for Summ. J., Ex. A ¶ 9 (Affidavit of Tonya Robinson).

The District's FOIA statute provides an exemption for "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained." D.C. Code § 2-534(a)(1). Based on the statute's language, reliance on this exemption requires a showing that (i) the requested information constitutes either trade secrets or commercial and financial information that an agency obtained from an entity outside the government, and that (ii) disclosure of that

information would substantially harm that entity's competitive position. With regard to the second prong of this showing, the party seeking the exemption must demonstrate "(1) that the party from whom the information was obtained faces actual competition, and (2) that the disclosure will cause substantial competitive injury." *Washington Post Co.*, 560 A.2d at 522 (D.C. 1989) (quoting *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987)). This exemption in the D.C. FOIA statute differs significantly from the comparable section in the federal FOIA, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). While the federal statute contemplates non-disclosure of any commercial and financial information deemed "privileged and confidential," the District's statute contains no such language and instead "explicitly focuses on the question of harm to the competitive position of the person providing the information." *Washington Post Co.*, 560 A.2d at 522.

The District persuasively argues that the wage reports and related information in dispute qualify as "commercial information" within the meaning of D.C. Code § 2-534(a)(1). In determining the definition of "commercial" and "financial," the terms "should be given their ordinary meanings." *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1290 (D.C. Cir. 1983). Simply put, "'[c]ommercial' surely means pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Board.*, 588 F.2d 863, 870 (2d Cir. 1978) (finding that "labor unions, and their representation of employees, quite obviously pertain to or are related to commerce and deal with the commercial life of the country."); *see also Flathead Joint Bd. of Control v. United States DOI*, 309 F. Supp. 2d 1217, 1220 (D.

Mont. 2004). The Tipped Wage Reports requested by Plaintiff—which include information employee compensation and how businesses are complying with wage laws—clearly relate to "commerce," given the plain meaning of that term. *See, e.g. 100Reporters LLC v. United States DOJ*, 248 F. Supp. 3d 115, 134 (D.D.C. 2017) ("[t]herefore, 'records that actually reveal basic commercial operations . . .fall within the scope of 'commercial' information.").[4]

The fact that the requested information qualifies as "commercial" in nature does not by itself justify non-disclosure under FOIA. Rather, as explained *supra,* withholding information pursuant to the trade secrets and commercial information exemption requires the government to prove that disclosure "would result in substantial harm to the competitive position" of the entity that reported the information. D.C. Code § 2-534(a)(1). According to the United States Court of Appeals for the District of Columbia Circuit, while:

> the court need not conduct a sophisticated economic analysis of the likely effects of disclosure . . . [c]onclusory and generalized allegations of substantial competitive harm . . . are unacceptable and cannot support an agency's decision to withhold requested documents . . . [b]ut the parties opposing disclosure need not 'show actual competitive harm;' evidence

[4] Plaintiff contends that this exemption should not apply to his requests, noting that state and federal court decisions have not deemed employee wage data to be confidential and emphasizing the principle that employees cannot be restrained from discussing their salaries. Pl. Opp'n at 12-17. Plaintiff's argument, however, appears to conflate the language of the federal and District FOIA statutes: while the former exempts "privileged and confidential information," the District's statute includes no language about the confidentiality of requested commercial information and instead focuses only on whether disclosure would substantially harm a party's competitive position.

> revealing . . . the likelihood of substantial competitive injury . . . is sufficient.

Public Citizen, 704 F.2d at 1290-91. The District acknowledges that it bears the burden of proof as to this aspect of the exemption, arguing that "'actual harm does not need to be demonstrated; *evidence* supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply,'" Def. Mem. Mot. Summ. J. at 6 (quoting *Essex Electro Eng'rs Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010)) (emphasis added), and that the party invoking the exemption must prove it likely that disclosure would cause substantial competitive harm. Def. Response at 3 (citing *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.2d 1182, 1187 (D.C. Cir. 2004)).

In prior cases defining the contours of this exemption, courts have weighed extensive evidence on the issue of competitive harm presented by the party invoking the exemption. For example, in *Washington Post Co. v. Minority Business Opportunity Commission*, the District of Columbia Minority Business Opportunity Commission produced multiple affidavits from affected businesses claiming competitive harm from the proposed release of documents they had submitted to the government to defend withholding the requested documents. 560 A.2d at 520. Even with that evidence, our Court of Appeals remanded the case for a more probing analysis as to whether the affidavits adequately proved substantial competitive injury "with respect to each document or class of documents" withheld by the agency. *Id.* at 523. Similarly, in *Public Citizen* the federal Food and Drug Administration supported its claim of competitive harm with "a lengthy expert report and numerous depositions documenting

the competitive injury that disclosure would cause." 704 F.2d at 1291. And in *National Parks & Conservation Ass'n v. Kleppe*, the administrative agency justified its reliance on the exemption and assertion of competitive injury through witnesses and exhibits presented over the course of two days of hearings. 547 F.2d 673, 675, 679-80 (D.C. Cir. 1976).[5]

In comparison, the District has offered a remarkably weak showing of substantial competitive injury with regard to the withheld Tipped Wage Reports. Unlike government agencies in the other cited cases, the District presented no affidavits from affected businesses or other witnesses, no reports or analyses of the impact of the requested disclosure, and no real evidence of competitive injury at all, save an entirely conclusory passage in an affidavit from a DOES official that the materials were withheld "under the FOIA trade secrets and commercial financial information exemption." Def. Mot. for Summ. J., Ex. A ¶ 9.[6] Instead, the District relies not on evidence of potential competitive injury, but on rank speculation as to the possible effects of disclosure of this information. The District reasons that the information "*could* allow businesses to gain insights about their competitors['] operations, undercutting competitive advantages . . . competitors *could* determine how much each business pays . . . [a] competitor *could* use this

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[5] The District's reliance on *Flightsafety Servs. Corp. v. DOL*, 326 F.3d 607 (5th Cir. 2003), is misplaced. That case did not focus on proof of competitive injury, but instead analyzed whether the exemption in the federal statute justified non-disclosure where disclosing the information would impair the government's ability to obtain necessary information in the future. 326 F.3d at 611-612.

[6] The affidavit provided by the District seems similar to that submitted in *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973). In that case, the United States Court of Appeals for the District of Columbia Circuit criticized the lower court for granting a motion for summary judgment in a FOIA case where "the sole support, regarding the contents of the documents and their exemption, of the Government's motion was an affidavit of the Director of the Bureau of Personnel Management Evaluation. The affidavit did not illuminate or reveal the contents of the information, but rather set forth in conclusory terms" that the documents should not be released. 484 F.2d at 823.

information to draw conclusions about the health and stability of each business." Def. Mem. Mot. for Summ. J. at 7 (emphasis added). As the District's counsel acknowledged at oral argument, it bases these claims more on logic than on evidence, but the undersigned views these assertions as far from indisputable: given that the wage reporting laws impose symmetrical obligations on all employers of a certain type, and given that employee wage data cannot be kept entirely confidential in any event, it is not obvious that disclosure of these materials would cause substantial competitive harm to any reporting employer. But, more importantly, the District's assertions are just that—assertions unsupported by any evidence, much less evidence of the type and quality used to justify exemption of disclosure presented in cases such as *Washington Post Co.* and *Public Citizen*. Because the District has made no showing that disclosure "would result in substantial harm to the competitive position of the person from whom the information was obtained," it has not satisfied the burden necessary to permit withholding the documents and information under this exemption.

B. Personal privacy exemption

The District relies on FOIA's personal privacy exemption to justify non-disclosure of the number of employees per employer. Def. Mot. for Summ. J., Ex. A ¶ 10.[7] The District withheld this information by striking from the unredacted versions of the spreadsheets the individual rows containing information for the individual employees. Def. Mem. Mot. for Summ. J. at 9; Def. Response at 12-13. Under D.C. Code § 2-

[7] Although Plaintiff originally requested the names of the individual employee, Plaintiff does not challenge the decision to withhold the names of employees. Pl. Opp'n & Mem. Mot. Summ. J. at 24.

534(a)(2), "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" may be exempted from disclosure. "The term 'unwarranted' requires us to 'balance the public interest in disclosure against the privacy interest Congress [and the Council of the District of Columbia] intended the exemption to protect.'" *District of Columbia v. FOP*, 75 A.3d 259, 265 (D.C. 2013) (citing *Padou v. District of Columbia*, 29 A.3d 973, 987 (D.C. 2011)). The first step in this analysis involves a determination of "whether there is any privacy interest at stake in the information sought." *Id.* "That interest need only be 'more than *de minimis*' to trigger application of the balancing test . . .[o]nce a more than *de minimis* privacy interest in implicated, the requestor must indicate how disclosing the withheld information would serve the public interest." *Id.* (internal citations omitted). The level of private information needed to trigger the balancing test is low. *Id.* at 266.

In applying this exemption, information that implicates a privacy interest includes "names, addresses, and other identifying information . . . individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature." *Id.* at 265-66. Once the privacy interest is identified, it is balanced against the public's interest under FOIA to "obtain 'full and complete information regarding the affairs of government and the official acts of . . .employees." *Padou*, 29 A.3d at 982 (citing D.C. Code § 2-531).

The Tipped Wage Reports produced by the District contain only the employer account number, name, and contact information, and an indication of whether the employer had complied with the laws for that quarter of 2019. Def. SOMF ¶ 3; Pl. SOMF ¶ 3. Pursuant to the personal privacy exemption, the District withheld the names

of employees and number of employees reported by each employer. Def. SOMF ¶ 5. The District represents that an unredacted version of the Tipped Wage Reports would be structured such that “each employer reports a separate row with data for each of its tipped employees.” Def. Mem. Mot. for Summ. J. at 9. According to the District, if this information is released even in anonymized form (i.e., without the employees’ names), someone who knows information about an employee—in particular, where the employee works, the number of hours she works, and perhaps her base wage rate—could then could connect that information to the individual row in the spreadsheet to learn further financial information about the employee, thus utilizing a “reverse engineering” process to the data in a manner that invades the employee’s privacy rights. Def. Response at 13. The District seeks to distinguish these spreadsheets from other payroll data produced in FOIA requests by contending that “releasing each row for each employee . . . would allow someone who knows any given employee and knows where that employee works to determine how much that employee earns.” *Id.* at 13.

While the District’s argument is largely theoretical, it does make out at least a plausible scenario under which an individual could combine the requested materials with information already known to learn information about what a particular employee earns. *Compare FOP v. District of Columbia*, 124 A.3d 69, 78 (D.C. 2015) (“*FOP 2015*”) (“[g]iven the particularization of the FOP's individual FOIA requests and with the information disclosed in the files, including the details of the disciplinary infraction, the year (or narrower time frame) in which the infraction occurred, and various other facts, FOP members interested in identifying the subject of the disciplinary proceedings . . . would have little difficulty winnowing down the possibilities to only a few candidates. It

is quite plausible that, in many cases, the additional clues provided by the officer's gender or race or the specific date of a key event would enable such a curious and well-informed reader to eliminate all but one of those possible suspects.”). Such information about an individual’s income constitutes private information, *Consumers’ Checkbook, Ctr. For the Study of Servs. v. United States HHS*, 554 F.3d 1046, 1050 (D.C. 2009), and the District has thus adequately demonstrated that the disclosure would implicate more than a *de minimis* privacy issue.

Under the statute, the fact that a privacy interest has been implicated does not automatically justify non-disclosure under the personal privacy exemption. As noted *supra*, if a requested disclosure implicates a privacy interest, it triggers a balancing test pitting individual privacy concerns against the public interest.

Here, Plaintiff has identified a substantial public interest in the disclosure of the requested materials. He asserts, and the District does not deny, that wage theft is a significant problem in the District of Columbia. By analyzing the data on an employee-by-employee basis, Plaintiff—as a workers’ right advocate—will be able to analyze the compliance of employers with the tipped wages and minimum wage laws and the District’s enforcement of those statutes. Pl. Opp’n & Mem. Mot. Summ. J. at 1. Plaintiff thus wishes to use the requested material in a manner consistent with FOIA’s goals: “[b]ecause the basic purpose of [FOIA] . . . focuses on the citizens' right to be informed about 'what their government is up to,' ‘information that ‘sheds light on an agency's performance of its statutory duties’ is in the public interest.” *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1231 (D.C. Cir. 2008) (internal citations omitted). The District notes that the Tipped Wage Reports include a “yes/no column,” which indicates

whether a business has complied with the law, and maintains that that information is "sufficient" for Plaintiff's purposes. Def. Opp'n at 14. But requiring Plaintiff to accept such a representation at face value essentially would constitute a holding that Plaintiff must take the government at its word regarding its activities, and would prevent Plaintiff from examining whether DOES is truly enforcing the law.

On the other hand, the privacy concerns implicated by the requested disclosure, while more than *de minimis*, do not impress the undersigned as particularly weighty. The "reverse engineering" envisioned by the District appears fairly unlikely to occur: the District does not posit exactly *why* anyone would engage in this exercise, provide examples of individuals seeking to obtain this type of information for any purpose, or present any proof that anyone would seek information in this fashion. The predicates for this hypothetical invasion of privacy—someone who seeks to combine the disclosed wage information with already-known information about a place of employment and either number of hours worked or wages earned, and an employer whose employees can be distinguished from one another based on this data—indicates that such intrusions would be exceptionally rare.

When applying the balancing test, "the requestor must indicate how disclosing the withheld information would serve the public interest." *F.O.P.*, 75 A.3d at 265 (internal citations omitted). Although the privacy interest implicated is more than *de minimis*, the undersigned is simply not convinced that the potential invasions of privacy posited by the District are anything but extremely unlikely, or even fanciful. Balancing that remote possibility against the public's cognizable interest in information that will "'shed light on agency's performance of its statutory duties,'" *FOP 2015*, 124 A.3d at 77 (internal

citations omitted), the Court finds that the personal privacy exemption does not apply, and that the District must disclose this information.

Accordingly, for these reasons, it is this 24th day of May 2021, hereby

ORDERED that the District of Columbia is added as a defendant in this matter; and it is

FURTHER ORDERED that Defendant's Motion for Summary Judgment is DENIED; and it is

FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED; and it is

FURTHER ORDERED that JUDGMENT IS ENTERED in favor of Plaintiff and against Defendant.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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