

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-012**

January 28, 2020

VIA ELECTRONIC MAIL

Ms. Luchi Lu

RE: FOIA Appeal 2020-012

Dear Ms. Lu:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Department of Consumer and Regulatory Affairs (“DCRA”) improperly withheld records you requested pertaining to an investigation into a complaint filed against you.

Background

On September 26, 2019, you submitted a FOIA request to DCRA for the following records: “I request the audio-files of Mr. Lawson’s interview with Mr. Silroy Brown on November 30, 2018, and with Mr. Sydney Lester on November 28, 2018.”

On October 17, 2019, DCRA denied your request, stating that a search revealed two responsive records (audio recordings), but disclosure of these records would constitute a clearly unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) (“Exemption 2”), and that the recordings are non-segregable as DCRA does not have the technical capacity to redact audiotapes.

On appeal, you challenge DCRA’s response. Specifically, you argue that you are the “general public” and a party to the investigation from which the requested records flow, and therefore, entitled to the records. You also challenge the veracity of the underlying investigation and discuss the damage it has caused to your reputation.<sup>1</sup>

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<sup>1</sup> We note that DC FOIA does not obligate DCRA to create records for you or to answer your questions. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency “has no duty either to answer questions unrelated to document requests or to create documents.”). “FOIA creates only a right of access to records, not a right to personal services.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). Accordingly, your assertions related to the nature and accuracy of the underlying investigation will not be addressed in this appeal.

DCRA sent this Office a response to your appeal reaffirming its earlier position that under Exemptions 2, the records are exempt in their entirety because disclosure under D.C. Official Code § 2-534(a)(2) would constitute a clearly unwarranted invasion of privacy.<sup>2</sup> Additionally, DCRA newly asserts that, pursuant to D.C. Official Code § 2-534(a)(3)(D) (“Exemption 3”), the agency reviewed the audio recordings and determined that some of the information constitutes investigatory records compiled for law-enforcement purposes, which are exempt from disclosure. Further, the agency asserts that this information was not reasonably segregable, as DCRA does not have the technical capacity to redact audiotapes.<sup>3</sup>

### Discussion

It is the public policy of the District of Columbia government that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The primary issues in this appeal are: (i) whether, pursuant to Exemption 2, the audio recordings are exempt in their entirety because disclosure would constitute a clearly unwarranted invasion of privacy; and (ii) whether, pursuant to Exemption 3, the recordings constitute investigatory records compiled for law-enforcement purposes.

#### *Exemption 2 – Personal Privacy*

Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). DCRA characterizes the records as containing personal privileged information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of the two named employees. The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id.*

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<sup>2</sup> A copy of the DCRA’s response is attached.

<sup>3</sup> Because we conclude that DCRA may properly withhold the recordings in question under the authority of Exemption 2, we will not address the agency’s argument that Exemption 3 provides an independent basis for withholding the recordings.

The privacy interest in the FOIA balancing analysis “encompasses the individual's control of information concerning his or her person,” including names, addresses, and other identifying information. *Padou, supra*, 29 A.3d at 982. Moreover, individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).

*District of Columbia v. FOP*, 75 A.3d 259, 265-66 (D.C. 2013).

We find that there is a privacy interest in the identifying information contained within the audio recordings.

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of “public interest” if it would shed light on an agency’s conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

This statutory purpose is furthered by disclosure of official information that “sheds light on an agency’s performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that “reveals little or nothing about an agency’s own conduct” does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773.

*Id.* at 1492-93.

On appeal, you argue broadly that there is a public interest in knowing if government employees (women employees in particular) are “wearing a pillow to fake pregnancy,” and whether other employees are “submit[ting] fake paper for paternity leave.” Given the ethics statutes, regulations, and policies prohibiting the waste or abuse of government resources, we recognize that there is a public interest in the information contained in the records that you seek. *Cochran v. U.S.*, 770 F.2d 949, 956 (11th Cir. 1985) (“[T]he balance struck under FOIA exemption [two] overwhelmingly favors the disclosure of information relating to a violation of the public trust by a government official . . .”). However, we find that this interest is not served by production of identifying information, as the agency’s conduct can be gleaned without identifying individuals. *Dunkelberger v. Dep't of Justice*, 906 F.2d 779, 781 (D.C. Cir. 1990) (distinguishing the “interest in knowing the identity of the disciplined employees ‘from other public interests that may arise in requests for disclosure of government investigatory records,’ such as knowing ‘that a government investigation itself is comprehensive,’ that a released report is accurate, or that ‘any disciplinary measures imposed are adequate.’”) (quoting *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984)).

*Segregability*

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

Where a FOIA request is made for records pertaining to an identified individual, as is the case here, no amount of redaction would protect the privacy interest, because any responsive documents would necessarily be tied to the named individual. *See Mueller v. U.S. Dep't of the Air Force*, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, “deleting [her] name from the disclosed documents, when it is known that she was the subject of the investigation, would be pointless”). Thus, we find that the requested records are not reasonably segregable. Having concluded as such, we need not analyze DCRA’s assertion that it does not have the technical capacity to redact audiotapes.

### Conclusion

Based on the forgoing, we conclude that DCRA had sufficient basis to withhold the recordings sought, and we hereby dismiss your appeal. This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Erin J. Roberts, Esq., FOIA Officer, DCRA (via email)