January 22, 2020

<u>VIA ELECTRONIC MAIL</u>

Mr. Raul Anaya

RE: <u>FOIA Appeal 2020-030</u>

Dear Mr. Anaya:

This letter responds to the administrative appeal you submitted, on behalf of your client, to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In your appeal, you challenge the response the Office of Unified Communications ("OUC") provided to your request for public records under DC FOIA.

<u>Background</u>

On September 10, 2019, you submitted a FOIA request to OUC for "ANY AND ALL RECORDS – OMITTING NOTHING - and the accident involving our client, including but not limited to . . . audio and/or written transcript of the 911 call(s), dispatch, call(s) for service, or police radio communications regarding this incident." Your request did not include authorization for release of the 911 recording from the 911 caller. On September 10, 2019, OUC denied your request in part, withholding the recording of the 911 call and radio run pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2"), to protect the personal privacy interests of the caller.

On November 18, 2019, this Office received your appeal. On appeal, you assert that you forwarded photo identification for your client -- who is not the caller. You also disagree with OUC's position that the 911 call could not be released in its entirety to parties other than the original caller. Finally, you also assert that any reasonably segregable portion of a public record must be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure.

On November 21, 2019, OUC provided its response to your appeal.[1] In its response, OUC maintained its position that the 911 call and related radio run is exempt from disclosure pursuant to Exemption 2. Additionally, OUC asserts that it does not maintain written transcripts of 911 calls and only has access to the audio recordings of these calls. Finally, OUC advised that it inadvertently failed to provide you with the requested calls for service, and these records were sent to you on November 19, 2019.

---

[1] A copy of OUC's response is attached.

<u>Discussion</u>

It is the public policy of the District of Columbia that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemption 2 applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Determining whether disclosure of a record would constitute an unwarranted invasion of personal privacy requires a balancing of individual privacy interests against the public interest in disclosing the records. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

In this request, you did not provide OUC with the written consent of the 911 caller for the release of the audio recording of the 911 call. And, OUC asserts that it withheld responsive records to protect the personal privacy interests of the caller pursuant to Exemption 2.

In general, there is a sufficient privacy interest in personally identifiable information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See*, *e.g.*, *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). OUC asserts that this information is communicated in the 911 call and responder communications. As a result, we agree with OUC's assertion that the calls are subject to protection from disclosure pursuant to Exemption 2, because the recordings contain an individual's name and phone number.

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.

You have not identified a public interest in this appeal. It is unclear how providing the unredacted audio of a 911 call and the communications of responders would reveal the conduct of OUC to a degree that would outweigh the relevant privacy interest. As a result, the information protected pursuant to Exemption 2 may be withheld from disclosure.

The final issue to address is segregability. Under D.C. Official Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). The phrase "reasonably segregable" is not defined under the 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).

Here, OUC maintains that it lacks the technical capacity to excise the protected information from the responsive audio recordings. Courts have repeatedly upheld that records were not reasonably segregable where the agency attested that it lacked the technical capability to edit the records in order to disclose non-exempt portions. *See, e.g., Milton v. DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (holding that an agency did not have to produce telephone conversation because it lacked the technological capacity to redact exempt portions of the recordings); *Mingo v. DOJ*, 793 F. Supp. 2d 447, 454-55 (D.D.C. 2011). We accept OUC's representation that the responsive records are not segregable.

Conclusion

Based on the foregoing, we affirm OUC's decision and 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: Jared Siegel, Assistant General Counsel
        OUC (via email)