

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-072**

January 24, 2020

VIA ELECTRONIC MAIL

Ms. Hosanna Myers

RE: FOIA Appeal 2020-072

Dear Ms. Myers:

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 challenge the response the Office of Unified Communications (“OUC”) to your request for public records under DC FOIA.

Background

On September 30, 2019, you submitted a FOIA request for any 911 calls relating to emergencies, and corresponding CAD printouts for such calls, from a specific address on a specific date and time. On September 4, 2019, OUC denied your request completely. You filed this appeal on January 14, 2020. On January 22, 2020, OUC filed a response to your appeal.¹ In the response, OUC indicates that your FOIA request was denied under D.C. Official Code § 2-534(a)(2) (“Exemption 2”) because you did not make the 911 calls and the 911 recordings contained the names of the callers and provided information on one caller’s medical condition. However, after your appeal, OUC reviewed its earlier position on your FOIA request, and on January 21, 2020, you were provided with a redacted copy of the Computer Aided Dispatch (“CAD”) documents along with a redacted portion of the 911 calls.

Discussion

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

¹ OUC’s response to your appeal is attached to this decision.

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

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 callers for the release of the audio recording of the 911 calls. OUC asserts that it withheld responsive records to protect the personal privacy interests of the callers pursuant to Exemption 2. You contend that because the calls were from a family planning clinic that the business has no privacy interest at stake. That is not the correct analysis. The privacy interest here is based on the privacy interests of the callers who made the calls from the clinic. According to OUC, on the first call, the caller provided the name, phone number and information regarding a patient’s procedure. In the second call, the caller provided his or her name and telephone number. That number did not match the number for the clinic.

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). In its appeal response, OUC asserts that this information is communicated in the 911 calls and responder communications. We conclude that the personally identifying information raises a sufficient privacy interest under Exempt 2.

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 calls 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.

Segregability

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).

In prior FOIA appeals, OUC has stated that it lacked 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). As a result, we have upheld OUC’s assertion that the 911 calls and CAD records were not segregable because of the technical difficulty in redacting the records. See FOIA Appeal 2020-030.

In this appeal response, OUC now states that it redacted the 911 calls and CAD records to remove the information that would identify the callers and other information, including medical information, that is subject to Exemption 2. According to OUC, these redacted documents have now been produced to you.

Conclusion

Based on the foregoing, we believe this was sufficient authority under DC FOIA to support OUC’s withholding of call records and production of the redacted CAD documents. Therefore, we 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)