

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-105**

August 3, 2020

VIA ELECTRONIC MAIL

Ms. Jessica Gilles

RE: FOIA Appeal 2020-105

Dear Ms. Gilles:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 (“DC FOIA”). In your appeal, you challenge the response you received from the Office of Unified Communications (“OUC”) regarding your request for public records under DC FOIA.

Background

On February 4, 2020, you submitted a DC FOIA request to the Office of Unified Communications (“OUC”), seeking a copy of a 911 call recording. In response to that request, OUC provided to you a redacted version of the call recording. You filed an appeal on February 6, 2020, challenging OUC’s production. Your appeal requested, pursuant to Americans with Disabilities Act (“ADA”) Title III (28 C.F.R. Part 36), “that the audio provided [] be unredacted as the high pitched sounds can cause triggers and that in future requests there be an alternative way to redact and/or omit the high frequency by receding the doppler shift.” You also filed a separate FOIA request on February 6, 2020, seeking a transcript of the same 911 call recording and body camera records from the responding officer.

On February 13, 2020, OUC filed a response to your appeal.¹ And, although you did not file an appeal regarding your DC FOIA request for the call transcript and body camera footage, OUC’s response included an explanation of the office’s denial of that request as well. OUC indicated that your FOIA request was initially denied under D.C. Code § 2-534(a)(2) (“Exemption 2”) because “the caller provided personally identifiable information about themselves and others that would subject the caller and the other party(s) to harassment or unwanted contact.” However, upon reviewing its earlier position on your FOIA request, OUC recognized that it redacted more of the call recording than the office deemed necessary. On February 12, 2020, OUC provided to you a new version of the 911 call recording, with updated redactions and the high-pitched sound silenced.

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

Since OUC does not prepare transcripts of 911 call recordings or maintain police body camera footage, the office did not provide you with those records.

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. 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. Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that form the basis for denial of a request. *See* D.C. 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. 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). Under FOIA, an agency has no duty to create documents that it does not have. *Zemansky v. United States Envtl. Prot. Agency*, 767 F.2d 569, 574 (9th Cir. 1985). Since OUC does not create transcripts of 911 call recordings and does not maintain police body camera footage, this decision affirms the office’s denial of your requests for those records.

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 Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

Your FOIA request did not provide OUC with the written consent of the 911 call participants to release the requested 911 call recording. As such, OUC asserts that it redacted the 911 call recording to prevent the public disclosure of the “personally identifiable information about [the caller] and others that would subject the caller and the other party(s) to harassment or unwanted contact.” In general, there is a sufficient privacy interest in the personal information of persons mentioned in law enforcement records. *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 is considered to be exempt from disclosure. *See, e.g., Dep’t of Defense v. FLRA*, 510 U.S. 487, 500 (1994). In light of applicable case law, we conclude that the personal information in the 911 call recording presents a sufficient privacy interest under Exemption 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 772-73. 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. Dep't of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

The 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 911 calls 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. 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 & 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. 55, 60 (D.D.C. 2009).

In response to the appeal, OUC stated that it removed a high-pitched sound from the redacted portions of the 911 call recording. According to OUC, that recording has now been produced to you.

Conclusion

Based on the foregoing, we believe there is sufficient authority under DC FOIA to support OUC's production of the redacted 911 call recording. 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 in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Jared Siegel, Assistant General Counsel
OUC (via email)