

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-108**

August 3, 2020

VIA ELECTRONIC MAIL

Mr. John Smith

RE: FOIA Appeal 2020-108

Dear Mr. Smith:

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 Metropolitan Police Department (“MPD”) regarding your request for public records under DC FOIA.

Background

On December 11, 2019, you submitted a DC FOIA request to MPD, seeking any and all correspondence related to a criminal case involving a specified individual. MPD denied that request on the basis that “disclosure of the requested records would constitute an unwarranted invasion of personal privacy,” pursuant to D.C. Code § 2-534(a)(2) (“Exemption 2”) and (a)(3)(c). On February 10, 2020, you sent an email to MPD responding to the agency’s denial of your request. You argued that the agency should produce to you the requested records because “if properly redacted, this would [not] be an unwarranted invasion of privacy and would be in accordance with all laws.” Secondly, you stated that “public interest exists due to [the] involvement [of the specified individual] in another case . . . [and] due to the fact he was on military orders . . .” Finally, you asserted that “the general public has a right to know who the type of person serving in the armed services on the taxpayers’ dime [is].” You also filed an appeal with this Office.

MPD responded to your appeal on February 27, 2020. The agency maintained its position that the requested records were properly withheld pursuant to the D.C. Code § 2-534(a)(2) and (a)(3)(C). MPD noted specifically the request in your February 10, 2020, communication to the agency that it redact the specified individual’s name from the requested records. MPD responded that, “[a]lthough redactions can protect the identity of individuals if they are previously unknown, redactions cannot protect the privacy of an individual if the request is for records concerning that specific individual.” Further, the agency argued that the reasons you advanced for disclosure of the requested records did not serve a cognizable public interest under DC FOIA.

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).

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 directly identifies a specific individual and requests “any and all correspondence (e.g. letters, emails)” related to a criminal case involving that person. 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). Personal 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). Although you have suggested that MPD redact names from any produced records, the agency rightfully argues that the specified individual’s identity could not be protected “because the records are about him and his criminal case specifically and no amount of redactions can erase that fact” when your DC FOIA request directly names him.

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 records regarding the criminal case of one specific individual would “contribute significantly to public understanding of the operations or activities of the government.” *Id.* at 776. Your arguments that the public has an interest in the specified individual’s “involvement in another case.....due to the fact he was on military orders.....” and that “the general public has a right to know who the type of person serving in the armed services on the taxpayers’ dime [is]” simply do not fit within the “core purpose” of the FOIA as identified by the Supreme Court. *Id.* As a result, MPD may withhold the requested records pursuant to Exemption 2.

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 your appeal, MPD argues that no amount of redaction would protect the identity of the individual specified in your FOIA appeal. This Office agrees with that assessment.

Conclusion

Based on the foregoing, we believe there is sufficient authority under DC FOIA to support MPD’s denial of your DC FOIA request. 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: Teresa Quon Hyden
MPD (via email)