

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-227**

February 18, 2021

VIA ELECTRONIC MAIL

Mr. Chris Peak

RE: FOIA Appeal 2020-227

Dear Mr. Peak:

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 Office of the Chief Medical Examiner (“OCME”) improperly withheld records responsive to your request under the DC FOIA.

Background

On May 20, 2020, you submitted a request to the OCME seeking “all releasable indexed data on COVID-19 deaths investigated by the medical examiner this year.” You stated that such data could include “the person’s age, gender, race and ethnicity; their home residence and the place the body was found; and the date, cause and manner of death, along with any other relevant information from the autopsy reports.” OCME responded on July 21, 2020, informing you that it would not release personally identifiable information about COVID-19 decedents. OCME based its response on D.C. Code § 2-534(a)(2), which protects “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” OCME also informed you that the Mayor’s COVID-19 website, to which OCME contributes daily, provides data on deaths sorted by age, gender, race, and ethnicity.

You appealed, citing to D.C. Code § 5-1412(c), which provides that “[a]ny . . . person with a legitimate interest may obtain copies of [certain] records maintained [by OCME] upon such conditions and payment of such fees as may be prescribed by regulation by the Mayor.” Those records, which you claim you are entitled to under the statute, would contain personally identifiable information, including names of decedents. As you explain in your appeal, your request centers on whether releasing “the name of a dead person would be an unwarranted invasion of personal privacy under” D.C. Code § 2-534(a)(2).

In its response to your appeal, OCME reiterates that its answer to you was proper under D.C. Code § 2-534(a)(2).<sup>1</sup> (“Exemption 2”). In particular, OCME argues that both decedents and their survivors have significant privacy interests in the withheld information and that you have failed to put forward a public interest justifying the disclosure notwithstanding that privacy interest.

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 may form the basis for denial of a request. *See* D.C. Code § 2-534.

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).

### *OCME Records Statute*

As an initial matter, this office rejects your argument that you are entitled to OCME’s case files under D.C. Code § 5-1412, which governs OCME’s maintenance of records. Although you are correct that the statute allows a person with a “legitimate interest [to] obtain copies of [such] records,” that allowance is expressly based “upon such conditions and payment of such fees *as may be prescribed by regulation by the Mayor.*” D.C. Code § 5-1412(c) (emphasis added). As relevant here, those conditions are laid out in 28 DCMR 5005.3. Under that regulation, you can obtain these records by: (1) providing written authorization of the next of kin for release of the records; (2) serving a subpoena; or (3) obtaining a court order. Your request does not include any of those, and thus D.C. Code § 5-1412(c) does not give you an automatic right to the records you seek.

### *Exemption 2*

OCME records may nevertheless be available under the DC FOIA if they are not subject to any applicable exemption. Under Exemption 2, which the agency has invoked here in denying you the names and other personally identifiable information from COVID-19 decedents, 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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

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<sup>1</sup> OCME’s response is attached to this decision.

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). In general, there is a sufficient privacy interest in personal identifying 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).

This Office has repeatedly held that, just as an individual has a substantial privacy interest in the individual's personally identifiable information, a decedent has a substantial privacy interest in the medical findings contained in the decedent's autopsy report. *See FOIA Appeals 2017-104, 2017-19, 2009-13*. As you note, the U.S. Department of Justice does take the position that, with respect to the federal FOIA, "an individual's privacy rights are extinguished upon death."<sup>2</sup> However, our decisions have consistently recognized that autopsy reports were properly withheld under DC FOIA pursuant to Exemption 2, and that a decedent still maintains privacy rights even after death.

Even were that not the case, it is undisputed that a decedent's survivors have protectable privacy interests with respect to sensitive materials about the decedent's death. *See Nat'l Archives & Records Admin. v. Favish*, 541 US 157, 167 (2004). You argue that the names of the decedents here do not qualify because the records you are seeking are not comparable to the graphic death-scene photographs at issue in *Favish*. In your view, withholding the names and other identifying information of COVID-19 decedents would not "spare surviving family members from further mental anguish and pain," which was a rationale motivating the Court's decision in *Favish*. However, that argument ignores the stigma that often accompanies a death resulting from COVID-19.<sup>3</sup> Indeed, it has been widely reported that many families are reluctant to acknowledge that their loved ones have died from the pandemic because of negative associations with the disease.<sup>4</sup> Releasing the names of decedents would cause many more families to feel that same pain and anxiety. As a result, releasing the records you seek would invade the privacy interest of those decedents' survivors.

The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. The public interest you articulate is in "understanding the significant disparities in who died from COVID-19, whether their deaths could have been prevented and whether they have all been properly counted." But it is not at all clear how releasing the names or other personally identifiable information you seek would further that public interest, particularly in light of the disaggregated data on COVID-19 mortality that the Mayor's Office already publishes.

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<sup>2</sup> <https://www.justice.gov/oip/blog/foia-post-2004-supreme-court-rules-survivor-privacy-favish>.

<sup>3</sup> *E.g.*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7338401/>.

<sup>4</sup> *E.g.*, <https://www.bostonglobe.com/2020/04/27/nation/coronavirus-brings-illness-death-sometimes-stigma/>.

When there is a privacy interest in a record and release of the documents would not further a countervailing public interest, the record may be withheld from disclosure. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). As a result, we find that OCME has properly withheld the requested names and personally identifiable information under Exemption 2.

### Conclusion

Based on the foregoing, we affirm OCME's decision and deny 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 the DC FOIA.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Rodney K. Adams, General Counsel  
OCME (via email)