

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-160**

November 30, 2022

VIA ELECTRONIC MAIL ONLY

Ms. Jonetta Rose Barras

RE: FOIA Appeal 2021-160

Dear Ms. Barras:

This letter is in response to the administrative appeal that you have submitted to the Mayor pursuant to the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531, *et seq.* In your appeal, you have challenged the response of the Office of the Chief Medical Examiner ("OCME") to your April 19, 2021 FOIA request, identified as 2021-FOIA-04505, which sought the following:

[A] copy of the autopsy report for Gabriel Eason, a two-year old who found dead around April 2 or 3rd at his home.

On April 19, 2021, OCME denied your request because:

Disclosure of personal information, especially medical records, is not permitted under FOIA. DC Code 2-534(a)(2) and 5 USC 552(b)(6). More specifically, see DC Code 5-1412 under DC Code 2-534(a)(6). Accordingly, OCME does not release its case files in response to FOIA requests. A direct request to OCME for a case file would need to be accompanied by 1) an authorization of the next of kin for release of information, 2) a subpoena, or 3) a court order. DC Code 5-1412 and 28 DCMR 5000. In cases where an investigation has not been completed, additional FOIA exceptions such as DC Code 2-534(a)(2), (a)(3), (a)(4), and (e) are applicable. Therefore, I must advise you that your request is declined.

In your April 19, 2021 appeal, you have asserted information is publicly available, "it is unclear whose privacy is being protected," and OCME should release any portion of the records that are reasonably segregable.

OCME Records Statute

D.C. Code § 2-534(a)(6) ("Exemption 6") provides for the withholding of "information specifically exempted from disclosure by statute..." Under D.C. Code § 5-1412(c), a person with a "legitimate interest" may obtain OCME investigative records "upon such conditions and

payment of such fees as may be prescribed by regulation by the Mayor.” Those conditions are laid out in 28 DCMR 5005.3, which allows the release of 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 meet any of the conditions contained within D.C. Code § 5-1412(c) and as such you do not have an automatic right to the records you seek.

OCME records may nevertheless be available under FOIA if they are not subject to any applicable exemption.

Personal Privacy

D.C. Code § 2-534(a)(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.” See *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

D.C. Code § 2-534(a)(3)(C) (“Exemption 3”) is more expansive than Exemption 2, and protects from public disclosure information contained in an investigatory file that “would constitute an unwarranted invasion of privacy.” Exemption 3 lacks the key word “clearly” that is contained in Exemption 2, and therefore is a broader privacy privilege.

In assessing OCME’s decision to withhold the requested information, the first part of the analysis is determining whether a sufficient privacy interest exists. *Id.* A privacy interest is cognizable under D.C. 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, personal 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 considering the privacy rights of the deceased, courts have found that an individual’s interest in privacy will extend beyond one’s death. *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001). The privacy interest of an individual may only be diminished, not eliminated, if that individual is deceased. *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) (“We have recognized that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased”); *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (“The fact of death, therefore, while not requiring the release of identifying information, is a relevant factor to be taken into account in the balancing decision whether to release information”).

The second part of a privacy 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 D.C. 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.

The public nature of information does not necessitate the subsequent release of related documents. *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Long v. United States DOJ*, 450 F. Supp. 2d 42, 68 (D.C. Cir. 2006) (“the fact that some of the personal information contained in these records already has been made public in some form does not eliminate the privacy interest in avoiding further disclosure by the government.”); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 53 (D.C. Cir. 2003) (finding that media identification of persons mentioned in a law enforcement file “does not lessen their privacy interests or ‘defeat the exemption,’ for prior disclosure of personal information does not eliminate an individual’s privacy interest in avoiding subsequent disclosure by the government”).

Finally, 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 v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). “‘Entire records are exempt from disclosure when it is shown that the exempt and nonexempt information are ‘inextricably intertwined,’ such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little information value.’ *See D.C. v. Fraternal Ord. of Police Metro. Police Lab. Comm.*, 33 A.3d 332, 346 (D.C. 2011).

In balancing the privacy interest of the deceased, it is unclear how disclosing the requested information is relevant to OCME’s conduct as a whole. In the absence of any countervailing public interest, we hold that OCME may withhold the identified information

This constitutes the final decision of this Office. You may challenge any subsequent response to your request by separate appeal to this Office. If you are dissatisfied with this decision, you may commence a civil action in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Sincerely,

The Mayor’s Office of Legal Counsel

cc: Rodney Adams, OCME FOIA Officer (via email only)