

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-264**

November 30, 2021

VIA ELECTRONIC MAIL

Mr. William F. Marshall

RE: FOIA Appeals 2021-264

Dear Mr. Marshall:

This letter responds to administrative appeals 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 DC FOIA.

Background

On September 8, 2021, you submitted a request to OCME seeking “[a]ll records, including but not limited to autopsy reports, toxicology reports, notes, photographs, and OCME officials' electronic communications, related to the deaths on Jan. 6, 2021 of the following individuals during the disturbances near or in the Capitol Building and any related investigations: Kevin Greeson; Benjamin Phillips [sic]; and Roseanne Boyland.” You requested documents within a date range from January 6, 2021 to September 8, 2021. In response, OCME provided you with 1,497 pages of redacted, responsive emails and their attachments. Further the agency informed you that it would not release personally identifiable information about individuals exempt for disclosure pursuant to D.C. Official 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 in accordance with D.C. Official Code § 5-1412, a request for an OCME file must be accompanied by either an authorization from the next of kin, a subpoena, or a court order.

You appealed, asserting that the agency’s “records with respect to the decedents are of great public interest, which outweighs the asserted privacy interests cited.” Based on the language of your appeal, we construe your appeal as challenging the agency’s complete withholding of the decedents’ OCME case files. On September 24, 2021, this Office notified OCME of your appeal

and requested a response. OCME responded on September 29, 2021.¹ In its response to your appeal, OCME reiterates that its answer to you was proper pursuant to D.C. Code § 2-534(a)(2) (“Exemption 2”) and D.C. Official Code § 5-1412 under D.C. Official Code § 2-534(a)(6) (“Exemption 6”).² OCME also invoked D.C. Official Code § 2-534(a)(3)(A)(i) (“Exemption 3(A)(i)”) as grounds for denying your request.³

Your appeal does not address either D.C. Official Code § 5-412, which governs the access to records maintained by the Chief Medical Examiner⁴, or the applicability of Exemptions 3 or 6 to your request.

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 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.

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).

Exemption 2

Under Exemption 2, 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.*

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

¹ OCME’s response is attached to this decision.

² Exemption 6 protects from disclosure information specifically protected by other statutes.

³ Exemption 3(A)(i) protects from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings.

⁴ Your request failed to provide written authorization from the decedent’s next-of-kin, a subpoena, or a court order designating you as a person with a “legitimate interest,” as required under D.C. Official Code § 5-1412(c); 28 DCMR 5005.3.

therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). 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. Indeed, this issue has been addressed in FOIA Appeals 2009-13, 2017-19, 2017-104, 2019-207, 2020-227, 2021-96, and 2021-178, where it was recognized that autopsy reports were properly withheld under DC FOIA pursuant to Exemption 2, and that a decedent still maintains privacy rights in death, as recognized by the federal Health Insurance Portability and Accountability Act of 1996. You have offered no legal authority to upset this precedent of protecting the private details of an individual's medical files. Further, 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).

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. Your appeal articulates no public interest for the release of the autopsy report of the decedent, outside of the statement that "intense public interest surrounding this case outweigh[s] any asserted privacy considerations." This is not a cognizable public interest under DC FOIA. The "public interest" in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

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.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

Your assertion that these "records with respect to the decedents are of great public interest" neither constitute a public interest under DC FOIA nor has any bearing on OCME's performance of its statutory duties. When there is a privacy interest in a record and no 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 case files under Exemption 2.

Exemption 3(A)(i)

Exemption 3(A)(i) protects from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. D.C. Official Code § 2-534(a)(3)(A)(i). "To invoke this exemption, an agency must show that the records were compiled for a law enforcement purpose and that their disclosure '(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Manning v. DOJ*, 234 F. Supp. 3d 26, 33 (D.D.C. 2017) (citing *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)).

The purpose of Exemption 3(A)(i) is to prevent “the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding.” *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 224, 232 (1978). “So long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, the investigatory record exemption applies.” *E.g. Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted).

Conversely, “where an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency’s decision.” *Id.* An agency must sustain its burden “by identifying a pending or potential law enforcement proceeding or providing sufficient facts from which the likelihood of such a proceeding may reasonably be inferred.” *Durrani v. DOJ*, 607 F.Supp.2d 77, 90 (D.D.C. 2009).

Here, we accept OCME’s representation that the case files at issue are investigatory and were compiled for law enforcement purposes. We also accept OCME’s assertion that disclosure of these case files could interfere with pending or anticipated enforcement proceedings in connection with a review being conducted by the United States Attorney’s Office and other agencies continuing to investigate the events of January 6th insurrection. As a result, we find that OCME has properly withheld the requested case files under Exemption 3(A)(i).

Exemption 6

This Office notes that you have not attached, to either your request or appeal, any written authorization from the decedent’s next-of-kin, a court order, or a subpoena. Under applicable law such documentation would indicate that you have a “legitimate interest” in obtaining copies of OCME records and files. *See* D.C. Official Code § 5-1412; 28 DCMR 5005.3. Indeed, this issue has been addressed in FOIA Appeals 2020-227, 2021-96, and 2021-178, where it was recognized that records were properly withheld under DC FOIA pursuant to Exemption 6 because the request did not meet the necessary requirements for access to OCME records and files set forth by D.C. Official Code § 5-1412 and 28 DCMR 5005.3. As a result, we find that OCME has properly withheld the requested case file under Exemption 6.

Conclusion

Based on the foregoing, we affirm OCME’s decision that case files at issue here was properly withheld pursuant to Exemptions 2, 3(A)(i), and 6.

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.

Sincerely,

The Mayor's Office of Legal Counsel

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