

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-051**

January 10, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Kim D. Parker

RE: FOIA Appeal 2022-051

Dear Ms. Parker:

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 have challenged the response of the Metropolitan Police Department (“MPD”) to your DC FOIA request.

Background

On December 17, 2021, you submitted a DC FOIA request to MPD, identified as 2022-BWC-00094, which sought:

[A]ny and all BodyCam footage for ‘any’ arrest made on October 7, 2021 at Subway, 2001 14th Street, N.W., Washington, DC 20009.

MPD denied your request on December 21, 2021, for the following reasons:

A review of our records did not locate a waiver of privacy interest on file for anyone who may have been arrested on the date at the location you have requested. Absent authorization and/or a waiver, a release of such records would constitute as a clearly unwarranted invasion of personal privacy and is exempt from disclosure pursuant to D.C. Official Code § 2-534 (a)(2) and (a)(3)(C).

On December 23, 2021, you filed an appeal with this Office asserting “[m]y office represents Nathaniel Alexander Gerald who would in fact be interested party, thus, entitled to receive the requested documentation.”

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.” In aid of that policy, 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 FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. D.C. Code § 2-534. Under FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Code § 2-502(18).

D.C. 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).

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.” In 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).

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 MPD’s decision to withhold the requested body-worn camera footage, 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). Moreover, the D.C. Circuit has held individuals have a “strong interest” in not being associated with unwarrantedly with alleged criminal activity whether they be suspects, witnesses, or investigators. *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990). Images are also considered to be personally identifiable information. See, e.g., *Mingo v. DOJ*, 793 F. Supp. 2d 447, 456 (D.D.C. 2011).

The second part of the analysis examines whether an individual privacy interest is outweighed by the public interest in disclosure. 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.

Here, we find that there is a cognizable privacy interest because individuals have a substantial interest in not being depicted in BWC footage of an incident or encounter involving MPD. In the absence of any explanation as to how the requested BWC footage would shed light on MPD’s conduct, MPD has properly withheld any response to the request. *See, e.g. Beck*, 997 F.2d at 1494 (When there is a privacy interest in a record and no countervailing public interest, the protected information may be withheld from disclosure).

Conclusion

Based on the forgoing, we affirm MPD’s decision.

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 Superior Court.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Brandy Reaves, MPD FOIA Officer (via email)