

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-075**

December 20, 2022

VIA ELECTRONIC MAIL ONLY

Ms. Nina Grace Howe-Goldstein

RE: FOIA Appeal 2022-075

Dear Ms. Howe-Goldstein:

This letter responds to the administrative appeal you have 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 have challenged the response of the Metropolitan Police Department (“MPD”) to your DC FOIA request.

Background

On January 16, 2022, you submitted a DC FOIA request to MPD, identified as 2022-FOIA-02630, which sought the following:

At approximately 3 or 4pm on December 5th, 2021, a 911 call was placed alleging that there was an active shooter at my residence, [address omitted]. This appears to have been knowingly false, with the intent of causing an MPD response at my residence, which proved successful, and police responded to what they believed to be an active shooter. I am seeking the recording of the 911 call, all available records pertaining to the call, all records pertaining to the police response at my residence, and all records pertaining to any subsequent investigation into the false 911 call. I will be making a separate request for bodycam footage of the police response. Attached: proof of residency and identity. (Date Range for Record Search: From 12/05/2021 To 01/16/2022)

On January 18, 2022, MPD responded to your request by referring you to the Office of Unified Communications (“OUC”) because MPD is not the custodian of 911 calls.

You submitted a second DC FOIA request to MPD on January 28, 2022, identified as 2022-FOIA-03027, which sought the following:

I am seeking all records pertaining to the police response at my residence, and all records pertaining to any subsequent investigation into the false 911 call. I will be making separate requests for bodycam footage of the police response and the 911 call. Attached: proof of residency and identity.

MPD initially closed your second request after erroneously deeming it to be a duplicate.

On January 28, 2022, you filed an appeal with this Office challenging the designation of your second request as a duplicate and its subsequent denial. On March 1, 2022, we notified MPD of your appeal and requested a response. MPD responded on September 29, 2022 stating your second request has been denied because you were not represented in any of the body-worn camera (“BWC”) footage and “absent authorization(s) and/or privacy waiver(s), a release of [third party] information would constitute a clearly unwarranted invasion of personal privacy, and would be exempt from disclosure pursuant to D.C. Code §§ 2-534(a)(2) and (a)(3)(C).” Finally, MPD stated that it did not locate any incident report that was responsive 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. Code § 2-531. In aid of that policy, the 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. D.C. Code § 2-534. Under the DC FOIA, an agency is required to disclose materials if they are “retained by a public body.” D.C. Code § 2-502(18).

DC FOIA was modeled on the corresponding federal FOIA statute. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute 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).

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.” 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 BWC 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 associated with a police incident. 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 foregoing, we affirm MPD’s decision and hereby dismiss your appeal. This constitutes the final decision of this Office with respect to your appeal. 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 only)