

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-115**

January 26, 2023

VIA ELECTRONIC MAIL ONLY

Ms. D. Michelle Douglas

RE: FOIA Appeal 2022-115

Dear Ms. Douglas:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the Office of Unified Communications (“OUC”) to your DC FOIA request.

Background

On January 10, 2022, you submitted a DC FOIA request to OUC, identified as 2022-FOIA-02481, which sought the following:

All communications between 3:00 pm and 5:00 p.m. related to dispatch of D.C. Fire Department and/or Emergency Medical Services to the grounds of the Capitol Building in response to an unidentified woman (later identified as Rosanne Marie Boyland) needing urgent medical attention after having lost consciousness on or near the Capitol steps. (Date Range for Record Search: From 01/06/2021 To 01/06/2021).

OUC denied your request on February 1, 2022 for the following reasons:

After a diligent search of our records, it has been determined that the information you are seeking is part of an ongoing open criminal investigation and enforcement proceedings. The release of such information could interfere with the enforcement proceedings by revealing the direction and pace of the investigation. It could also lead to attempts to destroy or alter evidence, reveal information about potential witnesses who could then be subjected to intimidation as part of an effort to frustrate future investigative activities, or could place witnesses in danger. For these reasons information about this incident is exempt from disclosure pursuant to D.C. Official Code § 2-534 (a)(2), (a)(3)(A)(i), (a)(3)(B) and (a)(3)(C).

Further, a search of our records did not locate a privacy waiver or authorization

on file. Absent a privacy waiver and/ or authorization, a release of such information would constitute 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).

In your March 23, 2022 appeal filed with this Office you assert,

[e]ven if there were an active investigation into the circumstances of Ms. Boyland's death (which, to the knowledge of her next of kin, our clients, there is not) there is no reason to believe – and certainly no reason articulated by the OUC – that anything in a recorded call to 911 or a radio dispatch calling EMTs to the scene could relate in any way to that or any other criminal investigation such that release of it *could* (much less *would to a certainty*) interfere with any imminent trial or adjudication.

You also state Rosanne Boyland's next of kin are your clients and can waive her, and their, privacy rights.

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 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.

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 Exemptions

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 OUC's decision to withhold the requested information, the first part of the analysis is determining whether a sufficient privacy interest exists. 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, 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). Additionally, vocal inflection has been found to be personal identifying information. *See N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc).

Emergency calls are generally made at a time of great fear and vulnerability. The tenor of one's voice, the words chosen, and the manner of delivery of the words at a time of such vulnerability represent a privacy interest. Further, 911 calls can be subject to Exemption 3(C) when the calls lead to investigations that focus on acts that could, if proven, result in civil or criminal sanctions. *See Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (The exemption "applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.").

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 DC 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.

In balancing the privacy interest of individuals associated with 911 calls, as related to a specific incident, versus any public interest in disclosure, it is unclear how disclosing the requested information is relevant to OUC's conduct as an agency.

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*, 997 F.2d at 1494.

Based on the foregoing, we affirm OUC's decision. A discussion of the remaining exemptions cited by OUC, D.C. Code §§ (a)(3)(A)(i) and (a)(3)(B), is reserved at this time.

Conclusion

Based on the forgoing, we affirm OUC'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 of the District of Columbia in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Domingo Juan, OUC FOIA Officer (via email)