

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-134**

August 11, 2022

VIA ELECTRONIC MAIL

Mr. Richard Joel Servoss

RE: FOIA Appeal 2022-134

Dear Mr. Servoss:

This letter responds to the administrative appeal 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 Unified Communications (“OUC”) improperly withheld records you requested under DC FOIA.

Background

On April 20, 2022, you submitted a request to OUC seeking 911 calls made due to a burglary in progress at a particular address on a particular date and a 911 call “made to describe the contents of the property that was stolen during the burglary.” On April 20, 2022, OUC denied your request in full pursuant to D.C. Official Code § 2-534 (a)(2), (a)(3)(A)(i), (a)(3)(B) and (a)(3)(C) (Exemptions 2, 3(A)(i), 3(B), and 3(C) respectively) because “the information you are seeking is part of an open investigation and enforcement proceedings” and releasing the 911 calls “could interfere with the enforcement proceedings by revealing the direction and pace of the investigation” or “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.”

On April 25, 2022, you filed an appeal with this Office stating in pertinent part “[a]s a victim of this burglary..., I am requesting access to these three 911 calls to better understand what occurred and why police were not dispatched to the scene of a burglary in progress.” On May 13, 2022, we notified OUC of your appeal and requested a response. OUC responded on May 17, 2022.<sup>1</sup> In its response, without elaborating, OUC reiterated its position that “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).” OUC provided the withheld 911 calls to this Office for *in camera* review.

---

<sup>1</sup> OUC’s response is attached for your reference.

## Discussion

It is the public policy of the District of Columbia government 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 . . .” *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

The 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), and 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).

### *Exemptions 2 and 3(C)*

Two provisions of DC FOIA provide exemptions relating to personal privacy. D.C. Official Code § 2-534(a)(3)(C) (“Exemption (3)(C)”) provides an exemption for disclosure for “[i]nvestigatory records compiled for law-enforcement purposes..., but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy.” The other provision, D.C. Official 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.” While Exemption (2) requires that the invasion of privacy be “clearly unwarranted,” the word “clearly” is omitted from Exemption (3)(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption (3)(C) is broader than under Exemption (2). *See United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

A 911 call can be subject to Exemption 3(C) when the call leads to an investigation that focuses 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.”). Because the recordings you seek relate to an investigation that could result in civil or criminal sanctions, Exemption 3(C) applies to your request.

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 Reporters Comm. for Freedom of Press*, 489 U.S. at 762. 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 personally identifiable 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 therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). The Supreme Court has held “as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy . . .” *Reporters Comm. For Freedom of Press*, 489 U.S. at 780. In this instance, we find the third-party 911 caller has a sufficient privacy interest in the non-disclosure of their call. However, the Supreme Court has also recognized that the protection of personal privacy cannot be used to withhold information from a requester pertaining solely to him or herself. *See Id.*, at 771. As a result, we find there is not a sufficient privacy interest in your own 911 call and need not balance the weight of the public interest involved.

The second part of the Exemption 2 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 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.

Here, you have not articulated a public interest cognizable under DC FOIA. You asserted that “[t]he Director of the OUC has admitted that the 911 dispatchers mistakenly forwarded the calls made while the burglary was in progress to the TRU” and you want the “911 calls to better understand what occurred and why police were not dispatched to the scene of a burglary in progress.” However, bare allegations of misconduct do not satisfy the public interest requirement under FOIA. *NARA v. Favish*, 541 U.S. 157, 175 (2004). 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 OUC has properly withheld the third party 911 call under Exemptions 2 and 3(C).

*Exemptions 3(A)(i) and 3(B)*

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

Exemption 3(B) exempts from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would “deprive a person of a right to a fair trial or an impartial adjudication.” D.C. Official Code § 2-534(a)(3)(B). The standard for withholding under this exemption has been interpreted to require “(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.” *Washington Post Co. v. DOJ*, 863 F.2d 96, 102 (D.C. Cir. 1988).

Here, OUC has not demonstrated how releasing your 911 call reporting missing property would jeopardize any law enforcement proceeding and has not clearly illustrated that there is a “pending or truly imminent” adjudication related to the burglary investigation that is the subject of your request. OUC also has not articulated how disclosure of your 911 call would interfere with the fairness of a trial or adjudication. As a result, OUC has failed to establish that Exemptions 3(A)(i) and 3(B) support the withholding of your 911 call.

#### Conclusion

Based on the foregoing, we affirm in part and remand in part. We affirm OUC’s decision to withhold the third party 911 call. We remand in part and direct OUC to promptly disclose to you your own 911 call.

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 the DC FOIA.

Sincerely,

The Mayor’s Office of Legal Counsel

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