

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-140**

January 18, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Crystal Golden

RE: FOIA Appeal 2022-140

Dear Ms. Golden:

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 Fire and Emergency Medical Services Department’s (“FEMS”) to your DC FOIA request.

Background

On May 5, 2022, you submitted a DC FOIA request to FEMS, identified as 2022-FOIA-06141, which sought “information on calls for service from Fire/EMS for Washington Surgi-Clinic [located at] 2112 F St NW Suite 400, Washington, DC 20037” for the time period of March 7, 2022 to March 31, 2022. Within your request, you specifically requested redacted audio calls but said a written report was fine if the calls were not available.

On May 12, 2022, FEMS provided you with an initial response that denied your request for any electronic care patient report pursuant to D.C. Code §§ 2-534 (a)(2)(“Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”) and (a)(6)(B)(“Information specifically exempted from disclosure by statute...”). FEMS also provided a link to its webpage containing information “about what documentation is required to obtain medical records.”

FEMS sent you a supplemental response on May 16, 2022 containing a printout of calls where it was dispatched to the subject address within the requested timeframe that redacted the contact information for private citizens and employee identification numbers pursuant to D.C. Code § 2- 534 (a)(2). Further, FEMS referred you to the Office of Unified Communications (“OUC”) for additional information, i.e. audio calls, that may be responsive to your request.

On May 12, 2022, you filed an appeal with this Office stating “[i]t is common place in many states to obtain non-identifying medical records to check for wrongdoing. The audio records can be redacted by editing out names on calls, or blocking it out with a marker on an incident report copy.”

We notified FEMS of your appeal and requested a response on May 13, 2022. FEMS responded on May 19, 2022 stating the records it creates when carrying out its functions are covered under the Health Insurance Portability and Accountability Act (“HIPAA”). FEMS further advised these “electronic patient care reports” constitute protected health information and are therefore exempt from disclosure pursuant to D.C. Code § 2-534(a)(6). Moreover, FEMS indicated that the release of the records to an unauthorized third party would constitute a clearly unwarranted invasion of personal privacy pursuant to D.C. Code § 2-534(a)(2).

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. *See* D.C. 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).

D.C. Code §§ 2-534 (a)(2) (“Exemption 2”)

D.C. Code § 2-534(a)(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).

In assessing FEMS’ decision to withhold the requested information, 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, 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).

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 identified in incident reports and dispatch logs, as related to a specific address, versus any public interest in disclosure, it is unclear how disclosing the requested information is relevant to FEMS’ 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.

D.C. Official Code § 2-534(a)(6) (“Exemption 6”)

Exemption 6 provides for the withholding of “information specifically exempted from disclosure by statute...” As cited by FEMS, HIPAA prohibits covered entities from using or disclosing protected health information except as provided in the HIPAA regulations. 45 C.F.R. § 164.502(a) (2016). As such, the “electronic patient care reports” identified by FEMS are exempt from disclosure.

Finally, under D.C. Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). “‘Entire records are exempt from disclosure when it is shown that the exempt and nonexempt information are ‘inextricably intertwined,’ such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little information value.’” *See D.C. v. Fraternal Ord. of Police Metro. Police Lab. Comm.*, 33 A.3d 332, 346 (D.C. 2011). While you have asserted FEMS has an obligation disclose any non-exempt portions of the records, this is not feasible, given the disclosure of records as related to a specific time and place would compromise the aforementioned privacy interest and/or HIPAA restriction.

Conclusion

Based on the foregoing, we affirm FEMS’s decision. This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Sincerely,

The Mayor’s Office of Legal Counsel

cc: Paula Gibbs, FEMS FOIA Officer (via email only)