

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-149**

January 18, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Crystal Golden

RE: FOIA Appeal 2022-

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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 Office of Unified Communications (“OUC”) to your DC FOIA request.

Background

On May 16, 2022, you submitted a DC FOIA request to OUC, identified as 2022-FOIA-06429, which sought the following:

[E]mergency calls from the Office of Unified Communications at Washington SurgiClinic. Their address is: 2112 F. St NW Suite 400, Washington, DC 20037...If they are not available, then a written report will suffice. The dates of emergency service included in this request are:

03/08/2022

03/09/2022

03/25/2022

03/28/2022

OUC denied your request on June 6, 2022 for the following reasons:

[I]t has been determined that the information you are seeking is part of an ongoing open investigation and enforcement proceedings. Thus, in accordance with the law and criminal proceedings, the information requested is exempt and precluded from disclosure. The release of such information could disclose confidential and/or sensitive investigative techniques and procedures not generally known outside of the government. Furthermore, it could interfere with the enforcement proceedings by revealing the direction and pace of the

investigation. For these reasons, and to not frustrate future investigations, or compromise witness security, information about this incident is exempt from disclosure pursuant to D.C. Official Code § 2- 534(a)(3)(E).

In your appeal, you have asserted,

I talked to someone from the Office of Unified Communications. They declined my request for records on the basis that it could potentially violate privacy. However, a redacted call would still allow for the patient to have privacy. My concern is for the well being of the patients and also to find out if there is a safety concern for the general public. Having these records would allow any appropriate agency to do a proper review of the clinic.

We notified OUC of your appeal on June 8, 2022 and requested a response. OUC responded on June 15, 2022 stating the information 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).”

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 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)

The primary issue with your request is whether the records sought are exempt from disclosure pursuant to D.C. Code § 2-534(a)(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 OUC’s 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). 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).

The D.C. Circuit has held there is a “strong privacy interest” in avoiding abortion-related violence. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006). An invasion of privacy need not occur immediately upon disclosure in order to be considered “clearly unwarranted.” *See Nat'l Ass'n of Retired Fed. Emps. (“NARFE”) v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (“In virtually every case in which a privacy concern is implicated, someone must take steps after the initial disclosure in order to bring about the untoward effect.”). Further, “[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain.” *NARFE*, 879 F.2d at 878; cf. *NARA v. Favish*, 541 U.S. 157, 167-70 (2004) (specifically taking into account “the consequences” of FOIA disclosure, including “public exploitation” of the records by either the requester or others).

Emergency calls made by victims or potential victims 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 pose a substantial likelihood of presenting one in an embarrassing or even humiliating light. With respect to incident reports—for which OUC is not the primary custodian—and dispatch logs as related to a specific address, in the context that these records are related to a reproductive health provider, associated individuals including but not limited to patients, doctors and other employees have a privacy interest for which D.C. Code § 2- 534(a)(2) seeks to protect. This interest extends beyond those specifically named. Where data is susceptible to being paired with other readily known information so as to lead to the identification of individuals, it also represents a privacy interest.

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, 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 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, D.C. Code §§ (a)(3)(c), (a)(3)(A)(i) and (a)(3)(B), is reserved at this time.

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