GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR

Freedom of Information Act Appeal: 2011-60

August 29, 2011

Steven K. Barentzen, Esq.

Dear Mr. Barentzen:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) ("DC FOIA"), dated May 23, 2011 (the "Appeal"). You, on behalf of Leonardo Mazzei ("Appellant"), assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated July 12, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought copies of the tapes of any telephone calls made to the District's emergency telephone calling system ("911 calls") in response to a traffic accident involving Mr. Mazzei.

In response, by letter dated July 22, 2011, MPD provided a transcript of relevant calls, redacted for personal identifying information that constituted a clearly unwarranted invasion of personal privacy and exempt from disclosure exempt under D.C Official Code § 2-534(a)(2), but withheld the dispatch tape pursuant to the same exemption.

On Appeal, Appellant challenges the withholding of the dispatch tape and the redaction of the transcript. Appellant states that the reason for the FOIA Request is to obtain information for litigation which has resulted from the traffic accident and which information Appellant has not been able to obtain despite vigorous efforts. Appellant contends that the records should be disclosed, unredacted, for the following reasons:

1. 911 calls are public records. Appellant cites case law from other states in support of this contention.

2. There is not an unwarranted invasion of privacy as this information is available by subpoena. Appellant adds that disclosure will avoid further burdening an overburdened Superior Court.

3. The need of Appellant for the information outweighs the privacy interests of the witnesses. Appellant asserts that even if disclosure

> were to infringe slightly on personal privacy, those privacy interests are greatly outweighed in this case by the need for Mr. Mazzei to identify witnesses to the accident in which an out-of-District driver rear-ended Mr. Mazzei on his motorcycle, seriously injuring him. Mr. Mazzei has been unable to obtain this information from other means and, without this information, Mr. Mazzei will have no way of obtaining the evidence necessary to support his claim of damages for the injuries which he suffered.

Appeal of Appellant, at 3.

In response, dated August 24, 2011, MPD reaffirmed its position. MPD maintains that the release of the identity of a person on a 911 tape would clearly violate his personal privacy and Appellant has not articulated a public interest which outweighs the privacy interest. In addition, MPD states that the 911 tapes are non-segregable as it does not have the technical capability to redact audiotapes.

Discussion

It is the public policy of the District of Columbia (the "District") 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). Moreover, in his first full day in office, the District's Mayor Vincent Gray announced his Administration's intent to ensure that DC FOIA be "construed with the view toward 'expansion of public access and the minimization of costs and time delays to persons requesting information.'" Mayor's Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for 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).

D.C. Official Code § 2-534(a)(2) ("Exemption (2)") provides for an exemption from disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." By contrast, 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, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (C) Constitute an unwarranted invasion of personal privacy." It should be noted that the privacy language in this exemption is broader than in Exemption (2). While Exemption (2) requires that the invasion of privacy be "clearly

unwarranted," the adverb "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 DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The exemption in this matter is asserted under, and would be judged by the standard for, Exemption (2).

An inquiry under a privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). It is clear that an individual who is a witness has a sufficient privacy interest in his or her name and other identifying information which is in a government record. Disclosure may lead to unwanted contact and harassment. See *Lahr v. NTSB*, 569 F.3d 964 (9th Cir. 2009)(privacy interest found for witnesses regarding airplane accident); *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1023 (9th Cir. 2008)(privacy interest found for government employees who were cooperating witnesses regarding wildfire); *Lloyd v. Marshall*, 526 F. Supp. 485 (M.D. Fla. 1981) ("privacy interest of the witnesses [to industrial accident] and employees is substantial . . ." *Id*. at 487); *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984)(privacy interest found for witnesses regarding industrial accident); *Codrington v. Anheuser-Busch, Inc.*, 1999 U.S. Dist. LEXIS 19505 (M.D. Fla. 1999) (privacy interest found for witnesses regarding discrimination charges). An individual does not lose his privacy interest because his or her identity as a witness may be discovered through other means. *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984); *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 501 (1994). ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.")

There is clearly a personal privacy interest in the records in this matter.

As stated above, the second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the purpose of FOIA, which is

> 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S., at 372 . . . This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772-773 (1989).

Appellant states that the records are needed to obtain information for litigation which has resulted from the traffic accident and which information Appellant has not been able to obtain despite vigorous efforts. However, disclosure is not evaluated based on the identity of the requester or the use for which the information is intended. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004); *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989). "The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. *EPA v. Mink*, 410 U.S. 73, 79, 92 (1973); *Renegotiation Board v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974)." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 (1975). "The private needs of the companies for documents in connection with litigation, however, play no part in whether disclosure is warranted. [citations omitted]." *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984).

In this case, Appellant has only offered a private need to overcome the privacy interest. However, the disclosure of the records will not contribute anything to public understanding of the operations or activities of the government or the performance of MPD. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989). Thus, as this is not a case involving the efficiency or propriety of agency action, there is no public interest involved.

> In the usual case, we would first have identified the privacy interests at stake and then weighed them against the public interest in disclosure. See *Ray*, 112 S. Ct. at 548-50; *Dunkelberger*, 906 F.2d at 781. In this case, however, where we find that the request implicates no public interest at all, "we need not linger over the balance; something … outweighs nothing every time." *National Ass'n of Retired Fed'l Employees v. Horner*, 279 U.S. App. D.C. 27, 879 F.2d 873, 879 (D.C. Cir. 1989); see also *Davis*, 968 F.2d at 1282; *Fitzgibbon v. CIA*, 286 U.S. App. D.C. 13, 911 F.2d 755, 768 (D.C. Cir. 1990).

Beck v. Department of Justice, 997 F.2d 1489, 1494 (D.C. Cir. 1993).

We do not believe that the cases cited by Appellant for the proposition that 911 tapes are public records changes our analysis. *Evening Post Publ. Co. v. City of N. Charleston*, 611 S.E.2d 496 (S.C. 2005), which directed that 911 tapes must be disclosed, was decided under a law enforcement exception of the state FOIA law and turned on the fact that disclosure would cause no harm to the agency. The privacy interest was not considered. *State v. Cain*, 613 A.2d 804 (Conn.1992), and *State v. Gray*, 741 S.W.2d 35 (Mo. Ct. App. 1987), made conclusory determinations that 911 tapes were public documents--neither provided an underlying rationale or authority for such conclusion. *State ex rel. Cincinnati Enquirer v. Hamilton County*, 662 N.E.2d 334 (Ohio 1996), made a similar conclusory determination, buttressing such determination on the prior two cases. While the 911 tapes are government records, a government record is not the same as a public record.

D.C. Official Code § 2-534(b) provides, in pertinent part, that "any reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section." Thus, there is a question as to whether MPD should have disclosed the tape with redactions. However, MPD states that the 911 tapes are non-segregable as it does not have the technical capability to redact audiotapes. Accordingly, we find that redaction of the tape is not feasible.

We note that in prior decisions, Freedom of Information Act Appeal 2010-08 and Freedom of Information Act Appeal 2011-11 (Reconsideration), the Office of Unified Communications and MPD, respectively, were found not to have the capability to modify an audiotape and disclosure was not required.

Therefore, the withholding of the dispatch tape and the redaction of the transcript was proper.[1]

Conclusion

Therefore, the decision of MPD is upheld. The Appeal is hereby DISMISSED.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Ronald B. Harris, Esq.
Natasha Cenatus
Terry Ryan, Esq.

[1] In Freedom of Information Act Appeal 2011-28, we considered a request to the Office of Unified Communications for a 911 tape. We upheld the decision of the Office of Unified Communications based on the fact that there were no responsive records located after an adequate and reasonable search. As there were no responsive records, the privacy issue was neither raised nor considered.