GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal: 2012-44

May 11, 2012

Mr. Rend Smith

Dear Mr. Smith:

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 April 25, 2012 (the "Appeal"). You ("Appellant") assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA dated March 21, 2012 (the "FOIA Request").

Background

Appellant's FOIA Request sought "any 911 recordings or transcripts for any incidents that occurred at or in the area of 1940 9th Street NW on 10/15/10."

In response, MPD offered to provide a transcript of the 911 audio of the relevant call, but stated that it was withholding the audio because it would identify the caller and constitute a clearly unwarranted invasion of personal privacy exempt from disclosure under D.C Official Code § 2-534(a)(2).

On Appeal, Appellant challenges the withholding of the audio of the 911 call, stating: "911 calls, however, are public record[s] and are no more an invasion of privacy than court records, which are regularly disclosed. I am however, willing to accept a transcript of the 911 audio that redacts the names of all callers involved."

In response, dated May 9, 2012, MPD reaffirmed its position. MPD maintains that the release of the identity of the caller on the 911 tape would clearly violate his or her personal privacy. 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).

It is unclear whether there is, in fact, a controversy. According to the response of MPD to the FOIA Request, which request was provided by Appellant as part of the administrative record, a transcript of the call was made available to Appellant. In his submission for the Appeal, Appellant states that he would be "willing to accept a transcript of the 911 audio that redacts the names of all callers involved." As there would be no reason to file the Appeal if Appellant was willing to accept the transcript of the 911 audio which was already offered, we will presume, for the purposes of this decision, that Appellant made this statement in error.

The circumstances of the Appeal are substantially similar to that in Freedom of Information Act Appeal 2011-60, where we upheld the decision of MPD to provide a transcript of relevant 911 calls, redacted for personal identifying information that constituted a clearly unwarranted invasion of personal privacy and exempt from disclosure under D.C Official Code § 2-534(a)(2), but to withhold the dispatch tape pursuant to the same exemption. The same reasoning applies here and the same result is warranted.

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). The administrative record does not indicate the nature of the caller, that is, whether the

caller was a victim or witness regarding the circumstances surrounding the call, but there is a sufficient privacy interest in either case. An individual who is a victim or the subject of an alleged criminal infraction has a privacy interest in personal information which is in a government record. Disclosure may lead to unwanted contact and harassment. *Kishore v. United States DOJ*, 575 F. Supp. 2d 243, 256 (D.D.C. 2008); *Blackwell v. FBI*, 680 F. Supp. 2d 79, 93 (D.D.C. 2010). Likewise, 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. As in the case of a victim, 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).

In this case, neither MPD nor Appellant has addressed the public interest in disclosure. However, based upon the administrative record, we find that 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).

Appellant asserts, without authority, that 911 calls are public records. We disagree. While "public record" is a term under D.C. Official Code § 2-502(18) defined to include "all books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body," Appellant is not using the term in this sense, as, under DC FOIA, not all "public records" must be disclosed and the determination of whether or not this is the type of "public record" which must be disclosed is the basis of this Appeal. Rather, Appellant must be understood to use the term to mean, in its common usage, a record which must be disclosed pursuant to statutory or judicial law or is routinely disclosed as a matter of practice and procedure. For example, D.C. Official Code § 2-536 specifies certain categories of information which must be disclosed publicly, that is, "which are specifically made public information." Court records are disclosed as a matter of practice and procedure. Thus, in the context of the argument of Appellant, a public record is a government record which, as a matter of law, is public information.[1] While a 911 tape is a record "prepared, owned, used in the possession of, or retained by a public body," it is not, as a matter of law, public information.[2]

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.

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[1] See, e.g., *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764, n.15 (1989), quoting the Restatement (Second) of Torts, contrasting "matters of public record, such as the date of his birth" with matters "not open to public inspection as in the case of income tax returns . . ." *Id.*

[2] We stated in Freedom of Information Act Appeal 2011-60: "While the 911 tapes are government records, a government record is not the same as a public record." This discussion clarifies the meaning of this statement.

We note that in prior decisions, Freedom of Information Act Appeal 2011-11 (Reconsideration) and Freedom of Information Act Appeal 2011-60, MPD was found not to have the capability to modify an audiotape and disclosure was not required. Similarly, in Freedom of Information Act Appeal 2010-08, the Office of Unified Communications was found not to have the capability to modify an audiotape and disclosure was not required. [3]

Therefore, the withholding of the 911 audio was proper.

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.
Aliyyah Z. Ferguson

[3] 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.