

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-103**

October 5, 2015

Mr. Ryan Greenlaw

RE: FOIA Appeal 2015-103

Dear Mr. Greenlaw:

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 Department of Behavioral Health (“DBH”) improperly withheld records you requested under the DC FOIA.

Background

On August 2, 2015, you submitted a request to the DBH for “copies of each Form FD-12¹ filed from 8:00 pm through midnight, Thursday, July 30, 2015, at the CPEP² facility in Building 14 of the former DC General Hospital.” The DBH responded to your request on September 15, 2015, stating that it had identified 3 records responsive to your request but that the records were exempt from disclosure pursuant to two provisions of DC FOIA: D.C. Official Code §§ 2-534(a)(2), which exempts from disclosure information that would constitute a clearly unwarranted invasion of personal privacy, and 2-534(a)(6), which exempts from disclosure “[i]nformation specifically exempted from disclosure by statute (other than [DC FOIA]), provided that such statute: (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) Establishes particular criteria for withholding or refers to particularly types of matters to be withheld.”

On appeal, you allege that you are entitled to reasonably segregable portions of the FD-12 forms, with personally identifying information redacted so as to comply with the District’s Mental Health Information Act and the federal Health Insurance Portability and Accountability Act of 1996.

DBH provided this office with a response to your appeal on October 1, 2015, in which it reiterates its legal reasoning for denying you the FD-12 forms you requested.³ DBH asserts that an FD-12 form is an admission record for emergency mental health observation and diagnosis

¹ An FD-12 form is formally known as an Application for Emergency Hospitalization by a Physician or Psychologist of the Person, Officer or Agent of D.C. Department of Human Services or an Officer to Make Arrests.

² CPEP is the DBH’s Comprehensive Psychiatric Emergency Program.

³ A copy of DBH’s response is attached.

that becomes part of the person's medical record at CPEP. CPEP releases an FD-12 form only with a signed patient authorization, subpoena, or court order. According to a declaration provided to this office by Jimmy Ibikunle, medical director of the CPEP, the FD-12 forms, "by necessity, include private and confidential information such as acts, presentation, and symptoms of mental illness, the expression of which may lead to, or already constitutes, significant risk of injury or danger to self and others."⁴

DBH disputes your contention that the records at issue are reasonably segregable by redacting the name and address of the individuals admitted for psychiatric observation and treatment, stating:

In the narrow four (4) hour time period that he identified, there were only three (3) FD-12s. Even with redacting the protected health information and identifying information, there is a substantial risk that Mr. Greenlaw would be able to identify individuals based upon the narrative description of the events, particularly if he or someone he knew had personal involvement in any of these incidents. Therefore, redacting the protected health information on the three (3) FD-12s cannot ensure continued anonymity for the individual subject to the FD-12.

DBH response at p. 2.

Further, DBH asserts that disclosing the forms would violate the District of Columbia Mental Health Information Act because the statute does not allow disclosures to the public of health information, even if the information is de-identified. Similarly, DBH claims that disclosure of the FD-12s would violate the Health Insurance Portability and Accountability Act because "HIPAA de-identification rules would not permit a local hospital to disclose redacted medical records for any individual brought in between the hours of 8 p.m. and 12 a.m., especially if there is public information such as a newspaper article about a criminal act that would allow the requester to re-identify the data."

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. 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 . . ." D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 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). As such, 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).

⁴ A copy of Dr. Ibikunle's declaration is attached.

Exemption 2 of DC FOIA

D.C. Official Code § 2-534(a)(2) (“Exemption (2)”) provides 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.” 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). The first part of the analysis is to determine 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.

Information protected under Exemption 6 [the equivalent of Exemption (2) under the federal FOIA] includes such items as a person's name, address, place of birth, employment history, and telephone number. *See Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989); *see also Gov't Accountability Project v. U.S. Dep't of State*, 699 F.Supp.2d 97, 106 (D.D.C. 2010) (personal email addresses); *Schmidt v. Shah*, No. 08–2185, 2010 WL 1137501, at *9 (D.D.C. Mar. 18, 2010) (employees' home telephone numbers); *Schwanner v. Dep't of the Army*, 696 F.Supp.2d 77, 82 (D.D.C. 2010) (names, ranks, companies and addresses of Army personnel); *United Am. Fin., Inc. v. Potter*, 667 F.Supp.2d 49, 65–66 (D.D.C.2009) (name and cell phone number of an “unknown individual”).

Skinner v. U.S. Dep't. of Justice, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

An FD-12 form is the epitome of the type of document exempt from disclosure under Exemption 2. The form requires the physician, psychologist, Department of Human Services agent, or police officer submitting the form to state the circumstances under which the person was taken into custody, the facts that lead to the belief that the person is mentally ill, and the facts that lead to the belief that the person is likely to injure self or others as a result of the mental illness. CPEP maintains submitted FD-12 forms due to its mandate to review requests for involuntary admission for mental health assessments and treatment for up to 72 hours. The purpose of the form is to solicit detailed information about an individual's mental health. Thus, a sufficient privacy interest exists.

The second part of a privacy analysis examines whether the public interest in disclosure outweighs the individual privacy interest. The Supreme Court has stated that the analysis must be conducted 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. 352, 372 (1976).

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.

Reporters Comm. for Freedom of Press, 489 U.S. at 773.

You have not asserted, nor can we envision, a public interest in disclosure of an FD-12 form. An FD-12 form consists solely of information about the mental health of a private citizen. Although DBH maintains FD-12s, the forms do not advance the public understanding of the operations or activities of the District government or DBH's performance. There is therefore no public interest to balance against the above established privacy interest. Disclosure of these records would unquestionably constitute an unwarranted invasion of personal privacy. Accordingly, FD-12 forms submitted to DBH are exempt from disclosure under Exemption 2.

Under the DC FOIA, even when an agency establishes that it has properly withheld a document under an exemption, it must disclose all reasonably segregable, nonexempt portions of the requested documents. D.C. Official Code § 2-534(b). *See also, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). Here, the DBH has considered whether the records can be segregated in accordance with applicable District and federal law and determined that they cannot. As discussed at length in our analysis of Exemption 6 below, we reviewed partially redacted copies of the FD-12s documents in question, and we concur with DBH's conclusion that there is no reasonable way for the documents to be redacted.

Exemption 6 of DC FOIA

The DBH asserts that the FD-12 forms are protected from disclosure under the District of Columbia Mental Health Information Act (D.C. Code § 7-1201.01 *et seq.*) ("MHIA") and the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191; 110 Stat. 1936) ("HIPAA"). As a result, DBH denied your request under D.C. Official Code § 2-534(a)(6), which exempts from disclosure information specifically exempt from disclosure by a statute other than DC FOIA. The MHIA regulates the disclosure of mental health information in the District. Disclosure of mental health information without a client's consent is limited to enumerated circumstances under the law, none of which applies here. You contend that mental health information that does not identify a client can be disclosed under the MHIA; however, DBH correctly points out that the disclosure of de-identified mental health information is permitted only for scientific research or management audits, financial audits, or program evaluation of a mental health professional or mental health facility. *See* D.C. Official Code § 7-1203.05. There is no evidence that you seek the forms for these purposes. Further, it is difficult to imagine how any of those purposes could be accomplished with the narrow 4-hour search window you have specified. Accordingly, the FD-12 forms are protected from disclosure under the MHIA.

The HIPAA also prohibits the disclosure of protected health information that is not de-identified. The standard for de-identification of protected health information under HIPAA is set forth in 45 CFR 164.514. This regulation provides that protected health information is considered de-identified if it is not individually identifiable and if there is no reasonable basis to believe it can be used to identify an individual. Here, you have requested FD-12 forms pertaining to a 4-hour period on a particular day at a specific facility in the District. DBH asserts that only 3 records are responsive to your request and that “[e]ven with redacting the protected health information and identifying information, there is a substantial risk that [you] would be able to identify individuals based upon the narrative description of the events, particularly if [you] or someone [you] knew had personal involvement in any of these incidents.” At our request, DBH provided this office with the FD-12 forms in question (with client names redacted) for our *in camera* review. We conclude based on our review and the applicable HIPAA provisions that there is a reasonable basis to believe that the information could be used to identify an individual, even if the individual’s name is redacted. Therefore, DBH’s denial of your request to provide you with redacted FD-12 forms was proper under HIPAA.

Conclusion

Based on the foregoing, we affirm the DBH’s decision with respect to your FOIA request and dismiss your appeal.

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,

/s/ Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor’s Office of Legal Counsel

cc: Deon C. Merene, Deputy General Counsel and FOIA Officer, DBH (via email)