

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-57**

May 7, 2015

VIA ELECTRONIC MAIL

Charles Jennings

RE: FOIA Request 2015-57

Dear Mr. Jennings:

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 (“DC FOIA”). In your appeal, you assert that the Office of Unified Communications (“OUC”) improperly withheld records you requested under the DC FOIA.

Background

On January 15, 2015, you submitted a request under the DC FOIA to the OUC for 9-1-1 call records, police and fire dispatch records, and any telephone or direct line communications between DC 9-1-1, dispatch, and WMATA from 1500 to 1630 hours on January 12, 2015, in regard to a response to L’Enfant Plaza metro station.

On April 9, 2015, the OUC responded to your request, asserting that the records you sought constituted an unwarranted invasion of privacy and were therefore exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(2).

Subsequently you filed an administrative appeal of OUC’s decision with the Mayor, asserting that “communications between governmental employees staffing the OUC dispatch center . . . are not subject to privacy exemptions as emergency service workers working in their normal capacities.” You further stated that “if 9-1-1 calls from the public are deemed to be private . . . then the City could reasonabl[y] omit the public callers voices, provide a transcript, or at least a log of calls, origins, times, and descriptive information from the dispatch systems of OUC and/or DCFEMS.”

The OUC failed to respond to this office’s request for a response to your appeal. This would normally be the end of our inquiry, as the agency has the burden of proof when asserting an exemption to FOIA; however, because privacy concerns of third parties have been implicated in your appeal, and because we have decided this exact issue before, we continue with our analysis.

Discussion

It is the public policy of the District of Columbia 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, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a). The right to inspect is subject to statutory exemptions. *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), and decisions construing the federal statute may be examined to construe the local law.

Your primary challenge to OUC’s decision is the agency’s withholding of, or minimally its failure to redact, the audio of 9-1-1 telephone calls. In Freedom of Information Act Appeal 2014-60, the MPD’s decision to withhold the audio of a 9-1-1 call was upheld on the grounds that: (1) disclosure would constitute a clearly unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2); and (2) the audio of the 9-1-1 call was non-segregable as MPD lacks the technical capability to redact the audio. Here, we hold the OUC to the same standard vis a vis technical capability since, to our knowledge, there has been no change in OUC/MPD’s technical capabilities. Accordingly, for the reasons stated in Freedom of Information Act Appeal 2014-60¹, we affirm the OUC’s withholding of audio from the 9-1-1 calls in question.

In the alternative to an audio recording, you requested a transcript of the audio from certain 9-1-1 calls. When it was responsible for responding to FOIA requests for calls for service information, MPD maintained that it did not have transcripts of 9-1-1 recordings. The OUC began responding to requests for calls for service information as of January 12, 2014.² Because the OUC did not respond to your appeal, we are uncertain as to whether it maintains transcripts of 9-1-1 recordings. As a result, we direct OUC to indicate whether it is in possession of responsive transcripts and produce them or state why they are exempt from disclosure under the DC FOIA.

In the same vein, we lack knowledge as to whether the OUC maintains records of interagency communications between OUC and WMATA relating to the requested incident. Under DC FOIA, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). While the OUC is not required to generate or create new documents, it must indicate whether it possesses a document. The current record is devoid of anything that indicates the existence or non-existence of the requested records of interagency communications. Therefore on remand, OUC shall indicate whether the interagency communications relating to the specified incident exist and produce them or state why they are exempt from disclosure.

Finally, in the alternative to a transcript or audio recording, you requested “at least a log of calls, origins, times, and descriptive information . . .” We believe a properly redacted call log is

¹ A copy of 2014-60 is attached to this decision for your review.

² *See* FOIA Appeal 2015-06, attached for your review.

unlikely to implicate the privacy interest of an OUC employee, a victim, or a witness; however, because OUC did not respond to your appeal, we do not know if the agency maintains such logs. Accordingly, we direct the OUC to determine whether it maintains a call log for the time period you have specified, and to produce it or state why it is exempt from disclosure.

Conclusion

This matter is dismissed in part, as it relates to 9-1-1 audio, and remanded in part. On remand, the OUC shall, within five (5) business days of the date of this decision:

(1) Determine if it maintains a call log that is responsive to your request and produce the log or state why it is exempt from disclosure; and

(2) Determine if it maintains, for the requested search period, 9-1-1 transcripts and interagency communications between OUC and WMATA. If OUC maintains these records, it shall either produce them or explain why they are exempt from disclosure.

This shall constitute the final decision of this office; provided, that you may challenge, by separate appeal, any subsequent decision issued by OUC related to this matter.

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: Gizele Richards, Deputy Director, OUC (via email)