GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-03

October 21, 2015

VIA ELECTRONIC MAIL

Mr. Ryan Greenlaw

RE: FOIA Appeal 2016-03

Dear Mr. Greenlaw:

This letter responds to your above-captioned 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 District's Office of Unified Communications ("OUC") failed to respond to a request you submitted under the DC FOIA.

Background

On August 3, 2015, you sent a FOIA request to the OUC via certified mail seeking records for "all 911 calls between 8:00 pm and 9:00 pm on Thursday, August 30, that resulted in police dispatch to a location in the First Police District, Service Area 107." Your request was further limited to specific enumerated criteria (e.g., police dispatch for trespassing, harassment, and vandalism). According to the United States Postal Service's tracking system, your FOIA request was delivered to the OUC on August 5, 2015. Having not received a response from OUC, on September 11, 2015, you submitted a follow-up request on the DC FOIA website and received a case number. You submitted your appeal to the Mayor on the grounds that as of the date of your appeal, you had not received a response from OUC pertaining to either your initial or follow-up requests within statutory timeframe under D.C. Official Code § 2-532(c).

Pursuant to D.C. Official Code § 2-532(e), the OUC's failure to timely respond to your request can be deemed a denial. Under D.C. Official Code § 2-532(e), you are also deemed to have exhausted your administrative remedies; however, you have chosen to exercise your right to an administrative appeal as provided under D.C. Official Code § 2-537. On appeal you assert that 9-1-1 calls responsive to your request should be disclosed except for redactions made pursuant to D.C. Official Code § 2-532(a)(2) ("Exemption 2")[1] for personal information such as names, phone numbers, addresses, and other identifying characteristics of the persons involved. Further, you assert that there exists a public interest in disclosure to shed light on police response to persons with perceived or actual mental illness based on descriptions of 9-1-1 callers.

[1] Exemption 2 prevents disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

Upon receipt of your appeal, this Office notified the OUC and asked the agency to formally respond. OUC responded to this office on October 14, 2015, with an explanation as to why your FOIA request should be denied. [2] The OUC also provided this office with the "Background Event Chronology" pertaining to the audio recording of the 9-1-1 call at issue and a copy of the audio recording itself for our *in camera* review.

The OUC asserts that it contacted you for clarification of the enumerated "protocol numbers" listed in your request and that you agreed to provide clarification as to your request but never did. The OUC further asserts that it conducted a search in response to your request, and the search returned only one 9-1-1 call resulting in dispatch to Patrol Service Area 107 on August 30, 2015, from 8:00 PM to 9:00 PM.[3] The OUC claims that this call is not responsive to your request because it pertains to a burglary alarm; therefore, it is outside the scope of the enumerated "protocol numbers" you specified. The OUC cites case law in support of its decision to limit its response to the scope of your request as drafted. *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir.1984) ("The agency [is] bound to read it as drafted, not as either agency officials or [the requester] might wish it was drafted.").

The OUC asserts that even if the call is considered responsive, the OUC would disclose only a "Background Event Chronology" for the call and a description of the recording with a *Vaughn* index because the recording of the 9-1-1 call itself is protected from disclosure under Exemption 2, citing *New York Times Co. v. Nat'l Aeronautics and Space Admin*. 920 F.2d 1002 (C.A. D.C. 1990). The OUC raises two arguments against your assertion that public interest favors disclosure of the recording: (1) your appeal focuses on the public interest of police conduct, but the OUC's records would not shed light on activity of the Metropolitan Police Department, which is a separate agency; and (2) you argue that there is a public interest in police response to descriptions of actual or perceived mental illness; however, "the only record obtained as a result of the search of OUC records does not involve any suspects or persons that could possibly deemed as mentally ill . . . The police located no persons on the premises."

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 a public record, however, is subject to exemptions. *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). 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).

[2] A copy of the OUC's response is attached hereto.
[3] *See* signed statement of acting FOIA Officer, which is attached hereto.

Because you filed your appeal before OUC explained its reason for denying your request, we base our analysis on the arguments you raised in the appeal as well as those we anticipate you would have raised had you received OUC's substantive denial. As a result, we shall address whether OUC conducted an adequate search in response to your request, whether the result of the OUC's search is responsive, and whether the OUC may withhold the 9-1-1 recording at issue under Exemption 2.

DC FOIA requires that a search be reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. United States DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation unsupported by any factual evidence that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States DOJ*, 578 F.2d 261 (9th Cir. 1978).

To establish the adequacy of a search,

> 'the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.' [*Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a 'reasonableness test to determine the 'adequacy' of a search methodology, *Weisberg v. United States DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

In conducting an adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). The determinations as to likely locations of records would involve knowledge of the agency's record creation and maintenance practices. *See Pub. Emps. for Envtl. Responsibility v. U.S. Section Int'l Boundary and Water Comm'n.*, 839 F. Supp. 2d 304, 317-18 (D.D.C. 2012). Generalized and conclusory allegations cannot suffice to establish an adequate search or the availability of exemptions. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

Here, OUC has indicated that its search was conducted by an acting FOIA officer who is knowledgeable about OUC's record creation and maintenance practices. This individual identified and searched the database where the responsive information would be located, and the search resulted in finding one 9-1-1 call within the timeframe and geographic area specified in your request. Based on the OUC's description of the search, we find that it was adequate under the DC FOIA.

The OUC maintains that although it located one 9-1-1 recording that took place within the timeframe and geographic area you requested, this call does not match the enumerated "protocol numbers" that you specified in your request. The OUC states that the 9-1-1 call was made in response to a suspected burglary, which is not one of the "protocols" you list. Even if a request "is not a model of clarity," an agency should carefully consider the nature of each request and

give a reasonable interpretation to its terms and overall content. *LaCedra v. EOUSA*, 317 F.3d 345, 347-48 (D.C. Cir. 2003) (concluding that agency failed to "liberally construe" request for "all documents pertaining to [plaintiff's] case" when it limited that request's scope to only those records specifically and individually listed in request letter, because "drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof" (citing *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)).

Since the "protocol numbers" you provided in your request do not match the OUC' s categorization methods, the acting FOIA officer at the OUC contacted you in attempt to obtain additional information about the records you were seeking. This employee states that you advised her that you would provide her with this information but you never did.[4] Nevertheless, under the guidance of *LaCedra*, the call at issue should be considered responsive because a heightened interest in a specific subset of records does not override the more general request. In addition, the call is responsive under a narrower interpretation. One of the enumerated "protocol numbers" of your request was for trespass. Trespass is a necessary element of burglary. *See* D.C. Official Code § 22–801 (defining burglary). The call at issue involved a potential burglary; therefore, it involves trespass. As a result, we find that the call is responsive to your request as drafted.

The OUC states that if the 9-1-1 call it located is determined to be responsive, the OUC would release a "Background Event Chronology" and descriptive *Vaughn* index pertaining to the recording but would withhold the audio recording itself under Exemption 2. Therefore, we consider whether the recording may be withheld in its entirety pursuant to Exemption 2. Under Exemption 2, 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). The OUC cites *New York Times Co. v. Nat'l Aeronautics and Space Admin*., 920 F.2d 1002, for the proposition that records of 9-1-1 calls are exempt from disclosure in their entirety as personal records. *New York Times* does not involve recorded 9-1-1 calls, but rather the final intercom recordings of the crew of the 1986 Challenger space shuttle disaster. *New York Times Co.*, 920 F.2d at 1004. Based on the specific facts and circumstances of the case, the court in *New York Times* found that the voices and vocal inflections of the crew immediately before their deaths were exempt because disclosure would constitute a clearly unwarranted invasion of personal privacy of the crew and their surviving family members. *Id*. at 1009-10.

We do not find that the *New York Times* case provides a blanket exemption for recordings of all 9-1-1 calls.[5] After reviewing the audio of the 9-1-1 call, which was initiated by a security

[4] *See* signed statement of the acting FOIA Officer, attached hereto.
[5] Privacy interests may prevent disclosure for 9-1-1 calls made by victims or witnesses at a time

monitoring company employee in response to the activation of an automated security alarm, we find that the only related privacy interests are those involving personally identifiable information. 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); *Schwaner 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. United States DOJ, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

Information such as names, 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) ("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."). As a result, we find that there is a sufficient privacy interest in the personally identifiable information in the 9-1-1 call.

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). The public interest argument you raise in your appeal is not relevant to the call at issue. Our *in camera* review of the recording confirms the OUC's representation that the conversation between the caller and the 9-1-1 operator contains neither a description of nor an interaction with an individual with actual or perceived mental illness. In the absence of a relevant countervailing public interest, we find that personally identifiable information in the call (i.e., the names, personal phone numbers, employee identification number, and address) is protected from disclosure pursuant to Exemption 2.

D.C. Official Code § 2-534(b) requires an agency to produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure; however, cases have held that records may be withheld in their entirety if an agency lacks the

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of heightened fear and vulnerability when the vocal inflection, the words chosen, and the manner of delivery pose a substantial likelihood of presenting one in an embarrassing or humiliating light. *See* FOIA Appeal 2011-61. Those factors are not present here.

technological capacity to remove exempt portions of a record.[6] In prior FOIA appeal decisions, the OUC has been found to lack the technical capacity to redact audio recordings.[7] The OUC did not indicate in its response to your appeal whether it currently has the technical capacity to redact audio recordings. If OUC has this capability, it shall disclose the audio recording of the 9-1-1 call at issue, with redactions made to personally identifiable information. If the OUC still lacks the technical capacity to redact the recording, the recording is exempt from disclosure in its entirety.

Conclusion

Based on the foregoing, we affirm in part, and remand it in part the OUC's decision. The OUC shall, within 5 business days of the date of this decision, disclose a "Background Event Chronology" redacted in accordance with the DC FOIA, as well as a descriptive *Vaughn* index pertaining to the 9-1-1 call discussed in this decision. In addition, if the OUC has the technical capacity to redact the audio recording, it shall disclose the recording with redactions made in accordance with the DC FOIA.

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

/s John A. Marsh*

John A. Marsh
Legal Fellow
Mayor's Office of Legal Counsel

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[6] *Milton v. United States DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on "the agency's current technological capacity" and holding that responsive telephone conversations were not reasonably segregable because an agency did not possess technological capacity to segregate non-exempt portions of requested records); *see also Mingo v. United States DOJ*, 793 F. Supp. 2d. 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because an agency "lacks the technical capability" to segregate information that is digitally recorded); *Antonelli v. BOP*, 591 F. Supp. 2d 15, 27 (D.D.C. 2008) (same); *Swope v. United States DOJ*, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (same).

[7] *See, e.g.*, FOIA Appeal 2010-08.

cc: Kelly Brown, FOIA Officer, OUC (via email)

*Admitted in Maryland; license pending in the District of Columbia; practicing under the supervision of members of the D.C. Bar