

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-77**

July 1, 2016

VIA ELECTRONIC MAIL

Ms. Veronica Ogunsula

RE: FOIA Appeal 2016-77

Dear Ms. Ogunsula:

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 District of Columbia Public Library (“DCPL”) improperly withheld records you requested under the DC FOIA.

Background

On April 4, 2016, you submitted a FOIA request to DCPL for footage from surveillance cameras and login information for identified computers on December 16th and 17th of 2015. On April 13, 2016, DCPL responded to the request by producing a redacted version of your personal login information; however, DCPL stated that the security camera footage and login information of third parties were both being withheld entirely pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”),¹ Title 1 DCMR § 406.2(a),² and D.C. Official Code § 39-108(a).³

On appeal you assert that: (1) withholding the video recordings on the basis of personal privacy is improper because library patrons have no expectation of personal privacy in a public library that openly informs its patrons of its operation of surveillance cameras; (2) the recordings were not created for an investigation; and (3) there is a public interest in releasing the recordings because the video would demonstrate how DCPL handles the safety of patrons’ property and privacy. Regarding the computer login information, you assert that DCPL’s response was insufficient because based on your personal experience and the surveillance video at the library there should be more responsive login information than DCPL provided. The appeal appears contradictory regarding the login information because you state that you appeal DCPL’s decision

¹ Exemption 2 protects “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

² This regulation does not appear to be applicable; DCPL probably intended to cite Title 1 DCMR § 406.2(b) which is the corresponding regulation to Exemption 2.

³ The purpose of D.C. Official Code § 39-108 is to protect the confidentiality of circulation records which can be used to identify a library patron and the specific material that patron has requested, used, or borrowed from the public library.

to withhold the information, but also state that “[you] relinqui[sh] [your] request for the login information of [other] users.” For the purposes of this determination, we will consider the appeal of the decision to withhold login information preserved.

On June 23, 2016, DCPL provided this Office with a twenty-six page response to the appeal, in which it reaffirms its decision to withhold certain records under Exemption 2 and D.C. Official Code § 39-108.⁴ Regarding the surveillance footage, DCPL asserts that patrons have a privacy interest in such footage because it shows their use of circulation records, and under D.C. Official Code § 39-108 DCPL must maintain the confidentiality of circulation records if they can be used to identify a library patron and the specific material used by the library patron. DCPL contests the public interest argument raised on appeal. DCPL asserts that it does not have the technical capacity to redact its surveillance video.⁵ Regarding the login information, DCPL maintains that you, as the requestor, received all of your available login information; however, the login records of other users were withheld in their entirety because absent consent or a court order the circulation records of library patrons are protected from disclosure under D.C. Official Code § 39-108. DCPL provided a description its search methods and a potential explanation for the reason its search results in fewer records than you expected.⁶

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. *See 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).

This appeal involves DCPL adequacy of search regarding computer login information and the application of Exemption 2 and D.C. Official Code § 39-108 to surveillance footage and computer login information. D.C. Official Code § 39-108 is applicable to DC FOIA under § 2-534(a)(6) (“Exemption 6”)⁷ (hereinafter D.C. Official Code § 39-108 will be referred to as Exemption 6).

⁴ A copy of DCPL’s response is attached.

⁵ *See* DCPL’s response at page 10.

⁶ *See* DCPL’s response at page 23.

⁷ Exemption 6 protects information from disclosure that is specifically protected from disclosure by other statutes.

Withheld Video Footage

Here, Exemption 6 requires DCPL to maintain the confidentiality of records that can be used to identify a library patron and the specific material used by the library patron. DCPL maintains that the footage depicts patrons and their use of library resources. DCPL did not provide the footage for *in camera* review, but we accept its representation. As a result, the portions of the video that show patrons using specific materials are protected from disclosure under Exemption 6. Ordinarily, D.C. Official Code § 2-534(b) requires an agency to produce reasonably segregable portions of public records after redacting portions that are exempt from disclosure; however, cases have held that records may be withheld in their entirety if an agency lacks the technological capacity to remove exempt portions of a record.⁸ Additionally, previous District FOIA appeal decisions have held that records may be withheld in their entirety when an agency lacks the technical capacity to redact the record.⁹ DCPL states in its response to your appeal that it lacks the technical capacity to redact the video recording at issue. As a result, the video recordings are exempt from disclosure in their entirety pursuant to Exemption 6.

Unlike Exemption 2, Exemption 6 does not involve a balancing of the interest in personal privacy and public disclosure. Having found the video recordings properly withheld under Exemption 6, we need not address Exemption 2 and its balancing test.

Withheld Login Information

You assert that because you engaged in multiple computer logins and DCPL only provided you with one responsive record that DCPL's response was not sufficient; therefore, we will address whether or not DCPL conducted an adequate search for your login records. DC FOIA requires only that, under the circumstances, a search is 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. U.S. Dep't of Justice*, 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. U.S. Dep't of Justice*, 578 F.2d 261 (9th Cir. 1978).

In order to establish the adequacy of a search,

⁸ *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).

⁹ *See, e.g., FOIA Appeal 2010-08* finding OUC lacked the technical capacity to redact audio recordings.

‘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 Dep’t of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

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

To conduct a reasonable and adequate search, an agency must make a reasonable determination as to the locations 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). This first step may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

Here, DCPL explains in an affidavit submitted with its response to your appeal that login records are maintained in its Pharos database server. A DCPL information technology specialist searched the server for login information on the computers you specified for the timeframes you specified. The affidavit explains that the Pharos database continually overwrites the login information it stores, and that the information retrievable from a search may decrease based on the activity the computers.

Although you present compelling evidence that additional records should exist, under DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18). DCPL cannot produce documents that it did not retain at the time of your request due to its database’s retention capacity. We are satisfied based on the DCPL’s description that DCPL identified the relevant locations for records responsive to your request and adequately searched them based on the information you provided. As a result, we find that DCPL conducted an adequate search.

Regarding the withheld login of other users, DCPL asserts that these records must be withheld in their entirety pursuant to Exemption 6. Exemption 6, however, only requires confidentiality of circulation records that can identify both a library patron and the specific material that patron has requested, used, or borrowed from the public library. As a result, DCPL can be in compliance with Exemption 6 by disclosing circulation records that redact either identifying information or the specific material that was requested, used, or borrowed; however, DCPL must also comply with Exemption 2.

The purpose of Exemption 2 is to protect personal privacy interests. To qualify for protection under Exemption 2, the analysis turns on the existence of a sufficient privacy interest and a balancing of this 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). 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. *Skinner v. U.S. Dep't. of Justice*, 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).

Here, there is a sufficient privacy interest in the names and identifying information of library patrons. *See id* at 500. The second part of the Exemption 2 analysis examines whether the individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. You have not raised a public interest in the disclosure of library patrons' names or identifying information. As a result, identifying information in the login records is properly subject to redaction under Exemption 2. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) ("In the usual case, we would first have identified the privacy interests at stake and then weighed them against the public interest in disclosure . . . 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.'). We find that DCPL's withholding of other user's login information in its entirety was overbroad. Login information can be disclosed in compliance with Exemptions 2 and 6 with redactions to all identifying information.

Conclusion

Based on the foregoing, DCPL's decision is affirmed in part and remanded in part. Within seven (7) business days from the date of this decision, DCPL shall contact the requester to determine if redacted versions of the login information are still sought,¹⁰ and if the records are still sought, DCPL shall disclose redacted versions of the login information in accordance with the guidance provided in this determination.

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/ John A. Marsh

John A. Marsh
Staff Attorney

cc: Grace Parry-Gaiter, General Counsel & FOIA Officer, DCPL (via email)

¹⁰ We are recommending this action because it is unclear from the appeal if this portion of the request was withdrawn or not.