

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-100**

July 19, 2017

VIA ELECTRONIC MAIL

Mr. Mike Eckel

RE: FOIA Appeal 2017-100

Dear Mr. Eckel:

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") improperly denied your request for the transcript of a 911 call.

Background

On January 10, 2017, you sent a FOIA request to the OUC for the transcript of a 911 call initiated on November 5, 2015, from the Dupont Circle Hotel. On May 9, 2017, the OUC denied your request citing the exemptions provided in D.C. Official Code §§ 2-534(a)(2), (a)(3)(C), and (a)(3)(D) (Exemptions 2, 3(C), and 3(D), respectively). The OUC's denial did not explain its application of the exemptions.

This Office received the appeal of the OUC's denial drafted by your general counsel on July 5, 2017. On appeal you assert that the 911 call is unlikely to contain extensive personal information protected by Exemptions 2 and 3(C). You assert that if the transcript contains sensitive or personal information the transcript should be released with redactions rather than withheld in its entirety. Further, you assert that the public interest in disclosure outweighs the privacy interests at issue because the transcript would shed light on the potential assassination of a foreign national and would also allow scrutiny of the response of law enforcement agencies.

Upon receipt of your appeal, this Office notified the OUC and asked the agency to formally respond. The OUC responded to this office on July 12, 2017. In its response, the OUC reaffirmed its position that the audio recording of the 911 call was protected from disclosure by Exemptions 2 and 3(C). The OUC asserts that both the caller the decedent have sufficient privacy interests to withhold the recording. The OUC argues that the public interests raised on appeal are not relevant to the recording because no governmental impropriety on behalf of the District has been alleged. Finally, the OUC asserts that it lacks the technical capacity to redact audio recordings; therefore, it properly withheld the recording in its entirety.

Following the OUC's response, this Office asked the OUC to clarify whether or not a transcript of the 911 call existed and to provide a copy of the 911 call for *in camera* review. The OUC explained that it only maintains audio recordings of 911 calls, not transcriptions. On July 18, 2017, the OUC provided this office with a copy of the 911 call at issue for *in camera* review.

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).

The FOIA request at issue is for a transcript of a 911 call. The OUC did not previously inform you that it did not create or maintain a transcript of the 911 call but rather maintains an audio recording of the call. FOIA does not require agencies to create records in order to respond to a request; but rather an agency must make a reasonable effort to locate existing records. The OUC determined that the audio recording was responsive to your request for a transcript. As a result, the analysis in this determination turns on whether the OUC may withhold the 911 recording in its entirety pursuant to Exemptions 2 and 3(C).¹

Exemptions 2 and 3(C) of the DC FOIA relate to personal privacy. Exemption 2 applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." 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." While Exemption 2 requires that the invasion of privacy be "clearly unwarranted," the word "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 Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

¹ Exemption 3(D) which prevents disclosure of "[i]nvestigatory records compiled for law-enforcement purposes... to the extent that the production of such records would... Disclose the identity of a confidential source and ... confidential information..." was raised by the OUC's in its initial denial of your request. Exemption 3(D) does not appear to be relevant to this 911 call, and the OUC did not address Exemption 3(D) in its response to your appeal.

A 911 call can be subject to Exemption 3(C) when the call leads to an investigation that focus on acts that could, if proven, result in civil or criminal sanctions. *See Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (The exemption “applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.”). Since the recording you seek relates to investigations that could have resulted in civil or criminal sanctions, Exemption 3(C) applies to your request.

Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of individual privacy interests against the public interest in disclosure. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 756. 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 audio recording at issue is slightly over 4 minutes long and involves hotel security personnel calling 911 after finding a man who appears to be unconscious in his hotel room and is discovered to be deceased. The recording involves potential privacy interests because the hotel employee is audibly disturbed when the guest is found to be deceased and the descriptions of the deceased may be troubling to surviving relatives. *See New York Times Co. v. Nat'l Aeronautics & Space Admin.*, 782 F. Supp. 628, 631-32 (D.D.C. 1991). The recording also contains clear privacy interests involving personally identifiable information of the caller. 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.”). Here the caller identifies himself by name and gives his cell phone number. As a result, we find that there is a sufficient privacy interest in the personally identifiable information in the 911 call recording.

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 does not appear to be relevant to the call at issue. Our *in camera* review of the recording contains no information pertinent to a potential assassination or subsequent law enforcement investigations. 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 technological capacity to remove exempt portions of a record.² The OUC indicates in its response to your appeal that it currently lacks the technical capacity to redact audio recordings. As a result, the recording is exempt from disclosure in its entirety.

Conclusion

Based on the foregoing, we affirm the OUC’s decision.

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.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Dionne Hayes, General Counsel, OUC (via email)

² *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).