

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

July 26, 2017

VIA ELECTRONIC MAIL

Mr. Scott Taylor
Sinclair Broadcast Group

RE: FOIA Appeal 2017-104

Dear Mr. Taylor:

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 Office of the Chief Medical Examiner (“OCME”) improperly withheld records responsive to your request under the DC FOIA.

Background

On May 26, 2017, you submitted a request to the OCME for autopsy reports of an individual who was the victim of a homicide in July 2016. OCME responded on May 30, 2017, and informed you that because you had not met the requirements of D.C. Official Code §§ 5-1412(b), (c), OCME would be withholding all responsive records pursuant to D.C. Official Code §§ 5-534(a)(2) and (a)(6).

In the instant appeal, you do not address OCME’s citation to D.C. Official Code D.C. Official Code § 5-1412, which governs access to records maintained by the Chief Medical Examiner.¹ In regard to the autopsy report, your appeal states, “We make our appeal based on the following: . . . The Autopsy Report and Ballistic Report would confirm the caliber of weapon used by the killers of [the decedent].” Your appeal also quotes D.C. Official Code § 2-532, which provides that “Any person has a right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534 . . .” Your appeal makes no attempt to address the applicability of § 2-534 to the autopsy report.

¹ Your initial request failed to provide written authorization from the decedent’s next-of-kin, a subpoena, or a court order designating you as a person with a “legitimate interest,” as required under D.C. Official Code § 5-1412(c); 28 DCMR 5005.3.

On July 12, 2017, this Office notified OCME of your appeal and asked for a response. OCME responded on July 13, 2017.² In its response, OCME reasserted that withholding the records was proper pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”)³ and D.C. Official Code § 5-1412⁴ under D.C. Official Code § 2-534(a)(6) (“Exemption 6”).⁵ OCME’s response cites to FOIA Appeal 2009-13 and FOIA Appeal 2017-19, previous DC FOIA appeal decisions which concluded that the release of autopsy reports would constitute an unwarranted invasion of privacy and that death does not extinguish an individual’s privacy rights.

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. Under the 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).

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).

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 determining 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. *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). Just as an individual has a substantial privacy interest in the individual’s personally

² OCME’s response is attached to this decision.

³ Exemption 2 prevents disclosure of “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

⁴ D.C. Official Code § 5-1412 limits disclosure of documents maintained by OCME.

⁵ Exemption 6 exempts from disclosure information specifically protected by other statutes.

identifiable information, a decedent has a substantial privacy interest in the medical findings contained in the decedent's autopsy report. Indeed, this issue has been addressed in FOIA Appeal 2009-13 and FOIA Appeal 2017-19, where it was recognized that autopsy reports were properly withheld under DC FOIA pursuant to Exemption 2, and that a decedent still maintains privacy rights in death, as recognized by the federal Health Insurance Portability and Accountability Act. You have offered no legal authority to upset this precedent of protecting the private details of an individual's medical files.

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. Your appeal articulates no public interest for the release of the autopsy report of the decedent, outside of the statement "The Autopsy Report and Ballistic Report would confirm the caliber of weapon used by the killers of" the decedent. This is not a cognizable public interest under DC FOIA. The "public interest" in DC FOIA has a narrow meaning, limited to furthering the statutory purpose of DC FOIA.

This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that "reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773.

Beck v. Department of Justice, et al., 997 F.2d 1489 (D.C. Cir. 1993) at 1492-93.

Your speculation that the release of the autopsy report "would confirm the caliber of weapon" used to kill the decedent does not constitute a public interest under DC FOIA. The caliber of the weapon has no bearing on OCME's performance of its statutory duties. When there is a privacy interest in a record and no countervailing public interest, the record may be withheld from disclosure. *See, e.g. Beck v. Department of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993). As a result, we find that OCME has properly withheld the requested autopsy records under Exemption 2.

Exemption 6

Because we conclude that the documents were properly withheld pursuant to Exemption 2, and because your appeal does not acknowledge Exemption 6 or articulate a reason that it is not applicable to the records you seek, we need not address whether the information is also protected under Exemption 6. This Office will note that you have not attached to the request or the appeal any written authorization from the decedent's next-of-kin, a court order, or a subpoena. Under applicable law such documentation would indicate that you have a "legitimate interest" in obtaining copies of an autopsy report. *See D.C. Official Code § 5-1412; 28 DCMR 5005.3.*

Conclusion

Based on the foregoing, we affirm OCME's decision and hereby 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,

The Mayor's Office of Legal Counsel

cc: Mikelle L. DeVillier, General Counsel, OCME (via email)