

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



Mayor's Office of Legal Counsel



August 7, 2017

VIA ELECTRONIC MAIL

Neil Wolfe
The Light Reports

RE: FOIA Appeal 2017-115

Dear Mr. Wolfe:

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”), on the grounds that the Office of the Chief Medical Examiner (“OCME”) improperly denied you access to records you requested under the DC FOIA.

Background

On July 14, 2017, you submitted a request to the OCME for, among other things,¹ copies of the death certificate and the complete autopsy report as well as any evidence used in determining the cause and time of death of a named decedent. OCME responded on July 21, 2017, informing you that because you had not met the requirements of D.C. Official Code § 5-1412(b) and (c),² OCME was withholding all responsive records pursuant to D.C. Official Code § 2-534(a)(2).

You appealed OCME’s denial, stating, “It appears as if this FOIA [request] has been closed without providing the information requested.” We therefore interpret your appeal to be challenging OCME’s withholding of responsive records under D.C. Official Code § 2-534(a)(2).

This Office notified OCME of your appeal on July 28, 2017, and OCME responded on July 31, 2017.³ In its response, OCME affirmed its position that it properly withheld the records pursuant

¹ You also requested records that OCME advised you it does not maintain. These records do not appear to be part of your appeal.

² This statute governs access to records maintained by the Chief Medical Examiner. D.C. Official Code § 5-1412(c) provides that a person with a legitimate interest may obtain copies of a death record if the person meets certain conditions. The conditions are set forth in 28 DCMR § 5005.3, and OCME represents that you have not met any of them (i.e., OCME has not received any subpoena, court order, or next-of-kin authorization directing it to release the decedent’s autopsy report to you).

³ OCME’s response is attached.

to D.C. Official Code § 2-534(a)(2) (“Exemption 2”),⁴ applicable case law, and previous DC FOIA appeal decisions concluding 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).

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 identifiable information, a decedent has a substantial privacy interest in the medical findings contained in the decedent’s autopsy report. This issue has been addressed in FOIA Appeals 2009-13, 2017-19, and 2017-104, where it was determined that: (1) autopsy reports were properly withheld under DC FOIA pursuant to Exemption 2; and (2) a decedent still maintains privacy rights in death, as recognized by the federal Health Insurance Portability and Accountability Act.

⁴ 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.”

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. Neither your initial request to OCME nor your appeal to the Mayor articulates a public interest in the decedent's autopsy report. In the context of public records laws, a record is deemed to be of "public interest" if it would shed light on an agency's conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

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.

Id. at 1492-93.

Disclosing the decedent's autopsy and other death-related records would not reveal any information about OCME's conduct. On the other hand, OCME has established that there is more than a *de minimis* privacy interest associated with the decedent's records. 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*, 997 F.2d at 1494. As a result, we find that OCME properly withheld the records you requested under Exemption 2.

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,

Mayor's Office of Legal Counsel

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