

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



Mayor's Office of Legal Counsel



August 25, 2017

VIA ELECTRONIC MAIL

Jason Klein

RE: FOIA Appeal 2017-133

Dear Mr. Klein:

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 Department of Health ("DOH") improperly denied you access to records you requested under the DC FOIA.

Background

On July 17, 2017, you submitted a request to the DOH for:

Any and all Letters of Intent that have been submitted pursuant to any public notice (one is attached, but this request covers all public notices) calling for the same to be submitted to DOH Medical Marijuana Program. This would include any letters of intent submitted March 1, 2017 through the date of this request, whether pursuant to the public notice attached or any other, in which an applicant indicates their intention to submit an application for registration of a dispensary in Ward 7, Ward 8, or both.

DOH responded on July 19, 2017, denying your request. DOH's denial indicated that it was withholding all responsive records pursuant to D.C. Official Code §§ 2-534(a)(1), (a)(2), (a)(4).

You appealed DOH's denial by letter dated August 2, 2017. Your appeal argues that there is a *de minimis* privacy interest in the withheld documents, "because it only reveals an individual's intention to seek a license to operate a medical marijuana dispensary." Your appeal goes on to simultaneously argue that there is a substantial public interest in disclosure of the records because "The identity of the individuals who will own, operate, and ultimately will be responsible for the facility is [of] great interest to the public in general." Lastly, your appeal articulates why you believe Exemptions 1 and 4 were inappropriately asserted.

This Office notified DOH of the appeal on August 10, 2017. DOH responded to this Office on August 16, 2017, indicating its intent to release responsive documents with redactions. On August 22, 2017, DOH released to you responsive documents, with redactions to addresses made pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”).¹ DOH’s production released the names of the primary contacts associated with each Letter of Intent – and only appeared to redact addresses and some telephone numbers and email addresses.²

On August 22, 2017, you acknowledged receipt of the released records but challenged the redactions of addresses made by DOH. Further, you asserted that you had personal knowledge of two Letters of Intent that were not included in the production – and asked for DOH to conduct another search. On August 23, 2017, this Office asked DOH to respond to your response to its production.

On August 25, 2017, DOH submitted a supplemental response that explained the legal basis for the redactions that DOH made pursuant to Exemption 2. DOH’s response indicated that there is a privacy interest in personally identifiable information. Further, DOH explained that no public interest was involved because release of the redacted portions would not reveal anything about the agency’s conduct. DOH also explained that it had researched the addresses and redacted only those which it believed to be residential – business addresses were released. Lastly, DOH explained that it had released all Letters of Intent that it maintained, but in an abundance of caution the agency had requested that the program in charge of the files look again. DOH represented that the agency would provide any additional Letters of Intent that may have been missed during the original search.

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).

¹ 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.”

² DOH’s production did not make redactions pursuant to Exemptions 1 and 4; this decision will not address these exemptions further.

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,³ 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 has a substantial privacy interest in the individual's personally identifiable information. The information that DOH did redact – primarily addresses, telephone numbers, and email addresses that DOH determined were personal and not of a business⁴ – raises a substantial privacy interest, as it all involves pieces of personally identifiable information.

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. In the context of DC FOIA, 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.

Here you have not articulated a public interest relevant to DC FOIA. Your public interest argument asserts “[t]he identity of the individuals who will own, operate, and ultimately will be responsible for the facility is [of] great interest to the public in general.” Popular interest in a subject is not the same as ‘public interest’ in the FOIA context. Your argument does not explain how releasing the redacted personal information will reveal anything about the conduct of DOH.

³ Here, DOH has made the decision to release to you the names of individuals listed as the primary contact for the Letters of Intent that you requested. It is this Office's view that DOH's release of names was discretionary; DOH could have redacted the names on the basis that names have a substantial privacy interest because they are personally identifiable information.

⁴ DOH has represented that the personally identifiable information that it redacted is in fact personal information and not that of a corporate entity. We accept these representations.

Indeed, it is unclear to this Office how these addresses, phone numbers and email addresses intersect with DOH's performance of its statutory duties. Conversely, it is clear that the release of this information could lead to the harassment of private citizens. When there is a privacy interest in a record and no countervailing public interest, the protected information may be withheld from disclosure. *See, e.g. Beck*, 997 F.2d at 1494. As a result, we find that DOH properly withheld the portions of the records it redacted under Exemption 2.

Conclusion

Based on the foregoing, we affirm DOH'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: Edward Rich, Senior Assistant General Counsel, DOH (via email)