

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



Mayor's Office of Legal Counsel



September 14, 2017

VIA EMAIL

Brian Freskos

RE: FOIA Appeal 2017-145

Dear Mr. Freskos:

This letter responds to the above-captioned administrative appeal that you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“D.C. FOIA”). In your appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld information in response to your D.C. FOIA request.

Background

On October 28, 2016, you sent a FOIA request on behalf of Trace Media to MPD for records related to lost or stolen firearms. MPD provided you with responsive records on June 9, 2017; however, the records did not include the firearms’ serial numbers, information which was specifically requested. On June 12, 2017, you asked MPD to provide the serial numbers. On June 22, 2017, MPD responded by denying your request, claiming that serial numbers were withheld to protect individual privacy interests in accordance with D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C).

You appealed MPD’s response, arguing that there is no privacy interest associated with the serial numbers you seek because the serial numbers are assigned to firearms not individuals. You claim further that different firearm manufactures can duplicate serial numbers, unlike social security numbers for individuals, which must be unique. You also assert that the release of firearm serial numbers alone cannot interfere with law enforcement proceedings. Finally, you maintain that disclosure of the information is in the interest of public safety to highlight the risks of illegal firearms and that hundreds of police departments around the country have responded to your similar public record requests by providing you with serial numbers.

On September 13, 2017, MPD provided this Office with a response to your appeal.¹ In its response, MPD reasserts its position that firearm serial numbers are protected from disclosure pursuant to D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C). MPD further asserts that other

¹ A copy of MPD’s response is attached.

jurisdictions' responses to your public records requests do not control MPD's response. MPD argues that there is a privacy interest associated with firearm serial numbers because the serial numbers can be cross-referenced with information in the National Crime Information Center ("NCIC") law enforcement database that would reveal personal information about the registered owners of the firearms.

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 crux of this appeal is whether MPD's withholding of firearm serial numbers was appropriate under D.C. Official Code §§ 2-534(a)(2) ("Exemption 2") and (a)(3)(C) ("Exemption 3"). 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. 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 step of analysis under both Exemptions 2 and 3(C) 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, such as phone numbers or addresses. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

Courts have recognized that an invasion of privacy need not occur directly as the result of a disclosure and protection is warranted if disclosure could lead to unwanted intrusions. *See, e.g., NARA v. Favish*, 541 U.S. 157, 167-70 (2004) (taking into account “the consequences” of FOIA disclosure, including “public exploitation” of the records by either the requester or others).

Here, MPD argues that an individual has a privacy interest in personal information in a government record and that a third party’s request for records about a private citizen can be reasonably expected to invade that citizen’s privacy. Your request, however, sought records pertaining to lost or stolen firearms, not pertaining to individuals associated with these firearms. A serial number belonging to a firearm is not, on its own, personally identifying information. To the extent that MPD’s records of serial numbers contain information on about an individual (e.g., the individual’s name, address, or phone number), MPD could justifiably redact such information. MPD asserts that firearm serial numbers can be cross-referenced with the NCIC database to reveal personal information about the firearms’ owners. The NCIC database is ordinarily available only to law enforcement and criminal justice agencies. For this reason, we find the potential for privacy invasion to be too attenuated to warrant withholding under either Exemption 2 or 3(C). As a result, MPD’s withholding of firearm serial numbers pursuant to Exemptions 2 and 3(C) is improper. Having found an insufficient privacy interest associated with firearm serial numbers, balancing the weight of the public interest involved is not necessary here.

Conclusion

Based on the foregoing, we remand MPD’s decision. Within 10 business days, MPD shall release to you the firearm serial numbers you requested in accordance with the guidance in this 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: Ronald B. Harris, Deputy General Counsel, MPD (via email)