

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-19**

February 24, 2017

VIA REGULAR MAIL

Mr. Mike Eckel

RE: FOIA Appeal 2017-19

Dear Mr. Eckel:

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 January 10, 2017, you submitted a request to the OCME for autopsy photographs and a toxicology report of an individual as well as certain internal correspondence generated by the OCME in connection with its investigation of the death. OCME responded on January 30, 2017, and informed you that it would be withholding all responsive records pursuant to D.C. Official Code §§ 5-534(a)(2), (a)(6)(A).

In the instant appeal, you challenge the “withholding [of] the relevant autopsy materials.” In your appeal, you argue that the autopsy materials should be released and that the “public has a legitimate interest in obtaining the requested records.” In favor of this interest, you posit that “there are reasonable grounds to conclude that the investigation by the MPD was compromised.” You further speculate that the individual’s death “may have resulted from other potential causes, including the possible introduction of toxic, lethal substances . . . .” Finally, you conclude that “this case qualifies as a high-profile incident with broad, lasting international interest that goes beyond that of the U.S. public interest.”

On February 9, 2017, we notified OCME of your appeal and asked for a response. OCME responded on February 15, 2017. In its response, OCME reasserted that withholding the records was proper pursuant to D.C. Official Code §§ 5-534(a)(2) and (a)(6)(A). Further, OCME cited to FOIA Appeal 2009-13, a previous DC FOIA Appeal decision, 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. OCME did not interpret your appeal to challenge the withholding of the deliberative correspondence and did not brief the issue. OCME explained in its response that responsive documents were withheld pursuant to D.C. Official Code § 2-

534(a)(2) (“Exemption 2”)<sup>1</sup> and D.C. Official Code § 5-1412<sup>2</sup> under D.C. Official Code § 2-534(a)(6) (“Exemption 6”).<sup>3</sup>

### 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). For the same reasons that personally identifiable information raises a substantial privacy interest for a citizen, the medical findings contained in an autopsy report raise a substantial privacy interest for a decedent. Indeed, in FOIA Appeal 2009-13 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.

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. You contend that the named individual who is the subject of the autopsy report’s “case

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<sup>1</sup> Exemption 2 prevents disclosure for “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

<sup>2</sup> D.C. Official Code § 5-1412 limits disclosure of documents maintained by OCME.

<sup>3</sup> Exemption 6 protects disclosure for information specifically protected by other statutes.

qualifies as a high-profile incident with broad, lasting international interest that goes beyond that of the U.S. public interest.” 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. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency’s own conduct.

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

The other public interest that you advance is that an agency separate from OCME, MPD, did not conduct an appropriate investigation into an international conspiracy. This instant appeal involves a determination rendered by OCME concerning OCME records; it is not an appeal of an MPD decision concerning MPD records. Your speculation surrounding the propriety of MPD’s investigation does not constitute a public interest under DC FOIA that would compel OCME to release its records, as OCME’s statutory function is to determine causes of death – not to investigate conspiracies or review the performance of agencies that have this responsibility. 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 autopsy records under Exemption 2.

Because we conclude that the documents were properly withheld pursuant to Exemption 2, we need not address whether the information is also protected under Exemption 6. Additionally, we agree with OCME that your appeal does not challenge the withholding of deliberative correspondence.

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)