

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-87**

June 26, 2017

VIA ELECTRONIC MAIL

Mr. Douglas Stevens

RE: FOIA Appeal 2017-87

Dear Mr. Stevens:

This letter responds to your above-captioned administrative appeal 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 District’s Office of Unified Communications (“OUC”) improperly denied a request you submitted under the DC FOIA.

Background

On June 7, 2017, you sent a FOIA request to the OUC for “a copy of a 911 call” made by someone asking for assistance at your office.

On June 8, 2017, OUC denied your request, citing to the personal privacy exemption, D.C. Official Code § 2-534(a)(2) (“Exemption 2”).

On June 12, 2017, you submitted this appeal. In your appeal, you assert without legal authority that “[a] phone call to the police alleging improper or illegal action by [you] is certainly something that [you] have a right to be aware of. The police represent the public as a whole, not just the allegeders of illegal activity requiring police attention.” Your appeal fails to address the privacy interest of the caller or the public interest in disclosure as contemplated by DC FOIA.

Upon receipt of your appeal, this Office notified the OUC and asked the agency to formally respond. OUC responded to this Office on June 26, 2017, with an explanation as to why your FOIA request should be denied: the caller has a privacy interest and no public interest in disclosure, as contemplated by DC FOIA, exists.

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).

We consider whether the recording may be withheld in its entirety pursuant to 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 to determine 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 *New York Times Co. v. Nat’l Aeronautics and Space Admin.*, 920 F.2d 1002, the record at issue was the final intercom recordings of the crew of the 1986 Challenger space shuttle disaster. Based on the specific facts and circumstances of the case, the court in *New York Times* found that the voices and vocal inflections of the crew immediately before their deaths were exempt because disclosure would constitute a clearly unwarranted invasion of personal privacy of the crew and their surviving family members. *Id.* at 1009-10.

We do not find that the *New York Times* case provides a blanket exemption for recordings of all 9-1-1 calls.¹ In general, there is a sufficient privacy interest in personal identifying information.

Information protected under Exemption 6 [the equivalent of Exemption (2) under the federal FOIA] includes such items as a person's name, address, place of birth, employment history, and telephone number. *See Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989); *see also Gov’t Accountability Project v. U.S. Dep’t of State*, 699 F.Supp.2d 97, 106 (D.D.C. 2010) (personal email addresses); *Schmidt v. Shah*, No. 08–2185, 2010 WL 1137501, at *9 (D.D.C. Mar. 18, 2010) (employees' home telephone numbers); *Schwaner v. Dep’t of the Army*, 696 F.Supp.2d 77, 82 (D.D.C. 2010) (names, ranks, companies and addresses of Army personnel); *United Am. Fin., Inc. v. Potter*, 667 F.Supp.2d 49, 65–66 (D.D.C.2009) (name and cell phone number of an “unknown individual”).

Skinner v. United States DOJ, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

¹ Privacy interests may prevent disclosure for 911 calls made by victims or witnesses at a time of heightened fear and vulnerability when the vocal inflection, the words chosen, and the manner of delivery pose a substantial likelihood of presenting one in an embarrassing or humiliating light. *See FOIA Appeal 2011-61*.

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) (“An individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”). As a result, we find that there is a sufficient privacy interest in the personally identifiable information in a 911 call.

The second part of a privacy analysis examines whether the public interest in disclosure outweighs the individual privacy interest. The Supreme Court has stated that the analysis must be conducted with respect to the purpose of FOIA, which is “to open agency action to the light of public scrutiny.” *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). You have not raised a public interest argument in this appeal; instead you have stated without citation that this record is “certainly something that [you] have a right to be aware of.”

In the absence of a relevant countervailing public interest, we find that personally identifiable information in the call at issue (i.e., the names, personal phone numbers, employee identification number, and address) is protected from disclosure pursuant to Exemption 2.

D.C. Official Code § 2-534(b) requires an agency to produce “[a]ny reasonably segregable portion of a public record . . . after deletion of those portions” that are exempt from disclosure; however, cases have held that records may be withheld in their entirety if an agency lacks the technological capacity to remove exempt portions of a record.² In prior FOIA appeal decisions, the OUC has been found to lack the technical capacity to redact audio recordings.³ The OUC has reaffirmed to this Office that it currently does not have the technical capacity to redact audio recordings.

Conclusion

Based on the foregoing, we affirm the OUC’s decision.

² *Milton v. United States DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on “the agency’s current technological capacity” and holding that responsive telephone conversations were not reasonably segregable because an agency did not possess technological capacity to segregate non-exempt portions of requested records); *see also Mingo v. United States DOJ*, 793 F. Supp. 2d. 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because an agency “lacks the technical capability” to segregate information that is digitally recorded); *Antonelli v. BOP*, 591 F. Supp. 2d 15, 27 (D.D.C. 2008) (same); *Swope v. United States DOJ*, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (same).

³ *See, e.g., FOIA Appeal 2010-08; FOIA Appeal 2016-03.*

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: Dionne Hayes, General Counsel, OUC (via email)