

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



Mayor's Office of Legal Counsel



February 20, 2018

VIA ELECTRONIC MAIL

Mr. Benjamin Weinstein

RE: FOIA Appeal 2018-75

Dear Mr. Weinstein:

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 Consumer and Regulatory Affairs (“DCRA”) improperly withheld records in response to your request under the DC FOIA.

Background

On November 28, 2017, you submitted a request to DCRA for records relating to “the vacant building determination” of a particular address. DCRA responded on February 5, 2018, denying your request and informing you that it was withholding 10 responsive documents to protect personal privacy pursuant to D.C. Official Code § 2-534(a)(2) (“Exemption 2”).¹

You appealed DCRA’s denial, arguing that personal information could be redacted, as has been done in previous requests to DCRA, instead of the documents being withheld in their entirety. This Office notified DCRA of your appeal on February 5, 2018. DCRA responded to this Office on February 12, 2018, reaffirming its position that the records were properly withheld pursuant to Exemption 2.² DCRA’s response asserts that there is a privacy interest because the records concern a residential address. Additionally, DCRA asserts that there is no public interest in disclosing the withheld records.

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

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 A copy of DCRA’s response is attached.

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.

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); *see also* FOIA Appeal 2017-133, FOIA Appeal 2017-149.

Having conducted an *in camera* review of the withheld records, we agree that there is a *de minimis* privacy interest associated with records pertaining to a specified residential address. *See Skinner*, 806 F. Supp. 2d at 113.

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.

District law requires DCRA to, *inter alia*, determine whether a building is vacant or blighted, notify a building owner of this designation, and advise the owner of his or her right to appeal the

designation. D.C. Official Code § 42-3131.11. The withheld records reflect DCRA's performance of these statutory duties. Although we recognize DCRA arguments that there is a privacy interest associated with the records, it appears that there is a public interest in the withheld documents as well.

The public interest in the records at issue is evident from several provisions of D.C. Official Code § 2-536, the statute describing information that must be made public. Of most relevance is D.C. Official Code § 2-536(a)(5), which states that the following must be made public:

Correspondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party.

The withheld documents contain a delinquency determination notice, a notice of vacant building response requirements, and a vacant building exemption approval. These documents constitute correspondence from a public body (DCRA) relating to its enforcement responsibilities (determining whether a building is blighted) and consequently the rights the District has (reclassifying the building for tax purposes) and the building owner has (appealing the determination) with respect to the determination. As a result, we find that there is a public interest in some of the withheld records that outweighs the privacy interest associated with the records.

D.C. FOIA requires agencies to reasonably segregate public records to the extent possible. D.C. Official Code § 2-534(b). Instead of withholding an entire document, an agency should make discrete redactions to privileged information where necessary. While D.C. Official Code § 2-536 designates certain information as required to be made public, it does so "[w]ithout limiting the meaning of other sections of this subchapter." As a result, DCRA properly withheld some of the documents you requested (e.g., financial information, utility bills), and this information should remain withheld or redacted.

Conclusion

Based on the foregoing, we remand this matter to DCRA. Within 10 days, DCRA shall review the withheld documents, make redactions in accordance with the guidance in this decision, and release the withheld records. 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: Erin Roberts, Esq., FOIA Officer, DCRA (via email)