

**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT**



October 30, 2018

VIA ELECTRONIC MAIL

Mr. [REDACTED] Cunningham
[REDACTED]
[REDACTED] 10458
[REDACTED]@yahoo.com

VIA ELECTRONIC MAIL

Director Karima Holmes
Office of Unified Communications
2720 Martin Luther King Jr. Avenue,
SE
Washington, D.C. 20032
director.ouc@dc.gov

RE: OOG-0002_8.23.18_FOIA AO

Dear Mr. Cunningham:

This letter is in response to your August 23, 2018, request for a Freedom of Information Act (FOIA) advisory opinion from the District of Columbia Office of Open Government (OOG). D.C. Official Code § 1-1162.05c empowers the OOG to issue advisory opinions on the implementation of FOIA. A review of the advisory opinion request and the Office of Unified Communications' (OUC) response thereto reveals two differing factual accounts by the parties as to whether OUC predicated acceptance of the FOIA request on the requester's presentation of valid identification. The OOG is unable to conclusively resolve the conflicting factual accounts. However, the OOG finds the OUC's assertion that it would not require a requester to present acceptable identification prior to accepting a FOIA request to be credible based upon OUC's general practice in FOIA matters. Although the OOG is unable to conclusively determine the accuracy of either account, this advisory opinion includes this issue as one of the matters to address. This advisory opinion addresses the appropriateness of a request by the Office of Unified Communications (OUC) to Mr. Cunningham that he present valid identification to: (1) submit a FOIA request for 911 audio recording for police assistance when the requester is the caller (first-party request); and (2) obtain the 911 audio recording for police assistance for a first-party request.

FOIA's legislative history appears to provide the grant of authority necessary for the District to adopt regulations to verify the identity of first-party requesters. The Federal Privacy Act of 1974, approved December 31, 1974 (88 Stat. 1896; U.S.C. § 552a et seq.) (Privacy Act) is the statute which governs how federal agencies may process first-party FOIA requests. Pursuant to the Privacy Act a requester may identify themselves by providing the following information: (1) full name; (2) current address; and (3) date and place of birth; and (4) at their option their

social security number. Additionally, the requester must either sign the first-party request form before a notary or execute the request under a federal law that permits statements to be made under penalty of perjury as a substitute for notarization. There are Mayor's Appeals decisions that recognize the person to whom the first-party record relates may waive privilege. However, currently under District law there are no statutes or regulations that mirror the Privacy Act's first-party identify-verification provisions, or which reflect the of the waiver process.

The instant issue of whether local FOIA requires the requester to present identification to process the request is not one of first impression to the OOG. The undisputed facts of #OOG-0001_1.04.18_FOIA mirror this matter. Therefore, relevant to this determination is the OOG's findings in #OOG-0001_1.04.18_FOIA AO, that absent statutory or regulatory authority an agency's FOIA identity-verification requirement does not have the force of law.¹ Consequently, it is the OOG's opinion that FOIA does not support a requirement: (1) that the requester present valid identification to submit a first-party FOIA request for a 911 audio recording; and (2) to obtain the 911 audio recording for police assistance for a first-party request. Even though the OUC granted the record to Mr. Cunningham, to the extent it was available, Mr. Cunningham did not withdraw his request that the OOG issue this advisory opinion. Therefore, the OOG is providing the following analysis and advice concerning OUC's implementation of FOIA.

I. BACKGROUND

On July 19, 2018, Mr. Cunningham went to the OUC to submit an oral FOIA request for an audio recording and audio transcript of a 911 telephone call he made for police assistance. The complainant's version of facts details a refusal by the employees of the OUC to accept his FOIA request without him first presenting a valid and acceptable form of identification. OUC's version of what took place is as follows:²

Employees advised complainant to submit the request in writing, by email or through the District's FOIA request management system.³ The employees also provided Mr. Cunningham with paper and pen so that he could submit the request in-person to them. They further advised that the requested record might be exempt from disclosure because it potentially contained information of a personal nature that could constitute an unwarranted invasion of personal privacy. As such, he would also need to submit an acceptable form of identification if he wished to obtain the record.⁴

¹View this advisory opinion here: https://www.open-dc.gov/sites/default/files/redacted2%20OOG-0001_1.04.18_FOIA%20AO_Mulhauser.pdf.

²This language is taken from OUC's August 29, 2018, response to Mr. Cunningham's appeal.

³Pursuant See 1 DCMR § 402.2, a written request may also be mailed or faxed to the FOIA Officer.

⁴OUC's September 24, 2018, communication to the OOG states: "Mr. Cunningham presented what appeared to be a library card, which the employees were unfamiliar with and felt was not sufficient to overcome the privacy concern, given the sensitivity of the information."

On or about July 21, 2018, Mr. Cunningham submitted a written request for a 911 audio and transcript along with a copy of his driver's license. On July 30, 2018, a former FOIA Officer Omekam sent Mr. Cunningham an email acknowledging receipt of his request. On July 31, 2018, Mr. Omekam sent a second acknowledgment email, which included a FOIAXpress case number. Later that day, Mr. Omekam provided Mr. Cunningham a copy of the audio recording. Although Mr. Omekan indicated that he was granting the request in full, he neglected to inform Mr. Cunningham that OUC does not create written transcripts of audio calls. Thus, the request was granted to the extent records were available.

There was a delay in providing the acknowledgement email; however, the available record was provided to Mr. Cunningham on the same day, prior to the date required pursuant to D.C. Code § 2-532(c)(1).

On August 22, 2018, Mr. Cunningham filed an appeal of OUC's determination with the Executive Office of the Mayor (Mayor). The next day Mr. Cunningham sought the OOG assistance in obtaining the record. Then OUC filed its response to the appeal with the Mayor on August 29, 2018. The Mayor's decision affirming the OUC's response to Mr. Cunningham's request was issued on September 6, 2018.⁵ After meeting with Mr. Cunningham on September 13, 2018, OOG Attorney Advisor Johnnie Barton sent an electronic communication to the OUC which in pertinent part states:

The matter regarding receipt of the 911 call from OUC to Mr. Cunningham is resolved. There apparently was a misunderstanding that OUC was sending the recording by regular mail and not email. As evidence of Mr. Cunningham's receipt of the 911 audio from OUC it is attached to this email as downloaded from his cell phone.

On September 20, 2018, the OOG sent an electronic communication to the OUC requesting its response to the facts in Mr. Cunningham's advisory opinion request. On September 24, 2018, the OOG received from the OUC an electronic communication in response to the allegations in Mr. Cunningham's advisory opinion request. The following documents were attachments to the OUC's September 24, 2018 response to the OOG: (1) Mr. Cunningham's advisory opinion request; (2) the September 13, 2018 email from the OOG; (3) emails exchanges between the OUC and Mr. Cunningham; (4) OUC's Response to the Cunningham Appeal; and (5) FOIA Appeal 2018-157.

⁵ The OOG was not aware of Mr. Cunningham's appeal or of the issuance of the Mayor's appeal decision until receiving a copy of it from the OUC on September 24, 2018.

II. 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). Any person has the right of access to public records, and may inspect and obtain copies of public records, unless the requested records are subject to withholding as expressly provided under D.C. Official Code § 2-534 (D.C. Official Code § 2-532(a)). However, this right is not absolute. “[T]he right of public access is limited by statutory exceptions, which consistent with the public policy of access, must be read narrowly; *See Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (2005).

D.C. FOIA is modeled on the federal Freedom of Information Act, and although not binding, we look to decisions interpreting like provisions in the federal act when we interpret the meaning of the D.C. FOIA; *See District of Columbia v. Fraternal Order of Police Metro. Police Labor Comm.*, 33 A.3d 332, 342 n.8 (D.C. 2011). Therefore, a review of the processing of first-party requests under federal FOIA is in order.

A. *Processing First-party FOIA Request Under the Privacy Act.*

The primary purpose of the Privacy Act⁶ is to safeguard individual privacy from misuse of federal records, and to provide that individuals be granted access to records concerning them which are maintained by federal agencies. The Privacy Act empowers federal agencies to process first-party FOIA requests by identifying the requester through information the requester submits in a Certification of Identification form or unsworn declaration that subjects the signer to perjury.⁷ *Rios v. United States*, 275 F.Supp. 3d 88 (D.D.C. 2017), provides an example of the Certification of Identification in use by a federal agency to process a first-party FOIA request:

Verification of identity. When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization [N]o specific form is required[.] . . . In order to help the identification and location of requested records, you may also, at your option, include your social security number. *Rios*, at 94.

⁶ The Privacy Act does not apply to states or the District of Columbia.

⁷ First party requesters may submit their request under both FOIA and the Privacy Act.

The clear distinction between the District government's and federal government's processing of first-party FOIA requests is the absence of a statutory or regulatory regime in the District to process first-party FOIA requests. District law is silent respecting this issue.

B. *The Requester's Identity is Irrelevant for Most Purposes Under FOIA.*

Generally, the identity of a FOIA requester is irrelevant, and D.C. FOIA law does not require a requester to provide identification or to prove his or her identity. "Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request." [*United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771, 103 L. Ed. 2d 774, 109 S. Ct. 1468 \(1989\)](#). Additional legal authority to support this position is found below in the D.C. FOIA statute, D.C. FOIA regulations and a Mayor's FOIA Appeal decision.

D.C. Official Code § 2-532(a) states, "[A]ny person has a right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534." The regulations implementing D.C. FOIA, at 1 DCMR § 402.3, do not require that the requester identify him or herself. In relevant part this provision states, "[a] request shall include a daytime telephone number, e-mail address or mailing address for the requester." Further, the Mayor's Office of Legal Counsel's found in FOIA Appeal 2017-90R⁸ that an anonymous person is entitled to submit a FOIA request under D.C. law and their identity is generally immaterial. The language from FOIA Appeal 2017-90R relevant to a determination in this matter provides:

"Further 1 DCMR § 402.4 states that a requester is required to include a daytime telephone number, e-mail address or mailing address to submit a FOIA request; there is no requirement to include the requester's name."
FOIA Appeal 2017-90R, July 31, 2017 page 3.

"[T]he exceptions are when an individual requests records pertaining to him/herself and, therefore, possesses the ability to wave his/her own privacy interests, or when a requester seeks a fee waiver based on affiliation with educational, news media, or other entities."⁹

While the Mayor's findings in FOIA Appeal 2017-90R state that a first party requester may waive the privilege to accommodate release of the record pertaining to him or herself, the OOG is unable to identify in the FOIA statute or its implementing regulations the process to accommodate the waiver. As discussed *infra*, such a process exists under federal FOIA pursuant to the Privacy Act.

⁸ The Mayor's decision also states that "anonymity is not a bar to filing an administrative appeal under DC FOIA." FOIA Appeal 2017-90R, July 31, 2017, at page 3.

⁹ Ibid Footnote 3.

C. *An Agency May Not Require That a Requester Produce Valid Identification as a Prerequisite to the Submission of a FOIA Request.*

The OUC contends that its employees did not tell Mr. Cunningham that it was necessary to present a valid and acceptable identification as a prerequisite to submission of a FOIA request. However, OUC's version of the facts is at odds with those of Mr. Cunningham. The OOG is unable to conclusively resolve the conflicting factual accounts in this matter. However, the OOG finds the OUC's assertion that the OUC would not require the requester to provide acceptable identification prior to accepting a FOIA request to be credible.¹⁰ Nonetheless, a review of the law on this matter is in order based on Mr. Cunningham's assertions to the contrary.

As stated *infra*, the identification of a requester is irrelevant for most cases under FOIA and an anonymous person may submit a FOIA request. Thus, an agency may not request that a requester produce valid identification as a prerequisite to the submission of a FOIA request.

D. *The Legislative History of FOIA Includes the Authority to Establish Reasonable Rules to Govern the Procedure by Which Requests are Made.*

A review of the legislative history of Bill 1-119, "the Freedom of Information Act of 1975," reveals that the legislative intent of the measure that led to the D.C. FOIA statute was to provide agencies, *inter alia*, with the authority to establish reasonable rules governing the procedure by which a request shall be made. At issue here is whether the Council's intent was to provide District agencies with the authority to adopt regulations to require identity verification for first-party requests. FOIA's legislative history suggests that it was. Specifically, a provision of FOIA's legislative history states:

The Act, however, also recognizes that the Mayor and agencies of the government must be given some flexibility in the handling of requests for information. Government officials are therefore granted the authority to establish reasonable rules to control the time, place and procedure by which requests shall be made.¹¹

The language from FOIA's legislative history appears broad enough to empower the Mayor and/ or D.C. agencies to adopt regulations with identity-verification provisions for first-party requesters.

III. RECOMMENDATIONS

¹⁰ Whether the OUC requested valid identification may be the result of a miscommunication or misunderstanding similar to whether the OUC was sending the record to Mr. Cunningham by mail or email.

¹¹ Report on the Committee on Government Operations on Bill 1-119, the Freedom of Information Act of 1975, at page 14 (Council of the District of Columbia July 23, 1975).

The existence of statutory identity-verification requirements to obtain records is not a novel process and exists outside the realm of FOIA in the District. One such example concerns vital records. To ensure the privacy and the proper release of vital records, the regulations governing the disclosure of vital records limit their release to persons with a direct and tangible interest in the record. To establish such individuals, when requesting vital records, the law states that in addition to submitting a proper application the “Registrar may also require identification of the applicant or a sworn statement.” This provision of the Vital Records regulations provides two means to establish the identity of the requester - identification or an affidavit.¹² The legislative history of D.C. FOIA supports the position that the District may implement regulations that govern the procedure by which FOIA requests are made. The OOG recommends that the Mayor promulgate FOIA regulations addressing identification requirements for first-party FOIA requesters that are similar to the requirements for obtaining vital records or similar to the federal privacy law requirements.

IV. CONCLUSION

The OOG is unable to resolve the conflicting factual accounts of whether the OUC required that Mr. Cunningham provide valid identification to submit his FOIA request. However, this advisory opinion does address that issue. Based on its experience with OUC and interview of the OUC personnel involved, the OOG finds it plausible that the OUC would not require of the requester acceptable identification prior to accepting a FOIA request. The OOG attributes the differing accounts to a possible misunderstanding and/or miscommunication rather than a mandate from the OUC. The OOG takes this view because the record shows that Mr. Cunningham’s misunderstanding of how the OUC would provide him with the requested record (by email and not regular mail) was the basis of his appeal to the Mayor and is why he sought the OOG advisory opinion.

Moreover, rather than denying the requester the record that related to solely to him, the OUC opted to process the first-party request by identifying the requester. The OOG finds the OUC’s actions consistent with FOIA’s public policy. However, D.C. FOIA and its regulations are silent as to the process an agency is to follow concerning a first-party request for records. For the reasons stated herein, it is the OOG’s opinion that currently the D.C. FOIA law does not support a requirement that the requester present valid identification to submit a first-party FOIA request for a 911 audio recording. The D.C. FOIA law also does not support an identification requirement as a prerequisite to obtaining the 911 audio recording for police assistance for a first-party requester. Thus, the OOG recommends the enactment of identity verification rules that contain provisions comparative with vital records regulations or with those of the Privacy Act. The enactment of identity verification rules for FOIA would remove any ambiguity and resolve the issue presented by Mr. Cunningham’s complaint.

¹² See 29 DCMR § 2821. 6.

Sincerely,

//s//

NIQUELLE M. ALLEN, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability

cc: Dionne L. Hayes, General Counsel OUC (Dionne.Hayes2@dc.gov)
Jared Siegel, OUC Attorney Office of General Counsel (Jared.Siegel@dc.gov)