GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-98

September 28, 2015

VIA ELECTRONIC MAIL

RE: FOIA Appeal 2015-98

Dear Mr. Gillum:

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(a) ("DC FOIA"), contending that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA.

Background

On August 31, 2015, you submitted a request to MPD for records pertaining to police report CCN#15131596. MPD responded to you in an email dated September 8, 2015, in which the agency denied your request based on an assertion that the records are investigatory files exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i).

Subsequently, you appealed MPD's decision on the ground that MPD improperly invoked the investigative records exemption. You maintain that disclosure of the records is in the public interest and cite to provisions of Arizona and Georgia state law, which allow for the release of initial police reports.

MPD responded to your appeal in a letter to this office dated September 19, 2015, reiterating its position that releasing the records at issue would interfere with an ongoing MPD enforcement proceeding. Further, at the request of this office, MPD provided a supplemental response on September 23, 2015, asserting that the withheld documents were not reasonably segregable.[1] Along with its supplemental response, MPD provided this office with a copy of the withheld CCN#15131596 reports for our *in camera* review.

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

[1] MPD's responses are attached for your review.

policy, DC FOIA creates the right "to inspect … and … copy any public record of a public body . . ." *Id.* at § 2-532(a).

That right, however, is subject to various exemptions that may form the basis for denial of a request. *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).

<u>The Investigatory Records Exemption</u>

The DC FOIA contains an exemption for investigatory records compiled for law enforcement purposes when disclosure would interfere with enforcement proceedings. *See* D.C. Official Code § 2-534(a)(3)(A)(i). The exemption applies to records prepared or assembled in the course of an investigation that focus directly on "specifically alleged illegal acts, illegal acts of a particular identified [persons], acts which could, if proved, result in civil or criminal sanctions." *Barry*, 529 A.2d at 321-22 (quoting *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974)). The purpose of the exemption is to prevent "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 224, 232 (1978). Further, the exemption remains applicable to records "[s]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence." *E.g., Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted).

In asserting the investigatory records exemption, it is impermissible for an agency to issue a "blanket exemption" of all records in a file by virtue of the records' location in that file. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 66 (D.C. Cir. 1986). "[W]here an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency's decision." *Fraternal Order of Police*, 82 A.3d at 815 (internal quotation and citation omitted).

It is clear that the records in question were compiled for law enforcement purposes with respect to an ongoing criminal investigation; the issue is whether their release would interfere with an enforcement proceeding. MPD has asserted that "[d]isclosure of records at this time would expose witnesses to danger, alert potential criminal suspects to the ongoing investigation, and reveal the direction and progress of the investigation, thus potentially compromising the investigation."[2] MPD provided the two CCN#15131596 reports in question to this office for *in camera* review. Having reviewed these reports, we concur with MPD's representation. The reports contain details on evidence seized, suspects' behavior when apprehended, and other

[2] MPD correspondence dated September 19, 2015, at p. 2.

information which, if disclosed, could expose the government's prosecution strategy and otherwise interfere with an open criminal investigation.

Segregability

Under the DC FOIA, even when an agency establishes that it has properly withheld a document under an exemption, it must disclose all reasonably segregable, nonexempt portions of the requested documents. D.C. Official Code § 2-534(b). *See also, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). Here, the MPD has demonstrated that it considered whether portions of the records in question, including CCN #15131596, are reasonably segregable. On the issue of segregability, MPD stated:

> A disclosure to a requester is deemed under FOIA to be publicly available. The disclosure of any information which would be useful or informative to the requester would also be useful or informative to a suspect or a witness. Knowing what has transpired in the investigation, which includes not only the information which the Metropolitan Police Department ("MPD") possesses but also knowing the information which it does not possess, a suspect or witness can take actions or tailor any statements which they are called to make in order to hamper or defeat the efforts of MPD. Any detail revealed can be useful. The identification of existing records itself would contribute to the disclosure of the direction, progress, and status of the investigation.[3]

Having reviewed the documents and MPD's responses to your appeal, we accept MPD's representation that there is no reasonable way for the documents to be redacted in the manner described in D.C. Official Code § 2-534(b),[4] as the exempt and non-exempt portions are inextricably intertwined such that after redaction of the withheld documents would produce "an edited document with little informational value." *Antonelli v. Federal Bureau of Prisons*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009) (internal citations omitted).

---

[3] MPD correspondence dated September 23, 2015, at p. 1.

[4] "(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section . . ."

Conclusion

Based on the foregoing, we affirm the MPD's decision and 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,

/s Gregory Evans

Gregory Evans
Associate Director
Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)