

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor



May 12, 2009

BY U.S. MAIL

[Redacted]  
Washington, DC 20

Re: Freedom of Information Act Appeal

Dear [Redacted]

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. § 2-531 *et seq.* (the "DC FOIA"), dated December 17, 2008 (the "Appeal"). We forwarded the Appeal to the Office of Police Complaints ("OPC") with a request for a response. The OPC responded by letter dated January 14, 2009 ("OPC Response"). We note the OPC Response included a *Vaughn* Index. Since you did not have an opportunity to respond to the exemptions OPC relied on, we gave you an opportunity to respond to the *Vaughn* Index, which you did by a letter dated March 19, 2009 ("*Vaughn* Response").

In your FOIA Request dated September 26, 2008, you sought copies of "[A]ll material maintained by the Office of Police Complaints related to Complaint No 08-0053 or to [Redacted] Requested material includes all records, documents and other material in any format or medium, including paper, electronic (e-mail, database records), video, photo or audio recording" ("FOIA Request"). OPC responded to your FOIA Request in a letter dated October 20, 2008, where OPC provided you with a copy of your complaint form and disposition letter.

On Appeal, Appellant challenges OPC's denial of his FOIA request. In summary, Appellant believes his request "clearly went beyond the actual complaint and disposition letter" and the FOIA request included "all" documents related to Complaint No. 08-0053. Further, Appellant believes the documents identified in the *Vaughn* index cannot be properly withheld in their entirety under the "investigative technique," "deliberative process," or "unwarranted invasion of privacy" exemptions compromising the DC FOIA.

Discussion

It is the public policy of the District 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, 2001 Ed. § 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.* § 2-532(a). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. D.C. Official Code, 2001 Ed. § 2-534.

Exemption 3 of the DC FOIA states “investigatory records compiled for law enforcement purposes” may be exempt from disclosure if the “production of such records would “disclose investigative techniques and procedures not generally known outside the government.” D.C. Code § 2-534(a)(3)(D). To rely on exemption 3 one must first establish the record has been compiled for law enforcement purpose(s). A record is considered to have been compiled for law enforcement purpose(s) if it was “created or acquired in the course of an investigation and the nexus between the investigation and one of the agency’s law enforcement duties is based on information sufficient to support at least a colorable claim of its rationality.” *Boyd v. Bureau Of Alcohol, Tobacco, Firearms, and Explosives*, 2006 WL 2844912 (D.C.) (citing *Quinon v. Fed. Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. 1996) (quoting *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. 1982)). Additionally, reliance on this exemption requires the technique or procedure at issue must not be “generally” known outside of the government.

Exemption 3 of the DC FOIA also states “investigatory records compiled for law enforcement purposes” may be exempt from disclosure if the “production of such records would constitute an unwarranted invasion of personal privacy.” D.C. Code § 2-534(a)(3)(C). Determining whether this part of the exemption applies requires one to balance “[T]he interest in privacy of the individual mentioned in the record against the public’s interest in disclosure.” 2006 WL 2844912 (citing *Beck v. Dept of Justice*, 997 F.2d 1489, 1491 (D.C. 1993). Under this balancing test, the only public interest relevant is “[O]ne that focuses on ‘the citizens’ right to be informed about what their government is up to.” *Id.* (citing *Davis v. U.S. Dept. of Justice*, 968 F.2d 1276, 1282 (D.C. 1992) (quoting *Dept of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989)). Further, the “[I]dentity and interest of the party requesting the document are irrelevant to this balancing.” *Id.* (citing *Mays v. Drug Enforcement Admin.*, 234 F.3d 1324, 1327 (D.C. 2001).

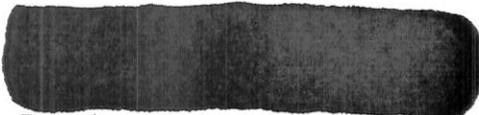
Here, it is quite clear OPC reliance on the investigative techniques and procedures exemption is inapplicable. To begin with, this exemption applies to techniques and procedures not “generally” known to the public. However, the investigative techniques and procedures OPC is attempting to shield from the public by cloaking these documents under this exemption cannot withstand minimal scrutiny in light of the fact OPC has a

public website explaining the investigative process. As a matter of fact, one would be able to glean more information about OPC's investigative process by going to the OPC website than one could ever gather from the release of these documents. The documents at the center of this dispute are primarily, if not fully, factual in nature and the release of these documents in this instance would not undermine OPC's ability to conduct investigations. Therefore, after conducting an *in camera* inspection of the *Vaughn* index entitled "Not disclosable due to deliberative process, investigative technique, and unwarranted invasion of privacy" we determine the investigative techniques and procedures exemption does not apply to these documents.

In a similar vein, the release of these documents would not constitute an unwarranted invasion of personal privacy under exemption 3 either. The officers at the center of this dispute were acting in their official capacity as law enforcement officers when the incident forming the basis of Appellant's FOIA request occurred. And the release of their names would not constitute an unwarranted invasion of their personal privacy under these circumstances. Here, we do not have a situation similar to *Lesar v. U.S. Dept. of Justice*, where the court held the FBI agents who were the subject of a FOIA request involving the assassination of Dr. Martin Luther King, Jr. faced the very real threat of being harassed or harmed by members of the community if their identities were revealed. 636 F.2d 472 (D.C. 1980). Although Appellant is seeking the names of all the officers involved in the incident, we are only releasing the identifying information for the officer who was found to be in violation of an MPD policy. To release the names of the other officers may constitute an unwarranted invasion of their personal privacy, since the allegations against them were unsustainable and it would not be in the public's interest to have the exonerated officer's names circulating in the community. To do otherwise would only serve to place an unfair stigma on these officers.

Additionally, we find the deliberative process privilege to apply to section numbers 13, 14, 45, 60, 61, 62, 63, 65, 66, and 74 of the *Vaughn* index entitled "Not disclosable due to deliberative process, investigative technique, and unwarranted invasion of privacy." D.C. Code § 2-534(a)(4). To invoke this privilege, two requirements must be met. First, the material must be predecisional, and, second, it must be deliberative. *Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003). To be deliberative, the document must be part of the initial process by which agency decisions and policies are formulated. *People for the American Way Foundation v. National Park Service*, 2007 WL 2416113 (D.C. 2007).

Here, these documents are clearly predecisional and not only reflect facts, but also the opinions of OPC investigators who conducted the interviews. These notes only aided OPC in formulating its final opinion on whether to sustain the allegations against the officers or not. As such, these documents are protected by the deliberative process privilege and were rightfully withheld.



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In conclusion, we REMAND this matter to OPC. OPC shall provide Appellant with all of the documents except for the ones specifically excluded by this opinion within ten (10) days of the date of this decision.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Regards,



Runako Allsopp  
Deputy General Counsel to the Mayor

cc: Ivelisse Cruz  
Deputy Director, OPC