

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-47

July 20, 2011

Melissa Gomez, Esq.

Dear Ms. Gomez:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated June 22, 2011 (the “Appeal”). You, on behalf of a client (“Appellant”), assert that the District of Columbia Fire and Emergency Medical Services Department (“FEMS”) improperly withheld records in response to your request for information under DC FOIA dated February 7, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records for a fire that occurred at 3132 16th Street, N.W., including records relating to any arson investigations, the cause of the fire, alarms, and reports.

In response, by letter dated April 12, 2011, FEMS denied the FOIA Request. It stated that the “the cause of the fire has been classified as ‘undetermined’” and, “if additional information is obtained,” there is a “high” likelihood of reopening an investigation. Therefore, it withheld the records pursuant to D.C. Official Code § 2-531(a)(3)(A)(i), which provides an exemption from disclosure for investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings.

On Appeal, Appellant challenges the response of FEMS to the FOIA Request as insufficient to justify the claim of exemption. First, Appellant questions whether there are applicable enforcement proceedings to which the exemption would apply. It notes that FEMS states that the investigation must be “re-opened.” Thus, there are no enforcement proceedings, only a “possibility” of such proceedings and the claimed interference. Second, Appellant contends that FEMS has not indicated how the disclosure of the requested documents would interfere with enforcement proceedings. Third, it asserts that some of these records in redacted form should be available, notwithstanding any applicability of the exemption.

In its response, dated July 13, 2011, as supplemented by an affidavit dated July 18, 2011, FEMS clarified, amplified, and reaffirmed its position. It states that the records consist of documents gathered in a joint investigation conducted by three law enforcement agencies. It also states that while the cause of the fire is classified as undetermined “[a]t this time,” “the investigation is considered part of a wider on-going investigation, the investigation has not been closed, and referral for criminal prosecution has not been ruled out.” The response also indicates that all of the witnesses have not been interviewed and that corroborating statements are expected to be obtained as part of the continuing investigation. It reaffirms its opinion that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(3)(A)(i) as investigatory records compiled for law enforcement purposes where disclosure would interfere with enforcement proceedings. It indicates that disclosure of records at this time may expose witnesses to danger, alert potential criminal suspects to the ongoing investigation, and reveal the direction of the investigation.

Discussion

It is the public policy of the District of Columbia (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 § 2-531. In aid of that policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a 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), and 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).

D.C. Official Code § 2-534(a)(3) provides, in pertinent part, an exemption from disclosure for:

Investigatory records compiled for law-enforcement purposes, including the records of Council investigations . . ., but only to the extent that the production of such records would:

(A) Interfere with:

(i) Enforcement proceedings;

For the purposes of DC FOIA, law enforcement agencies conduct investigations which focus on acts which could, if proved, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep’t of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). The exemption “applies

not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.” *Rugiero v. United States DOJ*, 257 F.3d 534, 550 (6th Cir. 2001). As stated above, the first contention of Appellant was that the law enforcement exemption does not apply because FEMS stated that the investigation was closed, with only a possibility that it would be reopened. Based on the response to the FOIA Request, Appellant raises a legitimate argument. However, FEMS has clarified or corrected its statements and now indicates that the investigation is ongoing and may lead to criminal prosecution. For purposes of the applicability of the exemption, it is sufficient if the enforcement proceedings are “reasonably anticipated.” *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). In light of the revised statement of FEMS, we find that the records in this case have been compiled for law enforcement purposes within the meaning of DC FOIA.

However, as argued by Appellant in its second contention, to establish the applicability of the exemption, it must also be established that disclosure could reasonably be expected to interfere with enforcement proceedings. See, e.g., *Juarez v. DOJ*, 518 F.3d 54, 58-59 (D.C. Cir. 2008); *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007). As stated above, FEMS indicates that disclosure of records at this time may expose witnesses to danger, alert potential criminal suspects to the ongoing investigation, and reveal the direction of the investigation, thus potentially compromising the investigation. We believe that this is credible and establishes the necessary interference with enforcement proceedings.

The third contention of Appellant is that some of the records in redacted form should be available, notwithstanding any applicability of the exemption. This, too, raises a legitimate argument. D.C. Official Code § 2-534(b) provides for the disclosure of “[a]ny reasonably segregable portion of a public record” However, the efficacy of segregation in this circumstance is dubious. The facts uncovered in an investigation form a mosaic and it cannot be determined with sufficient precision, especially in advance of the completion of the investigation or any subsequent enforcement proceedings, which facts are not material to the essential purposes of the endeavor and whose disclosure would not interfere with the investigation and enforcement proceedings. Even redacted records may provide information which, when combined with other facts, would reveal the scope and path of the investigation, thus potentially compromising the investigation. Accordingly, we do not find that the records are reasonably segregable.

Conclusion

Therefore, we uphold the decision of FEMS. The Appeal is hereby DISMISSED.

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.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Oluwasegun Obebe, Esq.