

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

Freedom of Information Act Appeal: 2011-55

August 18, 2011

Mr. Paul Wagner

Dear Mr. Wagner:

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 Fox5/WTTG-TV (“Appellant”), assert that the Metropolitan Police Department (“MPD”) 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 all records related to the administrative closure of the investigation of the 1999 homicide of Joyce Chiang. The records requested were to include, among others, the affidavit in support of the warrant to arrest, the Supplemental Report (PD-252), and memoranda between the United States Attorney’s Office and MPD.¹

In response, by email dated June 22, 2011, MPD provided certain records to the Appellant, but withheld many of the records. It withheld the affidavit in support of the arrest warrant, stating, in part, that “[i]t was prepared by the MPD for submission to the United States Attorney’s Office for filing . . . is captioned as ‘sealed,’ and was not intended for public disclosure when drafted.” It withheld the Supplemental Report (PD-252), stating, that “MPD routinely does not disclose the PD-252 to the public through FOIA. The reason is that this document contains information concerning suspects, witnesses, and procedures that the police took in order to investigate the case, which are not generally known to the public.” It also withheld other documents, such as memoranda between the United States Attorney’s Office and MPD (based on attorney-client privilege and work product privilege), investigative reports and documentation of internal review of facts leading to the closure (based on exemption for law enforcement records which would reveal investigative techniques not generally known to the public), interviews (based on privacy exemptions), and the names of suspects (based on privacy exemptions).

¹ The FOIA Request was filed on behalf of Fox5/WTTG-TV by Douglas Buchanan.

On Appeal, Appellant challenges the response of MPD to the FOIA Request. The scope of the challenge is unclear, as Appellant only specifically addresses two records, the affidavit in support of the arrest warrant and the Supplemental Report (PD-252).

First, Appellant asserts that the affidavit in support of the arrest warrant becomes a public document when it is executed. Appellant contends that the attorney-client privilege does not apply because MPD is not the client of the United States Attorney's Office. Appellant believes that the work-product privilege would not apply as the document is prepared by a detective (possibly with the assistance of the United States Attorney's Office) and reviewed first by a supervisor and then the United States Attorney's Office before being presented to a judge. Appellant argues that only a judge can "seal" a document, such sealing is temporary, and sealing does not apply to an affidavit in support of an arrest warrant. Appellant adds that the notion that the affidavit "'was not intended for public disclosure when drafted' is contrary to the very purpose of the affidavit."

Second, Appellant asserts that, in the case of a homicide, a PD-252 "is used in limited situations[:]. . . [w]hen the original offense occurs . . . [c]losing out the case with the arrest of...and naming the defendant . . . [and] [c]losing the case administratively." Appellant also states that "when it is used to close the case out administratively, it will list the probable cause contained in the arrest warrant."

Third, Appellant indicates generally that it becomes public knowledge a case is closed by an arrest or an administrative closure.

In the case of an arrest, documents that provide the justification for the arrest (such as the arrest warrant affidavit) become part of the public record. Additionally the circumstances surrounding the arrest, including the specific steps and investigative techniques used by the police are open to judicial and public scrutiny. The refusal to publically disclose the supporting evidence for 304.1 case closures is a disturbing pattern of practice that prevents public examination of the quality of such closures. This is especially true in this case when it is known that one of the documents, an affidavit in support of a warrant to arrest, would normally be available to the public.

Fourth, Appellant states that the names of the suspects have been disclosed in other cases and provides its news report that naming the suspects.²

Finally, Appellant states that James Trainum, a former member of MPD, has obtained similar information as a result of a Freedom of Information Act Appeal.

In its response, dated August 10, 2011, MPD modified its position. Upon review of the Appeal and the original request and response, MPD is releasing two internal memorandums concerning

² Appellant contests the applicability of a privacy exemption. "To claim the men are private citizens is absurd. One is doing life in a Federal Penitentiary [sic] and the other was deported after serving time for a violent crime."

the administrative closure of the homicide investigation as well as the name of the suspects. However, as to the rest of the responsive records, it reaffirmed its position.

First, MPD states that an affidavit in support of an arrest warrant is deemed a public document when the arrest warrant is executed, but the arrest warrant in the Chiang homicide investigation was never executed. Although the case has been administratively closed, future prosecution has not been foreclosed. As there is no statute of limitations on homicide, if the suspect who is presently incarcerated is released, or the suspect who is not in the United States should re-enter, an arrest and prosecution could ensue. The affidavit “sets forth in detail the probable cause formulated for the suspects’ arrests” as well as other information such as witness statements. Therefore, it maintains that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(3)(A)(i), (B), (C), and (D) as investigatory records compiled for law enforcement purposes where disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, and disclose the identity of a confidential source.

Second, MPD states that the Supplemental Report (PD-252) is not a public document. The form is executed on the closure of a criminal case without an arrest and is very detailed, containing much of the same information as is set forth in an affidavit in support of an arrest warrant. Like the affidavit in support of an arrest warrant, MPD maintains that the records are exempt from disclosure under D.C. Official Code § 2-531(a)(3)(A)(i), (B), (C), and (D).

Third, MPD states that memoranda between it and the United States Attorney’s Office and investigative reports are exempt from disclosure under D.C. Official Code § 2-531(a)(3)(A)(i), (D), and (E) as investigatory records compiled for law enforcement purposes where disclosure would interfere with enforcement proceedings, disclose the identity of a confidential source, and disclose investigative techniques and procedures not generally known outside the government. It asserts, in particular, that release of these documents would interfere with enforcement proceedings and disclose investigative techniques and procedures not generally known outside the government.

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).

In its response to the FOIA Request, MPD asserted several bases for exemption, including attorney-client privilege and work product privilege, but has chosen to analyze the exemptions pursuant to an exemption for investigatory records compiled for law enforcement purposes with respect to four different provisions thereunder. While we believe that there is merit to the original bases asserted, we also believe that the law enforcement exemption provides a sufficient basis upon which to uphold the decision of MPD.

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; . . .

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures not generally known outside the government;

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). It would not appear that there is any dispute that MPD is a law enforcement agency and that the records in this case have been compiled for law enforcement purposes within the meaning of DC FOIA.

As set forth above, Appellant asserts that the affidavit in support of the arrest warrant becomes a public document when it is executed. That is not strictly accurate. The public has a presumptive right to see arrest warrant affidavits, but access is still subject to the discretion of the court. See

Mokhiber v. Davis, 537 A.2d 1100, 1107, fn. 5 (D.C. 1988), citing *Commonwealth v. Fenstermaker*, 530 A.2d 414, 420 (Pa. 1987). However, in this case, the affidavit in support of the arrest warrant was not executed, so the contention of Appellant that this would be a public document would not apply. This, however, does not establish the availability of the exemption.

What is most crucial in this matter is the fact that further prosecution has not been foreclosed. Indeed, the facts and circumstances establish the intent to prosecute the suspects if the opportunity arises. Consequently, the detailed facts contained in the affidavit, if made public, could provide critical information to either suspect in the event of a prosecution, which knowledge could impede or compromise such prosecution. This is sufficient to satisfy the condition, or enumerated harm, contained in D.C. Official Code § 2-531(a)(3)(A)(i), i.e., interference with enforcement proceedings, and establish the availability of the exemption. Accordingly, it is not necessary to establish the applicability of the other conditions, or enumerated harms, contained in D.C. Official Code § 2-531(a)(3).

The reasoning with respect to the affidavit in support of the arrest warrant would also apply to the Supplemental Report (PD-252) and the memoranda between MPD and the United States Attorney's Office and investigative reports as it would contain much of the same or similar information as the affidavit in support of the arrest warrant. Indeed, with respect to the Supplemental Report (PD-252), as set forth above, MPD specifically states that it contain much of the same information as is set forth in an affidavit in support of an arrest warrant. Legal memoranda, investigative reports, and summaries of witness interviews would provide the information which would be reflected in, and most likely used to prepare, the affidavit in support of the arrest warrant or the Supplemental Report (PD-252).

As also set forth above, Appellant states that James Trainum, a former member of MPD, has obtained similar information as a result of a Freedom of Information Act Appeal. However, in that appeal, Freedom of Information Act Appeal 2011-11, the circumstances were different. In that matter, where MPD released an Investigative Report written after the administrative closure of the investigation, the administrative record reflects the fact that the suspect was incarcerated for life without a possibility of parole or appeal. Thus, unlike this matter, there was no possibility of a further prosecution.

Moreover, as we stated in Freedom of Information Act Appeal 2011-50, the provision of records in one situation does not compel a similar result in another situation. Unless otherwise prohibited by law, the release of records under DC FOIA as well as the federal FOIA is discretionary and can and should be made, notwithstanding the applicability of an exemption, if the public interest will not be harmed by its release. Indeed, Mayor's Memorandum 2011-01 directs not only that DC FOIA be construed with the view toward expansion of public access, but that "records exempt from mandatory disclosure be made available as a matter of discretion when disclosure is not prohibited by law or harmful to the public interest." We do not believe that the public interest justifies the release of such materials in this case. Given the possibility of a prosecution for homicide, the public interest would weigh against the release of the requested records.

Conclusion

Therefore, we uphold the decision of MPD. 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: Ronald B. Harris, Esq.
Natasha Cenatus