

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

**Freedom of Information Act Appeal: 2012-03**

November 23, 2011

Ms. Abigail Padou

Dear Ms. Padou:

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 October 18, 2011 (the “Appeal”). You (“Appellant”) assert that the Department of Parks and Recreation (“DPR”) improperly withheld records in response to your request for information under DC FOIA dated August 5, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records related to section 2(b)(2)(i) and (iii) of the Fiscal Year 2008 Supplemental Appropriations Temporary Act of 2008, which provided funding to the Department of Parks and Recreation for the following projects: “(i) An amount of \$500,000 to fund youth outreach in neighborhoods, including Langston Terrace; and . . . (iii) An amount of \$500,000 to fund a Ward 5 gang-intervention initiative.”

In response, by email dated August 26, 2011, DPR identified four records, but stated that it was withholding the records because they were “investigatory records” exempt from disclosure under D.C. Official Code § 2-531(a)(3)(A)(i) and (B).

On Appeal, Appellant challenges the partial denial of the FOIA Request. First, Appellant states that the documents “were not ‘compiled for law-enforcement purposes’ [but]. . . were created in the normal course of DPR’s budgetary, grant-award, and grant-oversight activities.” Second, with respect to the assertion of the law enforcement exemption, Appellant asserts that “DPR has not articulated any harm that will follow from disclosure of the requested documents, but has simply invoked the exemption in a conclusory manner.” Third, Appellant contends that DPR “does not take into account the likelihood that the records can be produced with redactions.”

In its response, dated June 14, 2011, DPR reconsidered its position as to one document and states that it will release the document to Appellant, but otherwise reaffirmed its position. It states that the documents:

are relevant to an ongoing U.S. Attorney investigation into activities conducted by Council Member Harry Thomas and related entities. If these documents were to be released to the public before this investigation is complete, there is a possibility that the investigation could be harmed or that the information contained in these documents could prejudice the public in such a way that the subjects of the investigation would be deprived of a right to a fair and impartial adjudication. . . . While it is true that these withheld documents were not created as the result of an investigation, these documents are now potential evidence in an ongoing investigation and should be treated with the same standard of care and discretion that all investigatory evidence deserves.

## 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.

DPR contends that the records are exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A)(i) and (B) pursuant to an exemption for investigatory records compiled for law enforcement purposes. D.C. Official Code § 2-531(a)(3) provides, in pertinent part, for 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; . . .

A threshold requirement for the application of the claimed exemption is that records must be compiled for law enforcement purposes. These records must be compiled by law enforcement agencies. 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). Contrary to the argument of Appellant, records incorporated into investigatory files will qualify as compiled for law enforcement purposes even if the records were not created originally for law enforcement purposes. See, e.g., *Hayes v. U.S. Dep’t of Labor*, No. 96-1149, 1998 U.S. Dist. LEXIS 14120 (S.D. Ala. 1998). However, in *Hayes*, as is typically the case, the agency creating the record was also the agency which converted it to a law enforcement use. In this case, DPR is not a law enforcement agency. DPR does not indicate that the withheld records have been provided to the Office of the United States Attorney. Therefore, the withheld records do not qualify as investigatory records compiled for law enforcement purposes and the claimed exemption would not apply.

In Freedom of Information Act Appeal 2011-17, we considered a situation where the records were created by a non-enforcement agency, but may have been transferred to a law enforcement agency. There, we noted that we were unable to find a case where the record is maintained by both a non-enforcement agency and a law enforcement agency. Based on our analysis of existing law, we concluded that if the records have been transferred, or requested for transfer, to a law enforcement agency which meets the requirements of the exemption, the records will be exempt from disclosure.

Nevertheless, even if DPR has transferred the requested records to the Office of the United States Attorney, we do not think that claimed exemption applies in this case. D.C. Official Code § 2-531(a)(3)(A)(i) and (B) requires that disclosure “would” interfere with enforcement proceedings or deprive a person a right to a fair trial or an impartial adjudication. Here DPR states that records are only “potential evidence” and there is only a “possibility” that the enumerated harms could occur. This does not meet the standard.<sup>1</sup> Moreover, based on our examination of the documents, which are purchase orders used to transfer funds for authorized grants, and a related memorandum of understanding, we do not think that such standard can be met.<sup>2</sup>

### Conclusion

Therefore, the decision of DPR is reversed and remanded. DPR shall produce the withheld records.

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<sup>1</sup> As stated herein, the standard for establishing the exemption is that the disclosure would interfere with enforcement proceedings. This was formerly the standard under the federal Freedom of Information Act. However, in 1986, the federal Freedom of Information Act was amended and the exemption is established thereunder if the disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). Nevertheless, although the current federal standard is less demanding than the prior standard, DPR does not establish the requisite harm under either standard.

<sup>2</sup> Under D.C. Official Code § 2-531(a)(6), the categories of information which must be made public includes “[i]nformation in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies.” Although it is not necessary to decide for the purposes of this decision, we believe that the withheld records fall within this provision.

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 Superior Court of the District of Columbia.

Sincerely,

Donald S. Kaufman  
Deputy General Counsel

cc: Jamarj Johnson, Esq.  
Will Potterveld, Esq.