

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR
Freedom of Information Act Appeal 2012-40**

April 27, 2012

Mr. Jeffrey L. Bloomfield

Dear Mr. Bloomfield:

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 April 1, 2012 (the “Appeal”). You (“Appellant”) assert that the Washington Convention and Sports Authority (“WCSA”) improperly withheld records in response to your request for information under DC FOIA dated March 1, 2012 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought “access to surveillance video of the intersection of N and 9th street NW taken on January 29th between 5:30pm and 7:30pm.”

In response, by letter dated March 26, 2012, WCSA withheld the requested record

because the record may disclose confidential information, investigative techniques and/or procedures not generally known outside of the agency. Further, the requested record may possibly contain information necessary for investigatory or law enforcement purposes, the release of which would interfere with enforcement proceedings. Finally, the request does not reasonably describe the records sought, e.g., the year in which the record was created.

On Appeal, Appellant challenges the withholding of the record. Appellant contends that:

1. As Appellant needs the record for litigation, the denial of the FOIA Request “interferes with my right to not be deprived of a right to a fair trial or an impartial adjudication” under D.C. Official Code § 2-534(a)(3)(B).

2. The statement of WCSA that the “record may disclose confidential information, investigative techniques and/or procedures not generally known outside of the agency’ is erroneous since the content of the video and the placement and even the angle of the surveillance camera has already been disclosed to me by agents of both law enforcement and the convention center itself.”

In response, dated April 20, 2012, WCSA reaffirmed its position. First, WCSA maintains that the FOIA request “did not reasonably describe the record sought” because “the year the record was created could not be reasonably ascertained.” Second, WCSA asserts that the record is exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A) and (E). WCSA states that the record “comprises images depicting a serious traffic accident and possible commission of an infraction.” It states that the record “may be used” in investigating “a serious motor vehicle infraction” and would, therefore, interfere with enforcement proceedings. Moreover, it states that disclosure of “the exact location, direction, orientation, angle, zoom, sequencing, frequency of recording, and other information regarding the cameras” would reveal techniques and procedures not known outside WCSA.

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).

First, WCSA contends that the FOIA request “did not reasonably describe the record sought” because “the year the record was created could not be reasonably ascertained.” We note that if an agency believes that a request does not sufficiently describe a record, the agency should contact the requester to attempt to clarify the request. See DCMR § 1-402.5.¹ However, as WCSA has identified the requested record and provided the record to this office for *in camera* inspection, this argument is moot.

Second, WCSA contends that the records are exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A)(i) and (E) 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:

¹ While the rules may only be binding upon subordinate agencies, they do set forth a reasonable and appropriate standard in dealing with the requests.

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

(A) Interfere with:

(i) Enforcement proceedings; . . .

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

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). In this case, WCSA is not a law enforcement agency under DC FOIA. See Freedom of Information Act Appeal 2012-03 (Department of Parks and Recreation not a law enforcement agency and D.C. Official Code § 2-534(a)(3) did not apply). Therefore, the withheld record does not qualify as an investigatory record compiled for law enforcement purposes and the claimed exemption does not apply.²

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. 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 can qualify as investigative records. However, in this case, as in Freedom of Information Act Appeal 2012-03, there is no evidence on the administrative records that the record has been transferred a law enforcement agency. Moreover, here, there is no evidence that any enforcement proceeding is pending or even contemplated.

² The fact that WCSA employs special police officers does not change our analysis. Pursuant to D.C. Official Code § 5-129.02, upon application, the District government may grant licenses to corporations and individuals to employ special police officers to protect private property. Despite similarities with the powers of regular police officers, special police officers are not regular police officers and cannot transform an agency without statutory law enforcement authority into a law enforcement agency. “It seems clear that special policemen are commissioned for the special purpose of protecting property on the premises of the employer and that they do not have the general duties and broad authority of a policeman or law enforcement officer in the ordinary sense of those terms. [citation omitted].” *Franklin v. United States*, 271 A.2d 784, 785 (D.C. 1970). See also *Moorehead v. District of Columbia*, 747 A.2d 138, 146 (D.C. 2000)(“The District licenses special police officers to protect private property.”)

Conclusion

Therefore, the decision of WCSA is reversed and remanded. WCSA shall provide access to the surveillance video.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under 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: Reginald Smith, Esq.