GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-37

May 29, 2015

VIA ELECTRONIC MAIL

Mr. Jeffrey L. Light

RE: FOIA Appeal 2015-37

Dear Mr. Light:

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 ("DC FOIA"). In your appeal, you ("Appellant") assert that the Metropolitan Police Department ("MPD") improperly withheld records you requested under the DC FOIA.

Background

On December 16, 2013, Appellant submitted a request under the DC FOIA to the MPD seeking records referring or relating to Stingray devices or equipment. The request describes Stingray as a cell site simulator manufactured by the Harris Corporation that mimics a wireless carrier cell tower to receive location data and other information from all nearby mobile phones and cellular data devices. The request contained 9 parts as follows:

1. Please provide all manuals, guides, videos, brochures, pamphlets, and other records, whether in print or electronic format, which refer or relate to the installation, training, deployment, or use of any Stingray devices or equipment.

2. Please provide all promotional materials, including letters, emails, brochures, pamphlets, videos, and other records, whether in print of electronic format, which mention or describe Stingray devices or equipment. Please include in this search records produced by, originating from, or sent by third parties which mention or describe Stingray devices or equipment.

3. Please provide all contracts, procurement documents, and other records which reflect the existence of any formal or informal agreement between the District of Columbia and Harris Corporation or its affiliates, representatives, or employees.

4. Please provide all invoices, budgets, and other records which reflect the current, future, or previous expenditure of District of Columbia funds to Harris Corporation or its affiliates, representatives or employees.

5. Please provide all e-mails sent to Cathy Lanier or Steven Sund between January 1, 2009 and the date of your search which are: 1) from any employee of Harris Corporation (i.e., an e-mail address ending in "@harris.com"); OR 2) from anyone, but which contains the terms "Stingray" or "cell site simulator". Excluded from this request are emails from news aggregation services.

6. Please provide all training materials, general or special orders, internal operating procedures, circulars, SiTel modules, or other documents that constitute, refer, or relate to MPD policy on the use of Stingray or other cell site simulators.

7. Please provide any talking points or other documents which constitute, refer, or relate to communications with the media about Stingray or other cell site simulators. Your search should include, but not be limited to, emails to or from Gwendolyn Crump (Gwendolyn.Crump@dc.gov) containing the term "Stingray"; emails to or from Gwendolyn Crump or Cathy Lanier referring or relating to the story by WUSA9 on MPD's use of Stingray (available online at http://www.wusa9.com/news/article/285084/158/DC-area-police-spying-on-cell-phonedata); and documents referring or relating to WUSA9's 2013 request for an interview with MPD regarding Stingray (request by Nadia Pflaum, npflaum@wusa9.com or Russ Ptacek, rptacek@wusa9.com).

8. Any documents constituting, referring, or relating to training on tracking civilian cell phones.

9. Please provide all other records that refer or relate to Stingray equipment or devices or any other cell site simulator equipment or devices.

The MPD submitted three responses to Appellant's request: 1) on June 25, 2014, the MPD produced 15 pages of records; 2) on September 5, 2014, the MPD produced 121 pages of records; and 3) on February 2, 2015, the MPD produced 4 pages of records. The MPD disclosed redacted portions of these records claiming exemptions under D.C. Official Code §§ 2-534(a)(1), (a)(2), (a)(3)(E), and (6). ("Exemption 1,"[1] "Exemption 2,"[2] "Exemption 3(E),"[3] and "Exemption 6"[4] respectively). The MPD located other responsive records, an operator manual, reference

[1] Exemption 1 protects records containing "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained."
[2] Exemption 2 protects records containing "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."
[3] Exemption 3(E) protects records that would "[d]isclose investigative techniques and procedures not generally known outside the government."
[4] Exemption 6, which allows for protection of information specifically exempted from disclosure by statute outside of DC FOIA, was asserted in conjunction with the Homeland Security Act of 2002 and the Arms Export Control Act of 1976.

guide, and training material. Those records were withheld in their entirety under the same exemptions.

Appellant submitted an appeal to the Mayor on February 21, 2015, challenging the MPD's second and third responses to the FOIA request. Appellant accepts redactions under Exemption 2 but contends all other redactions pursuant to Exemptions 1, 3(E), and 6 were improper. Appellant asserts that the use Exemption 1 is improper because the MPD did not show that the Stingray manufacturer faces actual competition and failed to indicate how disclosure would cause substantial competitive injury citing *Wash. Post Co. v. Minority Bus. Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). Appellant asserts that the use of Exemption 3(E) is improper because the public is aware of the use of Stingray devices; therefore, disclosure would not reveal investigative techniques or procedures that are not generally known outside the government. Appellant asserts that the MPD did not sufficiently explain the statutes it claimed as a basis for Exemption 6. Based on the MPD's limited assertion, Appellant could not determine how the Homeland Security Act of 2002 and the Arms Export Control Act of 1976 could prevent disclosure of the records.

In addition to contesting the MPD's use of exemptions, Appellant asserts that it was improper to withhold training material and manuals in their entirely. Appellant contends that the MPD must redact the relevant records and disclose segregable portions. Appellant asserts that the MPD's redactions of the training material and manuals may also be challenged, but without a portion of the records those challenges cannot be made.

Appellant asserts that the MPD disclosed a redacted brochure that cannot be redacted because it is in public domain having been released by the police department of Miami, Florida.[5] Finally, Appellant asserts that the MPD did not adequately search for responsive records. Specifically, the MPD did not appear to search for parts numbered 5 and 6 of the request.

In a letter dated May 4, 2015, the MPD responded to the appeal reaffirming its redactions and withholdings. In its response, the MPD does not assert Exemption 1 but affirms and clarifies its use of Exemptions 2, 3(E), and 6. The MPD also raises the exemption under D.C. Official Code § 2-534(a)(4) ("Exemption 4").[6] The MPD states that it consulted with the Federal Bureau of Investigation ("FBI") regarding this request to determine the law enforcement sensitive information related to its records of Stingray devices. The MPD describes its nondisclosure agreement ("NDA") with the FBI, which prohibits the disclosure of documents concerning the capabilities of Stingray devices. The MPD asserts that the NDA itself is withheld pursuant to Exemption 4. The MPD explains that the purpose of the NDA is to prevent disclosure of information that could assist people intent on violating the law to evade detection.

The MPD claims that Exemption 3(E) was properly asserted to redact accounting and index numbers of Stingray parts and equipment because the information could be used to perform a

[5] Appellant cites http://egov.ci.miami.fl.us/Legistarweb/Attachments/48003.pdf page 5 of a PDF
[6] Exemption 4, often known as the "deliberative process privilege" or "litigation privilege," protects "[i]nter-agency or intra-agency memorandums or letters … which would not be available by law to a party other than a public body in litigation with the public body."

cross-index analysis with other publicly available data to ascertain sensitive information relating to the technical capabilities of Stingray systems. The MPD argues that while the use of Stingray devices is known outside the government, the technical capabilities of such systems are not generally known and disclosure of technical capability could allow circumventing of law enforcement.

The MPD clarifies that its use of Exemption 6 to withhold and redact information is used in conjunction with the Arms Control Export Act and International Traffic In Arms Regulation (ITAR), which implements the Arms Export Control Act, 22 U.S.C. § 2778 and Executive Order 13637. The MPD states that Stingray devices are classified as regulated defense articles on the United States Munitions List (USML), and technical details related to USML technology are subject to the non-disclosure provisions of the ITAR, 22 C.F.R., Parts 120-130. The MPD asserts that the Arms Control Export Act and ITAR leave no discretion in the requirement to withhold information from the public.

Addressing Appellant's public domain argument, the MPD asserts that the information cited by Appellant was not disclosed by the Harris Corporation, the federal government, or the MPD; therefore, there is no waiver of the exemption from disclosure. Regarding the materials withheld entirely, the MPD claims that it withheld the training materials and manuals in their entirety, because the non-exempt information is inextricably intertwined with the exempt information. These materials consist of diagrams, flow charts, and other technical information that after redactions are applied would leave no useful information. On May 5, 2015, the MPD submitted training materials and manuals for *in camera* review. In response to Appellant's assertion that the MPD did not adequately search for records sought in parts 5 and 6 of the request, the MPD conducted another search and discovered responsive emails. The MPD states that the emails are presently being reviewed and will be released subject to appropriate redactions. The MPD states that there are over 900 pages of emails. At the time of the response, the MPD estimates that the review will take at least two weeks, and Appellant will be notified when the review has been completed.

Discussion

It is the public policy of the District of Columbia 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). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request.

DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987), and decisions construing the federal stature are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemptions

Appellant raises a valid argument that the MPD did not adequately assert the necessary elements to make redactions or withhold disclosure under Exemption 1. The MPD does not reassert or defend the use of Exemption 1 in its response to this appeal. Therefore, Exemption 1 is not considered in this Appeal. Exemption 2 is not at issue at issue either, because it is not contested by Appellant. Exemption 3(E) is at issue; Appellant argues that the MPD cannot redact or withhold the records under this exemption because the use of the devices is known to the general public. Further, Appellant asserts the use of Exemption 3(E) is improper because the redacted information, prices and model identifications, does not reveal investigative techniques or procedures of law enforcement.

For Exemption 3(E) to apply, the information at issue must not be well known to the public. *See Rugiero v. DOJ*, 257 F.3d 534, 551 (6th Cir. 2001). Even when a surveillance technique is commonly known, courts have endorsed the withholding of details that could allow criminals to circumvent the surveillance.[7] The MPD asserts that while the existence and use of Stingray devices is generally known, the technical capabilities of such devices are not generally known. There are technological countermeasures and efforts to circumvent surveillance by Stingray-like devices.[8] Due to the technical nature of Stingray surveillance, we defer to the MPD's assertion that knowing technological capabilities of the devices could result in increased circumvention. Here, disclosure of product names, costs, and serial numbers could be cross referenced with other available information, to reveal the technological capabilities of the MPD's Stingray equipment because product names, costs, and serial numbers are linked to the technological capabilities of these devices. Due to the MPD's assertion that knowledge of the specific, technical capabilities of the MPD's Stingray equipment could allow criminals to evade detection, the redactions and withholdings by the MPD under Exception 3(E) are proper.

Regarding Exemption 6, the MPD clarified the statutes outside of DC FOIA, the ITAR and the Arms Control Export Act, that it relied upon to prevent the release of technical information concerning the capability of its Stingray devices. The MPD states that Stingray devices have been classified as regulated defense articles on the USML. *See* 22 C.F.R. § 121.1(b). As such, technical details concerning this technology are subject to the non-disclosure provisions of the ITAR. *See* 22 C.F.R. §§ 120-130. The ITAR implements the Arms Export Control Act, 22

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[7] *See, e.g., Soghoian v. DOJ*, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) (protecting electronic surveillance techniques because release of information showing what information is collected during surveillance, how it is collected, and when it is not collected could allow criminals to evade detection); *Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (protecting details of electronic surveillance techniques, including "circumstances . . . timing of their use, and the specific location where they were employed"); *Boyd v. ATF*, 570 F. Supp. 2d 156, 158-59 (D.D.C. 2008) (concluding ATF properly withheld detailed information regarding use of surveillance equipment).

[8] A basic internet search revealed applications (SnoopSnitch and Android ISMI-Catcher Detector) and articles (*see, e.g.* Adrian Dabrowski, *et al*. *IMSI-Catch Me If You Can: IMSI-Catcher-Catchers* available at https://www.sba-research.org/wp-content/uploads/publications/DabrowskiEtAl-IMSI-Catcher-Catcher-ACSAC2014.pdf) that focus on circumventing the detection capabilities of Stingray-like devices.

U.S.C. § 2778, and Executive Order 13,637, which control the export and import of defense-related articles and services listed on the USML. Because this equipment is governed by the ITAR, anyone exporting the information is required to obtain a license from the Department of State. *See* 22 C.F .R. § 123.1. An unauthorized export of ITAR-controlled information is a felony. *See* 22 C.F.R., § 127. The technical information does not have to leave the borders of the United States to be deemed an export subject to the regulation. *See* 22 C.F.R. § 120.17 (defining an export as the disclosure of technical data about a defense article to a foreign national, even while located in the United States).

Here, Appellant's client is a reporter who has already published the MPD's initial disclosures from this FOIA request. Publication makes the information accessible to foreign nationals. Thus, if the MPD did not withhold and redact technical information of the Stingray devices the disclosure would constitute an unlawful export under the ITAR and the Arms Control Export Act. Therefore, Exemption 6 is properly asserted because disclosure by the MPD to Appellant would constitute an unlawful export under federal law.

Exemption 4 was raised by the MPD in its response to this appeal. As a result, Appellant has not had the opportunity to respond to its invocation. Exemption 4 has been interpreted to incorporate the protections available in civil discovery. *See United States v. Weber Aircraft Corp*., 465 U.S. 792, 799-800 (1984); *FTC v. Grolier Inc.*, 462 U.S. 19, 26-27 (1983). The MPD asserts that certain information was withheld and redacted under the law enforcement privilege encompassed in Exemption 4. Exemption 4 is most commonly asserted for the deliberative process privilege. *See, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

The law enforcement privilege is a qualified privilege recognized at common law that is designed to protect ongoing investigations from premature disclosure, disruption, and compromise. *See Black v. Sheraton Corp. of America*, 564 F.2d 531, 546-47 (D.C. 1977). The purpose of the privilege is to protect the confidentiality of sources as well as law enforcement strategies and accumulated evidence. *Kay v. Pick*, 711 A.2d 1251, 1256 (D.C. 1998) ("The privilege is a conditional one that must be asserted with particularity by a high official of the law enforcement agency who is both authorized to assert the privilege on behalf of the agency and who is in a position to know that the privilege is necessary. The assertion of the privilege must be formal and delineated. The party claiming the privilege must have (1) seen and considered the contents of the documents and (2) himself formed the view that on grounds of public interest, they ought not be produced, (3) state with specificity the rationale of the claimed privilege, namely, 3(a) specifying which documents or class of documents are privileged and 3(b) for what reasons.").

The deliberative process privilege of Exemption 4 is intended to protect the process and promote the quality of agency decisions. *See Sears*, 421 U.S. at 150-51. There are two requirements to invoke the deliberative process privilege. *See Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). First, the communication must be predecisional. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (stating that predecisional communications are "[a]ntecedent to the adoption of an agency policy"). Second, the communication must be deliberative. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (stating that a deliberative communication "makes recommendations or expresses opinions on legal or policy matters").

In this appeal, it is not clear that the law enforcement privilege of Exemption 4 offers protection from disclosure beyond what is provided by Exemption 3(E). Further, the MPD did not state sufficient specificity to prevent disclosure under the law enforcement privilege beyond the protection provided by Exemption 3(E). After examining the NDA that the MPD entered into with the FBI, we conclude the document cannot be withheld in its entirety under law enforcement privilege of Exemption 4. The NDA is responsive to Appellant's FOIA request and shall be produced subject to redactions under DC FOIA. However, the guidance that the FBI communicated to the MPD regarding this appeal is protected from disclosure under the deliberative process privilege of Exemption 4 because it is both predecisional for the MPD and deliberative.

Public Domain

Appellant argues that a portion of the record disclosed by the MPD, a redacted brochure, must be fully disclosed without redaction because it is in the public domain having been published by the police department of Miami. The Court of Appeals for the District of Columbia Circuit has held that under the public domain doctrine, information that would otherwise be subject to a valid FOIA exemption must be disclosed if that information is preserved in a permanent public record or is otherwise easily accessible by the public. (D.C. Cir. 2001), *Niagara Mohawk Power Corp. v. DOJ*, 169 F.3d 16, 19 (D.C. Cir.1999); *see also The Judicial Watch, Inc. v. United States DOD*, 963 F. Supp. 2d 6, 12 (D.D.C. 2013). In order for the public domain doctrine to apply, a requester must be able to point "to specific information in the public domain that appears to duplicate that being withheld." *Afshar v. U.S. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); *see, e.g., Edwards v. DOJ*, No. 04-5044, 2004 WL 2905342, at *1 (D.C. Cir. Dec. 15, 2004).

The MPD's assertion that the brochure was not disclosed by the Harris Corporation, the federal government, or the MPD does not appear to be relevant for the purposes of redaction, based on the public domain doctrine, as described by the courts. *See Students Against Genocide* 257 F.3d at 836 (finding that the public domain doctrine applies if a document is available as a permanent public record regardless of the entity that publishes the record); *see also, Niagara* 169 F.3d at 19. However, the brochure in the public domain does not match the records disclosed to Appellant by MPD.[9] Appellant has not provided sufficient support to apply the public domain doctrine because the records do not match. Therefore, we affirm the MPD's decision to redact the brochure.

Segregability

Appellant argues that the MPD improperly withheld training material and manuals in their entirely. The basis for this claim is D.C. Official Code § 2-534(b), which requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined

[9] Comparing http://egov.ci.miami.fl.us/Legistarweb/Attachments/48003.pdf with https://www.scribd.com/fullscreen/243265839?access_key=key-YOLWfl78oCzvd0vLFyWw&allow_share=true&escape=false&view_mode=scroll

under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, one interpretation is that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009).

Here, the MPD claims that redaction of the records would produce documents with no useful information. After reviewing the training material and manuals provided by the MPD, it is apparent that the records consist almost entirely of equipment descriptions, technical specifications, and surveillance techniques that would be withheld under Exemptions 3(E) and 6. After redactions for exemptions were applied little to no information value would remain. Therefore, the training material and manuals were properly withheld.

Adequacy of Search

In reviewing Appellant's claim that parts 5 and 6 of the request lacked a sufficient response, the MPD located over 900 pages of responsive emails. In its response the MPD stated that it will disclose the emails subject to applicable redactions. Therefore, this element of the appeal is moot due to the MPD's revised position. The MPD is instructed to review, redact, and disclose the records following the guidance in this determination.

Conclusion

Based on the foregoing, we affirm the MPD's revised decision in part, and remand it in part. The MPD shall provide Appellant a copy of its NDA with the FBI subject to redaction and shall state its legal grounds for the redactions under DC FOIA. As the MPD stated in its response to this appeal, the MPD shall produce the records it identified responsive to parts 5 and 6 of the request subject to redaction and shall state its legal grounds for the redactions under DC FOIA.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Sarah Jane Foreman

Sarah Jane Foreman
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Mayor's Office of Legal Counsel

/s John A. Marsh*

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cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)

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