

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-43**

April 20, 2015

VIA ELECTRONIC MAIL

Mr. Seth Rosenthal

RE: FOIA Appeal 2015-43

Dear Mr. Rosenthal:

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 March 6, 2015 (the “Appeal”). You (“Appellant”) assert that the Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under DC FOIA dated February 13, 2015 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought records pertaining to the investigation and prosecution of Leon Timberlake and Leonard Johnson for the murder of Warren “Peanut” Davis on or about September 25, 1994. In response, by email dated March 2, 2015, MPD denied the FOIA Request based on an assertion that the records in question are investigatory files that are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A) and (C).

On Appeal, Appellant challenges the denial of the FOIA Request on the ground that MPD is improperly asserting the investigative records exemption. Further, Appellant claims that MPD should have provided some of the requested materials with redactions because some of the individuals involved in the case are no longer living, while other have been prosecuted in a public trial.

In response, by letter dated April 3, 2015, MPD reasserts its position that the release of any records in its possession responsive to the FOIA Request would constitute a clearly unwarranted invasion of personal privacy and interfere with an ongoing MPD enforcement proceeding.

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).

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).

The DC FOIA contains an exemption for investigatory records compiled for law enforcement purposes that were (1) compiled for law enforcement purposes and (2) whose disclosure would interfere with enforcement proceedings. The purpose of the exemption is a prevention of “the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding.” *National Labor Relations Bd. V. Robbins Tire & Rubber Co.*, 437 U.S. 124, 232 (1978). “So long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, the investigatory record exemption applies.” *E.g. Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted).

Conversely, “where an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency’s decision.” *Id.*

Moreover, in asserting an investigatory records exemption it is impermissible for an agency to issue a “blanket exemption” that calls for an exemption of all records in a file by virtue of the records’ location in that file. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 66 (D.C. Cir. 1986). Instead, in responding to a FOIA request and compiling the legally mandatory *Vaughn* Index, an agency is permitted to make claims of generic exemptions for functionally similar records. *Id.*

In asserting the investigatory records exemption under the generic approach, the task of the agency is “three-fold.” *Bevis v. Department of State*, 801 F.2d 1386, 1388 (D.C. Cir. 1986). The agency must (1) “define its categories functionally;” (2) “conduct a document-by-document review in order to assign documents to the proper category;” and (3) “explain to the court how the release of each category would interfere with enforcement proceedings.” *Id.* This process is designed to “allow the court to trace a rational link between the nature of the document and the alleged likely interference.” *Crooker*, 789 F.2d at 67. What’s more, an agency must sustain its burden “by identifying a pending or potential law enforcement proceeding or providing sufficient facts from which the likelihood of such a proceeding may reasonably be inferred.” *Durrani v. United States Dep’t of Justice*, 607 F.Supp.2d 77, 90 (D.D.C. 2009).

Here, the issue is not whether the records were compiled for law enforcement purposes but instead whether their release would interfere with an enforcement proceeding. In response to the instant appeal, MPD offers no *Vaughn* Index and only an impermissible “blanket exemption” as to the entire homicide file, failing to indicate the nature of the records withheld. Moreover, MPD has not offered an affidavit to this office, for *in camera* review, explaining facts “from which the likelihood of . . . a proceeding may reasonably be inferred,” or from which this office could

“trace a rational link between the nature of the document and the alleged likely interference.” *Id*; *Crooker*, 789 F.2d at 67.¹

Conclusion

Based on the foregoing, the decision of MPD is remanded for disposition in accordance with this decision as follows. The MPD shall:

- (1) Conduct a document-by-document review of all repositories likely to contain a responsive record;
- (2) Categorize the documents located, asserting any applicable exemptions;
- (3) Provide Appellant with non-exempt, responsive records; and
- (4) Provide Appellant with an index of all withheld records and the applicable statutory exemptions.

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 J. Forman

Sarah Jane Forman
Associate Director
Mayor’s Office of Legal Counsel

¹ This burden may be met by an affidavit that provides the “identification of the targets of the investigation.” *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007).