GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-55

April 24, 2015

VIA ELECTRONIC MAIL

Mr. Adam Marshall
Katie Townsend, Esq.
Reporters Committee for Freedom of the Press

RE: FOIA Appeal 2015-55

Dear Mr. Marshall:

This letter responds to the administrative appeal of the Reporters Committee for Freedom of the Press ("Appellant") to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In the appeal, Appellant asserts that the Metropolitan Police Department ("MPD") improperly withheld records Appellant requested under DC FOIA.

Background

On January 23, 2015, Appellant sent a FOIA request to the MPD for records related to the use of Body Worn Cameras ("BWC") and asked for a fee waiver in connection with the records. The request consisted of eight parts:

1. All BWC recordings that have been categorized as "Retain" as defined in Special Order 14-09 or Special Order 14-14;
2. All BWC recordings that have been categorized as "Requires Supervisory Review" as defined in Special Order 14-09 or Special Order 14-14;
3. All BWC recordings that have been used for training purposes;
4. All records indicating which MPD officers were issued BWC between October 1, 2014, and January 23, 2015;
5. All records that reflect activation and/or use of BWC by an MPD officer between January 1, 2015, and January 8, 2015, including, but not limited to, narratives in field contact reports, supplements accompanying incident reports, arrest reports in the Records Management System ("RMS"), violation citations on PD form 61D, and notices of infraction ("NOIs");
6. All BWC recordings that have been provided to the D.C. Office of Police Complaints;
7. All BWC recordings that have been offered or admitted as evidence, lodged with a court, or otherwise shown or used in connection with any civil or criminal proceeding; and

8. All BWC recordings that have been offered or admitted as evidence, or otherwise shown or used in connection with any arbitration and/or mediation proceeding.

The MPD provided a written response to the request on March 19, 2015. The MPD supplied the list of officers who were issued BWC pursuant to part 4 of the request. The MPD stated that there were no responsive records pursuant to part 8 of the request. All remaining parts of the request are at issue in this appeal.

With regard to the records sought in parts 1 and 2 of the request, the MPD asserted the exemptions under D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C) ("Exemption 2" and "Exemption 3(C)" respectively).[1] The MPD claimed Exemption 2 for records sought in part 3 of the request. Additionally, the MPD claimed the exemption under D.C. Official Code § 2-534(a)(3)(A)(iii) ("Exemption 3(A)(iii)") for records related to part 6 of the request.[2] The MPD withheld the records responsive to parts 1, 2, 3, and 6 entirely, claiming an inability to redact the video records to segregate the nonexempt portions of the records for disclosure.

With regard to part 5 of the request, the MPD asserted that it was still attempting to determine a method to identify and retrieve responsive, nonexempt documents. For part 7 of the request, the MPD stated that it was not responsible for or aware of BWC recordings offered as evidence in civil or criminal proceedings, as the Office of the Attorney General for the District of Columbia or the United States Attorney's Office for the District of Columbia determines the use of BWC recordings as evidence in civil and criminal proceedings.

Appellant appealed the MPD's decision in a letter to the Mayor dated April 3, 2015, challenging the withholdings. Appellant argues that MPD does have the capability to redact exempt information from videos; therefore, the MPD has failed to meet its obligation to segregate and disclose nonexempt information under D.C. Official Code § 2-534(b). Appellant cites redacted videos on the MPD's official YouTube channel, including two redacted BWC videos, to dispute the claim that the MPD cannot redact videos. Further, Appellant states that one of the manufacturers of BWC currently used by the MPD provides software that integrates video editing tools in order to accomplish redactions.

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[1] Exemption 2 provides for an exemption from disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Exemption 3(C) provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . [c]onstitute an unwarranted invasion of personal privacy."

[2] Exemption 3(A)(iii) provides for an exemption from disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would … [i]nterfere with … Office of Police Complaints ongoing investigations."

Regarding part 3 of the request, Appellant argues that the training videos are required to be made public pursuant to D.C. Official Code §§ 2-536(a)(2), which states that "[a]dministrative staff manuals and instructions to staff that affect a member of the public" must be made public. Appellant argues that training regarding the use of BWCs does affect the public. As for part 6 of the request, Appellant challenges the use of the exemption claimed for BWC recordings provided to the D.C. Office of Police Complaints ("OPC"). Appellant contends that the MPD did not explain how disclosure of the videos would interfere with ongoing OPC investigations. Regarding part 7 of the request, Appellant argues that the MPD failed to fully consider BWC recordings that the MPD has provided to the Office of the Attorney General for the District of Columbia or the United States Attorney's Office for the District of Columbia.

The MPD responded to the appeal in a letter dated April 14, 2015. The MPD states that as of February 9, 2015, there were 1,027 videos categorized as "Retain," 28 videos categorized as "Requires Supervisory Review," and 94 videos used for training purposes, pursuant to parts 1, 2, and 3 of the request respectively. Regarding parts 1, 2, 3, and 6 of the request, the MPD reaffirmed its position that it presently does not have the technical capacity to redact exempt material from video. The MPD reasserts that Exemption 2 prevents disclosure of the recordings responsive to part 3 of the request; further, the training videos are considered part of an employee's personnel file, which is not open to public inspection. In response to Appellant's challenge regarding part 6 of the request, the MPD clarified its assertion of Exemption (3)(A)(iii), contending that disclosure of the videos would interfere with an OPC investigation by giving officers, witnesses, or complainants an opportunity to conform their statements or testimony to what is captured by the recordings.

In its response to the appeal, the MPD addresses Appellant's claim that the two redacted BWC videos on YouTube demonstrate the MPD's ability to redact video for disclosure. The MPD states that the posted videos were redacted by a vendor, not by the MPD. Further, the vendor determined that its fee to redact the videos was vastly underestimated given the MPD's requirements for complete and thorough redactions and the limitations of the software that was used. Moreover, the MPD claims the videos were specifically selected due to the recordings' relatively short duration and small amount of necessary redactions. The MPD states that it has not as yet identified a vendor or the optimum software to handle redactions in a manner required to protect the privacy of persons captured by BWC videos.

With regard to part 5 of the request, the MPD has determined that it will not waive fees of the request due to the manpower necessary to produce responsive documents. The MPD states that it will take staff a minimum of one month to identify and retrieve the responsive documents. Further, any responsive documents would have to be reviewed and redacted to protect the privacy of arrestees, victims, suspects, and witnesses. The MPD states that it will commence identifying, gathering, and reviewing responsive documents upon receipt of communication from Appellant that the records are still sought, despite the rejection of the fee waiver.

As to part 7 of the request, the MPD reaffirms that it does not have knowledge or control of BWC recordings used or offered as evidence in civil or criminal proceedings. The MPD states that federal and local prosecutors have independent access to the BWC recordings.

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).

Segregability

The main issue in this appeal is MPD's capacity to redact BWC recordings. Appellant argues that D.C. Official Code § 2-534(b) requires the MPD to 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 under DC FOIA. With regard to a FOIA search, "reasonable efforts" is defined to mean that "a public body shall not be required to expend more than 8 hours of personnel time to reprogram or reformat records." D.C. Official Code § 2-532(f)(1); however, under DC FOIA the precise meaning of the term "reasonably segregable" pertaining 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). There are two main interpretations of "reasonably segregable": one involves the concept of intelligibility and the other pertains to extent of the burden in editing or segregating the material. *See District of Columbia v. FOP Metro. Police Labor Comm.*, 33 A.3d 332, 345-346 (D.C. 2011).

Under the prong of intelligibility, to withhold a record in its entirety, 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). Regarding the burden of segregating material, cases have also held that records may be withheld in their entirety if an agency lacks the technological capacity to remove exempt portions of a record.[3] Here, the MPD claims it does not have the capacity to redact BWC recordings.

[3] *Milton v. DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on "the agency's current technological capacity" and holding that responsive telephone conversations were not reasonably segregable because an agency did not possess technological capacity to segregate non-exempt portions of requested records); *see also Mingo v. DOJ*, 793 F. Supp. 2d. 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of

In a recent federal FOIA case, a requester attempted to rebut an agency's claim that it could not redact video by citing redacted YouTube videos produced by the agency that masked the identities of individuals contained in the footage. *Stevens v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 157086, 33 (N.D. Ill. Nov. 4, 2014). The court stated that the requestor must provide probative evidence of bad faith on the part of the agency to rebut the agency's determination regarding its lack of technical capacity to make redactions. *See id*. at 33-34. The court found that the cited YouTube clips failed to rebut the agency's determination that it lacked the capacity to redact video records. *See id.* Further, the Supreme Court has explained that there is a presumption of legitimacy accorded to the official conduct of the government and clear evidence is usually required to displace it. *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004).

Here, Appellant has cited redacted BWC recordings on the MPD YouTube channel to rebut the MPD's claim that it lacks capacity to redact video. The MPD has responded that those sample videos were performed by a vendor under contract and do not represent the ongoing capacity of the MPD to redact video in response to FOIA requests. In prior DC FOIA appeal determinations, disclosure was not required when the MPD lacked capability to modify an audiotape.[4]Here, Appellant has not presented clear evidence to rebut the MPD's assertion of its inability to redact BWC videos. In response to Appellant's claim that simple methods of video redaction are available, Freedom of Information Act Appeal 2013-06 found that "DC FOIA provides no warrant to second-guess the management practices of an agency in the technologies or equipment which it acquires and maintains." The relevant standard of technological capacity is that of an agency's FOIA office, not a general standard. *See Stevens* 2014 U.S. Dist. LEXIS at 33. Here, BWC recordings are properly withheld in their entirety, when an exemption to disclosure under DC FOIA applies, because of the absence of sufficient evidence to rebut MPD's claim that it lacks the capacity to redact BWC recordings.

Exemptions

The MPD raises Exemption 2, Exemption 3(C), and Exemption 3(A)(iii) to withhold disclosure of the BWC recordings. Exemption 2 and Exemption 3(C) are addressed in Freedom of Information Act Appeal 2015-12 ("FOIA 2015-12"), in which the Appellant made a prior request for BWC recordings. In FOIA 2015-12, the MPD's decision to withhold BWC recordings was upheld. The analysis in FOIA 2015-12 focused on the balance of the privacy

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recorded telephone calls are inextricably intertwined with exempt portions because an agency "lacks the technical capability" to segregate information that is digitally recorded); *Antonelli v. BOP*, 591 F. Supp. 2d 15, 27 (D.D.C. 2008) (same); *Swope v. DOJ*, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (same).

[4] *See e.g.*, Freedom of Information Act Appeal 2014-57, Freedom of Information Act Appeal 2013-55, Freedom of Information Act Appeal 2013-21, Freedom of Information Act Appeal 2013-06, Freedom of Information Act Appeal 2012-44, Freedom of Information Act Appeal 2011-60, and Freedom of Information Act Appeal 2011-11 (Reconsideration). Similarly, in Freedom of Information Act Appeal 2010-08, disclosure was not required when the Office of Unified Communications was found not to have the capability to modify an audiotape.

interests of the two exemptions against the public interest in disclosure. Here, as in FOIA 2015-12, there are valid privacy concerns, mainly the interest to not be associated with alleged criminal activity. Additionally, as in FOIA 2015-12, there are no allegations of wrongdoing by the MPD. A generalized interest in oversight alone does not suffice to require disclosure over privacy interests. *See McCutchen v. United States Dep't of Health & Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994) ("A mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests"). Consequently, Appellant has not raised a sufficient public interest to overcome the privacy interest contained in the records. In the present Appeal, the same exemptions and analysis of FOIA 2015-12 are applicable to parts 1 and 2 of the request. Consequently, records responsive to parts 1 and 2 of the request are properly withheld in their entirety under Exemption 2 and Exemption 3(C).

The MPD also raises Exemption 2 with respect to part 3 of the request, asserting that all responsive training records are considered a part of an employee's personnel file, which is not open to public inspection. The District of Columbia Court of Appeals has found that MPD employees, despite being public employees, have a cognizable privacy interest. *See District of Columbia v. FOP*, 75 A.3d 259, 267 (D.C. 2013). This privacy interest does not give the government license to shield all information from disclosure, but it means that a FOIA requester will have to demonstrate how release of the information will further the public interest. *See id.* at 267-68. A slight privacy interest can outweigh a lesser public interest. *See U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994). Appellant acknowledges that privacy interests may exempt portions of this part of the request from disclosure but asserts that the exempt portions of the records should be redacted. As discussed above, due to the MPD's inability to redact BWC recordings, a valid exemption allows the records to be withheld entirely. Beyond a generalized interest in oversight, Appellant has not set forth a public interest that would outweigh the privacy interest involved in the records responsive to part 3 of the request. *See McCutchen* 30 F.3d at 188. Therefore, the records responsive to part 3 are properly withheld in their entirety under Exemption 2.

In addition to privacy interests, the MPD also raises Exemption 3(A)(iii) regarding part 6 of the request. To satisfy the requirements of Exemption 3(A)(iii), investigatory records compiled for law enforcement purposes that would interfere with OPC ongoing investigations, an agency has the burden of showing: (1) the documents requested have been "compiled for law enforcement purposes", and (2) disclosure of those documents would interfere with OPC ongoing investigations. *See Bevis v. Department of State*, 801 F.2d 1386, 1388 (D.C. Cir. 1986). Here, the first requirement is not at issue because Appellant is requesting BWC recordings compiled for law enforcement purposes. Appellant challenges the assertion that the disclosure of the recordings would interfere with OPC ongoing investigations. To satisfy the interference requirement an agency must show that its ongoing law enforcement proceeding could be harmed by premature release of evidence or information. *See Juarez v. DOJ*, 518 F.3d 54, 58-59 (D.C. Cir. 2008). A type of interference that satisfies this requirement is the release of information that hampers the ability to elicit untainted testimony. *See Media, Inc. v. U.S. Secret Serv.*, No. 97-2108, 1998 WL 185496, at *4 (D.D.C. Apr. 16, 1998). In its response to the appeal, the MPD claims that release of the BWC recordings would give officers, witnesses, and complainants an opportunity to conform their statements or testimony to what is

captured by the recordings. As a result, records responsive to part 6 of the request are properly withheld in their entirety under Exemption 3(A)(iii).[5]

Knowledge of Records and Fee Waiver

Part 7 of the request seeks all BWC recordings "that have been offered or admitted as evidence, lodged with a court, or otherwise shown or used in connection with any civil or criminal proceeding." In its response to this request, the MPD states that the decision whether to offer BWC recording into evidence rests with prosecuting attorneys, and the MPD does not have knowledge as to which videos have been introduced in local and federal proceedings.[6] The Appellant challenged this response, maintaining that its request includes footage "otherwise shown or used in connection with any civil or criminal proceeding," which includes any BWC recordings that the MPD has provided to local and federal prosecutors, regardless of whether the footage was ultimately offered or admitted as evidence in a proceeding. On appeal, the MPD provided additional information by stating that federal and local prosecutors have independent access to MPD's BWC recordings, and the MPD does not have knowledge or control over what is offered as evidence in court proceedings.

The Supreme Court has set forth two requirements to qualify what constitutes an agency record: (1) an agency must either create or obtain the materials, and (2) the agency must be in control of the requested materials when the FOIA request is made. *DOJ v. Tax Analysts*, 492 U.S. 136, 145 (1989). Here, the first requirement is met as the MPD created the BWC recordings. What remains uncertain is whether MPD actually provided BWC footage to prosecutors, and whether it maintains copies of this footage, regardless of whether the footage was later introduced in legal proceedings.

Courts have identified four factors to determine whether an agency has sufficient control over a record: (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files. *See e.g., Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996); *Tax Analysts v. DOJ*, 913 F. Supp. 599, 603 (D.D.C. 1996). The issue of control is not determined solely by possession, but rather by considering all of the circumstances involved. *See Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978). Here, the MPD retains possession of BWC recordings; however, the MPD states that "federal and local prosecutors have independent access to the BWC recordings." It is unclear from the MPD's statement whether it has provided federal and local prosecutors with recordings, regardless of whether these recordings were later used in legal proceedings.

[5] These records may also be withheld under Exemption 2 and Exemption 3(C), but that analysis is not necessary because Exemption 3(A)(iii) alone is sufficient to prevent disclosure.
[6] The MPD did convey to Appellant its knowledge that a portion of BWC footage was used in the criminal trial of one particular defendant and provided Appellant with information about how to view portions of the footage that have been made publicly available.

The MPD may be asserting that federal and local prosecutors have independent access to the BWC footage and therefore do not obtain it from MPD. Under this interpretation, the MPD has never provided BWC recordings to federal and local prosecutors and does not have any knowledge of BWC recordings that federal and local prosecutors have accessed. Therefore, the MPD's lack of knowledge regarding the use of the BWC recordings in connection with civil or criminal proceedings indicates that the MPD lacks sufficient control to produce the records in response to Appellant's request. Alternatively, the MPD may be asserting that independent access exists solely with respect to evidentiary use of the recordings. Under this interpretation, the MPD may turn over BWC recordings to prosecutors who then have independent access to determine what is introduced as evidence. Therefore, the MPD would have sufficient control to produce the records in response to Appellant's request. Because the MPD's position is unclear, we direct the MPD to clarify its response to this aspect of Appellant's request.

With respect to part 5 of the request, the MPD does not assert a right to withhold records related to the activation and use of BWC, but rather the MPD denies Appellants request for a fee waiver. Under D.C. Official Code § 2-532(b), DC FOIA provides an agency burdened by a FOIA request with recourse, as it permits some of the cost of production to be shifted to the requestor. *See District of Columbia v. FOP*, 33 A.3d 332, 347-348 (D.C. 2011). Prior determinations have found that the jurisdiction of administrative appeals does not encompass fee disputes.[7] Therefore, this appeal does not reach a determination on the denial of the fee waiver. This appeal confirms that the MPD has stated that it will produce records responsive to part 5 of the request if Appellant agrees to share the cost of production.

Conclusion

Based on the foregoing, we affirm the MPD's decision in part, and remand it in part. The MPD shall clarify its response to part 7 of the request in accordance with this decision by indicating whether it has provided any BWC recordings to local and federal prosecutors and, if so, whether the MPD maintains copies of this footage. If the MPD maintains copies of the recordings, it shall provide them to Appellant or state its legal grounds for withholding them.

[7] *See e.g.*, Freedom of Information Act Appeal 2014-04, Freedom of Information Act Appeal 2013-56. Freedom of Information Act Appeal 2013-26, Freedom of Information Act Appeal 2012-30, Freedom of Information Act Appeal 2012-21.

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 Gregory M. Evans

Gregory M. Evans
Associate Director
Mayor's Office of Legal Counsel

/s John A. Marsh*

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

* License pending in the District of Columbia, working under the supervision of a licensed attorney.