

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2016-39**

March 11, 2016

VIA ELECTRONIC MAIL

RE: FOIA Appeal 2016-39

Dear Mr. Robinson:

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) ("DC FOIA"). You assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to a request you submitted to MPD under DC FOIA dated October 27, 2015.

Background

Your FOIA request sought records pertaining to the investigation and prosecution that led to your convictions. In response, by letter dated January 7, 2016, MPD granted in part and denied in part your FOIA request. MPD asserted that the records in question are investigatory files that are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i). The portions of the record that were provided to you were redacted to protect privacy interests in accordance with D.C. Official Code §§ 2-534(a)(2), (a)(3)(C).

On appeal, you challenge MPD's partial denial of your request on the grounds that MPD is improperly asserting a "blanket withholding" of all of the files in the investigative record. You do not appear to challenge the redactions made to the document MPD released. Further, you argue that any "enforcement proceeding" has long since closed, as you have been prosecuted, convicted, and sentenced for the crime at issue. As a result, you characterize MPD's assertion of an open investigation as "disingenuous" and made "not in good faith."

By email dated March 9, 2016, MPD provided this Office with a response to your appeal<sup>1</sup>, in which it reasserts the agency's position that the further release of any responsive records in its possession would interfere with an ongoing MPD enforcement proceeding.<sup>2</sup>

Discussion

It is the public policy of the District of Columbia 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

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<sup>1</sup> A copy of MPD's response is attached.

<sup>2</sup> The proceeding is related to MPD's investigation of the December 17, 1993 murder of Frank Blakeney.

policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). That right, however, is subject to various exemptions. *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). Accordingly, 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 that: (1) were compiled for law enforcement purposes; and (2) whose disclosure would interfere with enforcement proceedings. The purpose of the exemption is to prevent “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. 224, 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.*

In asserting an investigatory records exemption it is impermissible for an agency to issue a “blanket exemption” that exempts from disclosure 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). Agencies may, however, justify their withholdings on a “category-of-document by category-of-document” basis. *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. 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 you seek were compiled for law enforcement purposes but instead whether their release would interfere with an enforcement proceeding. In response to the instant appeal, MPD provided a detailed declaration which specifically identifies all documents within the investigatory file and the reasons why their release would be harmful to an enforcement proceeding.<sup>3</sup> MPD’s declaration explains facts “from which the likelihood of . . . a

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<sup>3</sup> A copy of MPD’s declaration is attached.

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.<sup>4</sup> This Office accepts MPD’s position that the case at issue is an open homicide file, as there are still suspects who have not been charged.<sup>5</sup> As a result, the investigation at issue cannot be considered closed. Having determined that an open investigation remains, we conclude that release of the remaining documents you seek could interfere with an enforcement proceeding and have been properly withheld.

### Conclusion

Based on the foregoing, the decision of MPD is affirmed. 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 Melissa Tucker

Melissa Tucker  
Associate Director

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<sup>4</sup> 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).

<sup>5</sup> MPD’s position is supported by the facts set forth in *Robinson v. United States*, 797 A.2d 698 (D.C. 2002), which indicate that only two of the four persons involved in the December 12, 1993 murder of Frank Blakeney have been apprehended and charged.