

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2017-05**

November 10, 2016

VIA ELECTRONIC MAIL

Ms. Lauren Bateman

RE: FOIA Appeal 2017-05

Dear Ms. Bateman:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld records you requested under the DC FOIA.

Background

You submitted a request to the MPD for photographs taken during the investigation of a domestic violence incident. The MPD responded to you on September 27, 2016, denying your request on the basis that the records are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i) (“Exemption 3(A)(i)”) because disclosure of the investigatory records compiled for law enforcement purposes would interfere with enforcement proceedings.

On appeal, you challenge the MPD’s denial of your FOIA request based on Exemption 3(A)(i). While you do not contest that the photographs are investigatory records compiled for law enforcement purposes, you assert that disclosure of the photographs would not interfere with enforcement proceedings and that the MPD did not adequately describe how disclosure would interfere with enforcement proceedings to justify withholding. Further, you assert that rather than impairing the enforcement proceedings, you share the MPD’s goal of protecting women from domestic violence.

The MPD sent this Office a response to your appeal in which it reasserted its position that the records are protected from disclosure by Exemption 3(A)(i).<sup>1</sup> The MPD clarified its application of Exemption 3(A)(i), stating that disclosure of the photographs would interfere with enforcement proceeding by allowing witnesses or defendants to modify their testimony based on the depictions in the photographs. The MPD also asserts that its FOIA staff contacted the Assistant United States Attorney supervising the criminal prosecution, who confirmed MPD’s position that disclosure of the photographs at issue here would result in harm to the criminal prosecution.

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<sup>1</sup> The MPD’s response is attached for your reference.

## 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 policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of 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 Com’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

As previously discussed, Exemption 3(A)(i) protects from disclosure investigatory records that are compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. The purpose of the exemption is to prevent enforcement from being “jeopardized by the premature release of the evidence.” *See Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted). Conversely, when an agency fails to establish that the documents sought relate to an ongoing investigation or would jeopardize a future law enforcement proceeding, the investigatory records exemption does not protect the agency’s decision. *Id.* A type of harm to enforcement protected by Exemption 3(A)(i) includes the disclosure of information that would allow witnesses to modify, tailor, or construct their testimony in light of information learned from investigatory records. *Accuracy in Media v. United States Secret Serv.*, 1998 U.S. Dist. LEXIS 5798, \*13 (D.D.C. Apr. 16, 1998)

Here, the threshold requirement for invoking Exemption 3(A)(i), that the records qualify as investigatory records, is clear and uncontested. Our analysis turns on whether disclosure of the photographs would interfere with pending enforcement proceedings. On appeal the MPD asserts that disclosure of the records would allow witnesses or the defendant to tailor their testimony to be consistent with the depictions in the photographs. Exemption 3(A)(i) is used to prevent the detrimental impact of modification and fabrication of testimony on enforcement. *See Accuracy in Media*, 1998 U.S. Dist. LEXIS 5798 at \*13. While you assert that disclosure would not result in harm to enforcement because your interest of preventing domestic violence is aligned with the interest of MPD, this alignment does not overcome the purpose of Exemption 3(A)(i) of preventing harm to enforcement proceedings. As a result, the investigatory photographs have been properly withheld from disclosure pursuant to Exemption 3(A)(i).

Conclusion

Based on the foregoing, we affirm the MPD's decision and hereby dismiss your appeal.

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.

Respectfully,

Mayor's Office of Legal Counsel

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