

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

July 26, 2017

VIA ELECTRONIC MAIL

Mr. Scott Taylor
Sinclair Broadcast Group

RE: FOIA Appeal 2017-105

Dear Mr. Taylor:

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 from MPD under DC FOIA.

Background

On May 26, 2017, you submitted a request to MPD for “Body cams of every Officer at scene of [decedent] shooting on July 10th, 2016 and body cams of every Officer at Hospital interviewing [decedent]. Plus any video of Security Cameras from the scene that the Police collected during their investigation.”

MPD responded to you on May 30, 2017, 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. MPD’s denial indicates that the requested footage “pertains to an open investigation by the Metropolitan Police Department.”

On appeal, you challenge MPD’s denial of your FOIA request and assert your belief that “releasing the records would only enhance the opportunity for new tips and evidence to flow into MPD and aid in solving the murder.” In support of this, you claim “[t]hese types of records are released across the Nation [sic] in other jurisdictions and lead to solving crimes with help from the public after viewing said records.” Your appeal goes on to ask without explanation, “[w]e question does picking and choosing what body cam video is released putting [sic] the public at risk in unsolved murders?” You cite no legal authority on appeal, asserting instead that “there appears to be no enforcement proceedings or on-going investigation at this time,” and that “release of the records would not interfere with enforcement or an on-going investigation due to the fact [sic] there hasn’t been an arrest of any suspect for the past 11 months.”

The MPD responded to your appeal in a letter to this Office¹ in which it reasserted its position that the records are protected from disclosure by Exemption 3(A)(i). In support of this position, MPD proffered that the investigation is still ongoing and that release of the records could “adversely affect the contemplated prosecution of the person or persons who committed the offence.” MPD’s response further states that “[r]elease of the videos would inform any suspects or witnesses on how to tailor their statements so as to avoid culpability.”

On July 21, 2017, you requested that this Office supplement your appeals with your belief that “it’s not an open investigation due to the fact DC Police [sic] released the Shot Spotter data thru [sic] a . . . [a third party FOIA request] earlier this year. It is now considered a closed or cold case via DC Code due to the release of those ShotSpotter records thru [sic] the Police Department [sic] to a secondary anonymous FOIA requester.” You did not provide a citation to any District law that would support this assertion. Your July 21, 2017 correspondence contained an attached July 12, 2017 denial letter from MPD stating that “the requested records pertain to an open investigation by the Metropolitan Police Department.”² Your July 21, 2017 correspondence concluded by asking that all requests relating to this shooting “be filled and handed over. . .”

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 Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

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 “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). “[S]o 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.” *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

¹ MPD’s response is attached for your reference.

² The withholding of records relating to the July 12, 2017 denial letter is addressed in FOIA Appeal 2017-112.

enforcement proceeding, the investigatory records exemption does not protect the agency's decision. *Id.*

On appeal you argue without legal authority that there is no enforcement proceeding here because an arrest has not been made. Specifically, you state "there appears to be no enforcement proceedings or on-going investigation at this time," and that "release of the records would not interfere with enforcement or an on-going investigation due to the fact [sic] there hasn't been an arrest of any suspect for the past 11 months." The standard you describe for whether an enforcement proceeding is ongoing does not comport with the law. See *Antonelli v. U.S. Parole Comm'n*, No. 93-0109, slip op. at 3-4 (D.D.C. Feb. 23, 1996) (reiterating that courts repeatedly find "lengthy, delayed or even dormant investigations" covered by Exemption 7(A)); *Butler v. DOJ*, No. 86-2255, 1994 WL 55621, at *24 (D.D.C. Feb. 3, 1994) (stating that agency "leads" were not stale simply because they were several years old given that indictee remained at large), *appeal dismissed voluntarily*, No. 94-5078 (D.C. Cir. Sept. 8, 1994); *Afr. Fund v. Mosbacher*, No. 92-289, 1993 WL 183736, at *4 (S.D.N.Y. May 26, 1993) (finding that documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)); see also *Davoudlarian v. DOJ*, No. 93-1787, 1994 WL 423845, at *2-3 (4th Cir. Aug. 15, 1994) (unpublished table decision) (holding that records of open investigation of decade-old murder remained protectable). The time elapsed in this investigation, roughly a year, is not long enough to support your contention that there is no ongoing enforcement proceeding. *E.g. Dickerson v. DOJ*, 992 F.2d 1426, 1432 (6th Cir. 1993) (affirming records as properly withheld for investigation of Jimmy Hoffa's 1975 disappearance.).

Similarly meritless is your contention in your July 21, 2017 correspondence that the records are "now considered a closed or cold case via DC Code due to the release of those ShotSpotter records thru [sic] the Police Department [sic] to a secondary anonymous FOIA requester." It is unclear to what District laws you are referring, as you do not specify. The FOIA request you referenced was for "Shotspotter data for July 9, 2016 & July 10, 2016 District 3 and District 5." Your request for a specific investigative file by name is different than a broader request for gunshot data on two dates in two different areas of the District. As a result, MPD's granting of that request in no way indicates that the investigation at issue is "a closed or cold case." Indeed, MPD's repeated assertions that the matter is ongoing overcome your unsupported conclusions that it is not.

Here, the records you seek were compiled for the law enforcement purpose of investigating a homicide, and MPD has asserted that the criminal investigation pertaining to the homicide is ongoing. As a result, MPD has clearly met the threshold requirements for invoking Exemption 3(A)(i), and our analysis turns on whether disclosure would interfere with enforcement proceedings.

Disclosure of the records requested could reveal the direction of the investigation and allow suspects to avoid detection, arrest, and prosecution. See FOIA Appeal 2016-94. Here, MPD has proffered that "[r]elease of the videos would inform any suspects or witnesses on how to tailor their statements so as to avoid culpability." While your appeal is based on your belief that "releasing the records would only enhance the opportunity for new tips and evidence to flow into

MPD and aid in solving the murder,” this belief does not overcome the purpose of Exemption 3(A)(i), which is to protect releasing investigatory details that could interfere with law enforcement efforts. As a result, we find that MPD properly withheld the investigatory records from disclosure pursuant to Exemption 3(A)(i).

Conclusion

Based on the foregoing, we affirm 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.

Sincerely,

The Mayor’s Office of Legal Counsel

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