

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-11**

December 29, 2016

VIA ELECTRONIC MAIL

Ms. Geneva Sands

RE: FOIA Appeal 2017-11

Dear Ms. Sands:

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 all video footage from December 4, 2016, showing a named individual inside of Comet Ping Pong. Your request encompassed footage showing police responding to an incident that occurred at Comet Ping Pong on that date, video from any cameras inside the establishment, and any body-worn camera footage captured during the MPD’s response to the incident. The MPD denied your request on the basis that responsive 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 present several arguments. First, you assert that public safety benefits related to informing the public of the “true nature of the threats posed by ‘fake news’ far outweigh any potential concerns relating to the current enforcement proceedings.” Second, you contend that “it’s unclear how releasing the requested video could interfere with the proceedings in any way beyond the video, images and other information that have already become part of the public record.” Third, you note that you requested several specific types of video footage from the incident in question, yet MPD’s initial response to your request offers an explanation only as to the denial of footage from body-worn cameras.

We advised MPD of your appeal, and MPD responded by reasserting its position that the records in question are protected from disclosure by Exemption 3(A)(i).¹ In its response, MPD acknowledged that you are seeking video footage of an incident that took place inside of Comet Ping Pong on December 4, 2016, “as well as any video footage of police officers responding to

¹ The MPD’s response is attached for your reference.

this location.” MPD reiterated its position that the videos in question are investigatory records compiled for law enforcement purposes, and that disclosure of the videos would interfere with enforcement proceedings. The MPD further explained that the criminal investigation at issue is pending, and that releasing any video records would educate involved persons, such as suspects or witnesses, as to the nature or direction of the investigation. According to the MPD, this could lead to the tailoring of testimony to support a version of the event and escape criminal responsibility. Releasing any images of witnesses, the MPD maintains, would jeopardize their safety.

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 when disclosure would interfere with enforcement proceedings. A significant 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 suspects or 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 video recordings qualify as investigatory records, is clear and uncontested. Our analysis turns on whether disclosure of the requested video footage would interfere with pending enforcement proceedings. On appeal the MPD asserts that disclosure of the records would allow a witness or suspect to tailor his or her testimony to be consistent with images in the video recordings. 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. Consequently, the MPD has preliminarily satisfied both elements of Exemption 3(A)(i), and we consider your assertions on appeal to determine if disclosure should be ordered. First, you assert that disclosure would serve the public interest and benefit public safety by informing the public of the dangers

of fake news and outweighs any potential concerns relating to the enforcement proceedings. This balancing standard is not appropriate to Exemption 3(A)(i) but rather applies to FOIA exemptions involving personal privacy, such as D.C. Official Code §§ 2-534(a)(2) and (3)(C). *See United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). Your second assertion, that disclosure of the video would not interfere with the enforcement proceedings because the information has already become part of the public record, if true would eliminate the protection of Exemption 3(C)(i). It is our understanding, however, based on the MPD's representation that the video footage in question is not part of the public record, and you have offered no evidence to the contrary. Third, the MPD's response to your request only addressed footage from body-worn cameras and not the other footage you requested. The MPD clarified on appeal and we agree that the application of Exemption 3(A)(i) is relevant to all forms of investigative video capturing the December 4th incident. As a result, the MPD properly withheld responsive video footage from disclosure pursuant to Exemption 3(A)(i) at this juncture based on a pending criminal investigation into events captured on the responsive video footage.

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)