

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



Mayor's Office of Legal Counsel

August 4, 2017

VIA ELECTRONIC MAIL

Mr. Scott Taylor
Sinclair Broadcast Group

RE: FOIA Appeal 2017-112

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 June 28, 2017, you submitted a request to MPD for "the ShotSpotter data and audio in connection to the shots fired in . . . [a] murder investigation on July 10th, 2016. We would like the audio 10 minutes before the shots fired up till 15 min after the shots were fired."

MPD responded to you on July 12, 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 records "pertain 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 "We found the attached ShotSpotter data . . . on line [sic] that indicates part of our FOIA Request . . . was filled PREVIOUSLY thru [sic] an anonymous request last month and is now posted on line [sic] thru [sic] a FOIA request." Your appeal further posits 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 appeal concluded by asking that all requests related to this shooting "be filled and handed over. . ."

MPD responded to your appeal in a letter to this Office in which it reasserted its position that the records are protected from disclosure by Exemption 3(A)(i).¹ In support of this position, MPD proffered that its investigation into the murder at issue is ongoing and that release of the requested records could “adversely affect the contemplated prosecution of the person or persons who committed the offense.” MPD further states that “[r]eleased records would inform any suspects or witnesses on how to tailor their statements so as to avoid culpability.”

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

On appeal, you argue 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.” You do not indicate the District law on which you rely, nor do we know of any such law providing that the release of certain ShotSpotter data indicates the closure of a criminal investigation. The FOIA request you referenced was for “Shotspotter data for July 9, 2016 & July 10, 2016 District 3 and District 5.” MPD’s granting of that separate request does not indicate that the investigation at issue is “a closed or cold case.” MPD asserts that the matter is ongoing, and we have no reason to conclude otherwise.

¹ MPD’s response is attached for your reference.

The records you seek here 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 met the threshold requirements for invoking Exemption 3(A)(i), and our analysis turns on whether disclosure would interfere with enforcement proceedings.

We note that MPD typically releases generalized ShotSpotter data;² however, you are requesting data contained in a specific investigative file. Essentially you are seeking the theories or conclusions of MPD investigators as to which, if any, ShotSpotter data they have connected to the particular homicide in question. As a result, what you are asking for is materially distinct from the request for longitudinal data over a two-day period in two police districts, which MPD previously released.

While your appeal is based on your belief that the case is closed or cold, 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. *See* FOIA Appeals 2016-94, 2017-104, 2017-105. MPD maintains that disclosing the records you requested could reveal the direction of its ongoing investigation and allow suspects to avoid detection, arrest, and prosecution. In specific, MPD states that “[r]eleased records would inform any suspects or witnesses on how to tailor their statements so as to avoid culpability.” In light of the statutory purpose of Exemption 3(A)(i), we find that MPD properly withheld from disclosure the investigatory records you requested.

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)

² *See, e.g.*, FOIA Appeals 2015-68 and 2017-88.