

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



Mayor's Office of Legal Counsel

August 18, 2017

Mr. Jonathan S. Jeffress

RE: FOIA Appeal 2017-129

Dear Mr. Jeffress:

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 Department of Corrections ("DOC") improperly withheld records in response to a request you submitted to DOC under DC FOIA dated June 1, 2017, on behalf of your client.

Background

Your FOIA request sought records pertaining to an April 10, 2017, incident involving your client that resulted in a double amputation.

On June 22, 2017, DOC denied your request. DOC 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) ("Exemption 3"). DOC's denial also described your request for "All records" as not being "an adequate description."

On appeal, you challenge DOC's denial of your request on the grounds that DOC is improperly asserting a "blanket exemption" of all of the files in the investigative record. You assert that DOC has not made sufficient showings of the existence of an investigation or that the release of documents would interfere with an enforcement proceeding. Further, you request that the withheld records be subject to redaction and segregated release. Lastly, you list specific types of documents that you are requesting.

On August 10, 2017, DOC provided this Office with a response to your appeal<sup>1</sup>, in which it reasserts the agency's position that the release of any responsive records in its possession would interfere with an ongoing enforcement proceeding. Additionally, DOC's response indicates that it will provide to you some of the documents enumerated in your appeal and further indicates the online location of some responsive policy documents.<sup>2</sup>

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

<sup>2</sup> To the extent that DOC has provided you with documents or has indicated their online location, we consider such parts of your appeal to be moot.

## 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). 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).

Exemption 3 exempts investigatory records that: (1) were compiled for law enforcement purposes; and (2) whose disclosure would interfere with enforcement proceedings. D.C. Official Code § 2-534(a)(3)(A)(i). “To invoke this exemption, an agency must show that the records were compiled for a law enforcement purpose and that their disclosure ‘(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.’” *Manning v. United States DOJ*, 234 F. Supp. 3d 26 (D.D.C. 2017) (citing *Mapother v. U.S. Dep’t of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)).

The purpose of Exemption 3 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.* 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, DOC has provided a declaration, dated August 8, 2017, which states that “the investigation was (and is still) on-going.” And as DOC’s response to this Office indicates, this Office “must give ‘substantial weight’ to agency declarations absent contrary evidence or evidence of bad faith.” *Manning v. United States DOJ*, 234 F. Supp. 3d 26 (D.D.C. 2017). As a result, we accept the declaration’s assertion that there is an ongoing criminal investigation.

However, 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 not issue a "blanket exemption," but Exemption 3 does not require the agency to provide document specific justifications for withholding. Instead, agencies may justify their withholdings on generic categories of documents, rather than a document-by-document basis. *Id.*

To assert 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.

Here, the DOC's declaration states only the declarant's belief "that public disclosure of the records of the April 10, 2017 incident will interfere with the ongoing criminal investigation and prospective enforcement proceedings regarding the incident, including the allegation of assault on staff." While DOC is correct in citing to *Manning* for the proposition that this Office must accept the assertions of a declaration absent contrary evidence or evidence of bad faith – the declaration that DOC provided this Office is akin to a "blanket exemption" and does not engage in the generic approach contemplated by *Manning*. In *Manning*, the agency's declaration provided more than DOC's declaration provides here:

The [agency] divided its investigative materials into two categories: (1) evidentiary/investigative materials, and (2) administrative materials. . . . The [agency] then reviewed and assigned document types into each category. . . . The [agency] further divided the two main categories into smaller subcategories. . . . The "evidentiary/investigative materials" category includes three subcategories: (1) confidential source statements; (2) exchange of information between [agency] and other law enforcement agencies; and (3) documentary evidence or information concerning documentary evidence. . . . The "administrative materials" category also has three subcategories: (1) reporting communications; (2) miscellaneous administrative documents; and (3) administrative instructions...

The declaration then describes how disclosing each subcategory of information would interfere with the pending investigation. . . . *see CREW*, 746 F.3d at 1098 (stating that "it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; it must rather demonstrate how disclosure will do so" (internal quotation marks omitted)). For example, the declaration explains that revealing confidential source statements could subject to retaliation or intimidation those individuals who are cooperating with law enforcement, which, in turn, could have a "chilling effect on the [agency]'s investigative efforts here and [on] any resulting prosecutions." . . . Further, [declarant] states that releasing information exchanged between the [agency] and its law enforcement partners would "reveal the scope and focus of the investigation; identify and tip off individuals of interest to law enforcement; and

provide suspects or targets the opportunity to destroy evidence and alter their behavior to avoid detection.”

*Manning v. United States DOJ*, 234 F. Supp. 3d 26 (D.D.C. 2017)

Here, the issue is not only whether the records you seek were compiled for law enforcement purposes but also whether their release would interfere with an enforcement proceeding. In response to the instant appeal, DOC’s declaration did not identify the types of documents being withheld. DOC’s declaration does not explain facts from which this Office could “trace a rational link between the nature of the document and the alleged likely interference.” *Crooker*, 789 F.2d at 67. This Office accepts DOC’s position that there is an ongoing investigation; but is unable, at this point, to conclude how disclosure would interfere with that investigation.

### *Reasonable Redaction*

The D.C. Code mandates reasonable redaction to allow for the disclosure of portions of documents not protected by an exemption. D.C. Official Code § 2-534(b). Because of DOC’s apparent use of a “blanket exemption,” it is unclear if DOC has engaged in a reasonable redaction analysis. On remand, DOC should review the withheld documents to make a determination if portions of some of the withheld documents could be released with protected portions redacted.

### Conclusion

Based on the foregoing, the decision of DOC is moot in part and remanded in part. Within 15 days of this decision DOC shall release to you all portions of responsive records that in DOC’s judgement would not interfere with an enforcement proceeding. Further, within 15 days of this decision, for all responsive documents that DOC believes would interfere with an enforcement proceeding, DOC shall review the withheld documents and issue to you a new decision letter which (1) defines categories of investigatory records, and (2) is accompanied by a declaration articulating how release of each category of documents could interfere with an enforcement proceeding. You may by separate appeal challenge DOC’s subsequent decision letter.

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