

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



Mayor's Office of Legal Counsel



August 25, 2017

VIA EMAIL

Ms. Mary Finn

RE: FOIA Appeal 2017-134

Dear Ms. Finn:

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

Background

On July 5, 2017, you submitted a FOIA request to MPD seeking “a list of all weapon types or protective/preventative devices” used by D.C. police responding to inauguration protests on January 20, 2017. On August 3, 2017, MPD denied your request, under D.C. Code § 2-534(a)(3)(A)(i) (“Exemption 3(A)(i)”), claiming that disclosure of the records would interfere with pending civil and criminal enforcement proceedings.

Your appeal challenges MPD’s use of Exemption 3(A)(i) arguing that the information should not be withheld because it has been released in previous requests. You also claim there is a public interest in disclosure.

MPD provided this Office with a response to your appeal.¹ In its response, MPD reasserts that the documents are protected from disclosure under Exemption 3(A)(i). MPD states that it is currently conducting criminal and civil investigations related to the protests and riots that occurred on January 20, 2017. MPD states “release of the requested documents would inform persons involved of facts that could permit them to fashion their statements or testimony in order to escape culpability for wrongful actions.”

¹ A copy of MPD’s response is attached.

Discussion

It is the public policy of the District of Columbia 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 . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

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(A)(i) 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. 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(A)(i) 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. DOJ*, 607 F.Supp.2d 77, 90 (D.D.C. 2009).

Here, MPD asserts that the responsive records are part of ongoing criminal and civil investigations involving citizens and law enforcement personnel. Consequently, this Office accepts MPD’s representation that the records you seek were compiled for law enforcement purposes. In order to withhold an investigatory record, however, MPD must also indicate how disclosure would foreseeably harm enforcement proceedings. *Crooker v. ATF*, 789 F.2d 64, 65-

67 (D.C. Cir. 1986) (finding that agency failed to demonstrate that disclosure would interfere with enforcement proceedings).

Your request is for a list of “weapons and protective/preventative devices” used by police responding to a specific event. MPD asserts, without elaboration, that disclosure of a list of weapons and protective devices use by police “would inform persons involved of facts that could permit them to fashion their statements or testimony in order to escape culpability for wrongful actions.” It is difficult to comprehend how the information, regarding equipment alone, would interfere with enforcement proceedings. We find that MPD has not sufficiently described the potential interference to enforcement proceedings to allow withholding of the responsive records in their entirety under Exemption 3(A)(i). It is possible that the documents, which contain the equipment used in response to inauguration protests, contain additional information which if disclosed may interfere with enforcement proceedings.² It does not appear that MPD addressed the segregability of the withheld records, whether portions may be disclosed without causing the harm to enforcement proceedings. As a result, MPD’s current withholding is not permissible pursuant to Exemption 3(A)(i).

Conclusion

Based on the foregoing, we remand MPD’s decision. Within 10 business days from the date of this decision, MPD shall either: (1) provide you with previously withheld records; or (2) clarify to you by letter the nature of each withheld record, the particular harm release of that record would cause, and explain if redaction is not feasible. This constitutes the final decision of this Office; you may file a separate appeal for a subsequent denial.

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: Ron Harris, Deputy General Counsel, MPD (via email)

² MPD has not described or provided the responsive records to this Office. While your request asks for a list of equipment used in response to inauguration protests, it is possible this information is not compiled into a particular list but rather exists across multiple records. MPD has no obligation to compile a specific list that does not already exist; under FOIA, MPD is not required to create new records or to answer interrogatories. *See Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009), *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985).