

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2017-69**

May 15, 2017

VIA EMAIL

Ms. Jessica Steinberg

RE: FOIA Appeal 2017-69

Dear Ms. Steinberg:

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”) did not adequately respond to requests for records, submitted on behalf of your clients, under the DC FOIA.

Background

On February 16, 2017, and March 1, 2017, your office submitted two FOIA requests, on behalf of two clients, to MPD seeking arrest report records related to your clients. On March 7, 2017, and March 16, 2017, denied both requests, citing to D.C. Code § 2-534(a)(3)(A)(i) (“Exemption 3”).

This appeal challenges MPD’s use of Exemption 3. The appeal argues that an early termination of parole hearing is not an enforcement proceeding, and if it were MPD has not proven that release of the records would interfere with the enforcement proceeding. The appeal cites to federal law and regulation which grant a right to be “apprised of the evidence” against your clients, such that release of such information could not interfere with the proceedings. Further, the appeal argues that even if parts of the records would interfere, MPD has a duty to segregate exempt portions instead of withholding the entire record.

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, asserting that the parole proceedings are enforcement proceedings because they determine the imposition of sanctions. MPD notes that your appeal “correctly notes. . . that the federal regulations provide for [your] clients to ‘be apprised of the evidence’ used against them in the hearings. The regulations make no mention of using the FOIA process to obtain the evidence.” Finally, MPD notes that your clients could “tailor his or her testimony upon receiving the requested records that could inform the hearing panel of activities that have occurred subsequent to the underlying charges.”

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).

Interference with Enforcement Proceedings

On appeal MPD has cited to Exemption 3. Because of the broad nature of Exemption 3, and absent being offered specific case law to the contrary, this Office accepts MPD’s argument that a parole early termination hearing is an enforcement proceeding for Exemption 3 purposes.

However, in order to withhold an investigatory record a release must foreseeably harm an enforcement proceeding. *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). MPD’s arguments that this request is “an effort to obtain records outside the discovery process,” is not persuasive. *North v. Walsh*, 279 U.S. App. D.C. 373, 881 F.2d 1088, 1099 (1989) (“FOIA rights are unaffected by the requester's involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery . . .”). MPD’s response imply that your clients would be entitled to the withheld documents, had they requested them pursuant to the Parole Act².

If your clients would be entitled to these documents under the law that creates the enforcement proceeding, then it is difficult to see how MPD’s release of these documents to your clients would interfere with that enforcement proceeding. As a result, we find that MPD has not sufficiently described the potential interference to enforcement proceedings to allow withholding the responsive records in their entirety. Further, it does not appear that MPD addressed the segregability of the withheld records, whether portions may be disclosed without causing the harms contemplated under Exemption 3.

² Indeed, it would appear that 28 C.F.R. § 2.89 (“Miscellaneous provisions”) incorporates 28 CFR § 2.56 (“Disclosure of Parole Commission file”) to apply to District of Columbia Code offenders.

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)