

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel

November 1, 2017

VIA E-MAIL

Mr. Terrell Roberts

RE: FOIA Appeal 2018-16

Dear Mr. Roberts:

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 on behalf of your client.

Background

You submitted a FOIA request to the MPD for certain body-worn camera footage, use of force reports, public incident reports (PD-251) and citation violations (PD-61).

MPD granted your request in part, by providing the PD-251<sup>1</sup>, and denied your request in part, stating that some of your requested records were being withheld 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.

On appeal, you challenge MPD's response, asserting that MPD had not adequately explained how disclosure of the withheld records would interfere with a law enforcement proceeding. You argue without citation that "[i]n recent times, episodes of police use of force (which primarily motivates the request) are normally divulged to the public."

MPD sent this Office a response to your appeal on October 24, 2017,<sup>2</sup> reaffirming its earlier position that under Exemption 3(A)(i) the records are exempt in their entirety because disclosure would interfere with an ongoing enforcement proceeding. MPD argues that the video footage could "inform any suspects or witnesses on how to tailor their statements so as to avoid culpability." MPD concedes that the PD-61<sup>3</sup> describing the incident in question should be

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<sup>1</sup> A PD-251 is a public incident report.

<sup>2</sup> A copy of the MPD's response is attached.

<sup>3</sup> A PD-61 is a citation that is issued in lieu of taking someone into custody.

released, and has represented to this Office that a copy will be provided to you.<sup>4</sup> Further, MPD explains that the use of force report could interfere with the ongoing investigation by having an effect on witnesses and participants' recollections of what transpired, which could affect criminal or civil proceedings.

### 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 from disclosure 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

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<sup>4</sup> We accept MPD's representation that it will provide the PD-61 to you, and find that portion of your appeal to be moot.

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 withheld responsive records are part of “an investigation of the incident in question [which] is presently active.” 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). We accept MPD’s representation that the release of the video footage and the use of force report could interfere with an ongoing enforcement proceeding, because the footage and report could inform witnesses and suspects of how to tailor their statements. As a result, we find that the footage you requested was properly withheld.

### Conclusion

Based on the forgoing, we affirm the MPD’s decision and dismiss your appeal.

This shall constitute 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)