

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



**Mayor's Office of Legal Counsel**

December 27, 2017

VIA ELECTRONIC MAIL

Mr. Blaine Pardoe

RE: FOIA Appeal 2018-054

Dear Mr. Pardoe:

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 November 15, 2017, you submitted a request to MPD for records related to unsolved homicides known as “the Freeway Phantom murders” from the 1970’s. On or around November 30, 2017, MPD granted your request in part, releasing a reward notice, news article, and incident report. MPD denied your request in part, withholding its investigative documents 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 indicated that the unsolved homicide cases are considered open investigations. Additionally, MPD stated that disclosure of its investigative records would impede enforcement efforts by enabling witnesses or suspects to conform future testimony based on the facts in the investigative records. Finally, MPD noted that only two of the six murders you sought records for were investigated by MPD; the remaining four were investigated by police in Maryland.

On appeal, you challenge MPD’s partial denial of your FOIA request, declaring that approximately 46 years have passed since the crimes occurred, and you do not believe that disclosure of the investigative records would hinder law enforcement efforts. Further, you argue that you are a bestselling true crime author, and attention from writing about the unsolved homicides may facilitate law enforcement efforts by bringing new leads. Finally, you assert that you would be satisfied by reviewing redacted copies of the investigative file or copies of a note left by the alleged killer.

On December 20, 2017, 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).<sup>1</sup> In

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<sup>1</sup> MPD’s response is attached for your reference.

support of this position, MPD proffered that its investigation into the murders is ongoing and that release of the requested records could adversely affect MPD's enforcement efforts by informing any suspects or witnesses on the direction of the investigation and enabling them to conform testimony to escape culpability. MPD's response also described the categories of withheld documents, claiming that disclosure of any of the records could impede its enforcement efforts.

### 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 due to the age of the records any harm of disclosure would be minimal, and responsive records should be disclosed to bring attention and new leads. The records you seek here were compiled for the law enforcement purpose of investigating homicides, and MPD has asserted that its criminal investigation pertaining to the homicides 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.

Your belief that the cases are cold 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 Dickerson v. DOJ*, 992 F.2d 1426, 1432 (6th Cir. 1993) (finding that an investigation into 1975 disappearance remained ongoing and therefore was still "prospective" law enforcement proceeding.) MPD maintains that disclosing the records you requested could reveal the direction

of its ongoing investigations and allow suspects to avoid detection, arrest, and prosecution. In light of the statutory purpose of Exemption 3(A)(i), we find that MPD properly withheld from disclosure the investigatory records you requested.<sup>2</sup>

### 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)

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<sup>2</sup> Although MPD's application of Exemption 3(A)(i) is justifiable, we note that this exemption, like others, is discretionary. Due to the age of the cases, MPD may determine that the benefits of disclosure outweigh the potential harm to ongoing law enforcement proceedings. MPD, as the agency responsible for the ongoing investigation, is in the best position to assess the potential impact of disclosure. Therefore, MPD may elect to disclose or continue to withhold its investigative records related to the unsolved homicides.