

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



Mayor's Office of Legal Counsel

November 13, 2017

VIA ELECTRONIC MAIL

Mr. David Bralow
The Intercept

RE: FOIA Appeal 2018-25

Dear Mr. Bralow:

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 ("DC FOIA"). In your appeal, you assert that the Metropolitan Police Department ("MPD") improperly withheld records in response to your request for information under DC FOIA.

Background

On September 6, 2017, you submitted a request to the MPD for records pertaining to the investigation of a homicide that occurred on "July 20, 2016" (though from the substance of your request, it appears you meant July 10, 2016). Specifically, you sought "records, including any expert analysis, concerning communications between [the decedent] and Wikileaks or any other third-party relating to the dissemination of DNC emails." Your request states that the existence of such communications could help negate "the widely reported story that such emails were disseminated by hostile state actors."

MPD responded on October 18, 2017, denying your request 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.

On appeal, you challenge the denial of your FOIA request, asserting that MPD's denial amounts to a "blanket exemption" and that MPD has not adequately explained how release of the decedent's computer records could interfere with an ongoing homicide investigation into the decedent's death. Further, you assert that MPD should have redacted records instead of withholding them in their entirety.

The MPD responded to your appeal and reasserted its position that the records are protected from disclosure by Exemption 3(A)(i). MPD's response states "The investigation is still ongoing. The release of any report generated as part of the investigation would adversely affect any future law enforcement proceeding by informing witnesses or suspects of information not otherwise known."

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).

Your request is similar in subject matter to previous requests that have been denied and appealed to the Mayor. *See* FOIA Appeal 2016-94 (affirming MPD’s denial of request for investigatory records into July 10, 2016 homicide); FOIA Appeal 2017-104 (affirming Office of the Chief Medical Officer’s denial of Sinclair Broadcast Group’s request for autopsy report relating to July 10, 2016 homicide); FOIA Appeal 2017-105 (affirming MPD’s denial of Sinclair Broadcast Group’s request for body worn camera footage relating to July 10, 2016 homicide); FOIA Appeal 2017-112 (affirming MPD’s denial of Sinclair Broadcast Group’s request of shot spotter data relating to July 10, 2016 homicide); FOIA Appeal 2017-115 (affirming OCME’s denial of The Light Reports’ request for autopsy report relating to July 10, 2016 homicide).

Exemption 3(A)(i) exempts 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 any ongoing investigation or would jeopardize a future law enforcement proceeding, the investigatory records exemption does not protect the agency’s decision. *Id.*

Here, as was the case in previous requests for related records, the records sought were compiled for the law enforcement purpose of investigating a homicide, and MPD has stated that “[t]he investigation is still ongoing.” As a result, the threshold requirements to apply Exemption 3(A)(i) are clearly met, and the analysis turns on whether disclosure would interfere with enforcement proceedings. MPD asserts “The release of any report generated as part of the investigation would adversely affect any future law enforcement proceeding by informing witnesses or suspects of information not otherwise known.” In past appeals, we have noted that releasing investigation records could reveal the direction of the investigation and allow suspects to avoid detection,

arrest, and prosecution. Further, disclosure could allow a suspect or witness to take actions or tailor statements in order to hamper or defeat enforcement efforts.

Your appeal challenges MPD's response as a "blanket exemption," and argues that MPD "falls short of [the] mark" in explaining how the release of the records you requested would interfere with an enforcement proceeding. We accept MPD's representation that the release of records relating to "a computer owned or used by" a decedent before his death could interfere with an ongoing homicide investigation into that death. Your belief that the release of the decedent's electronic records, and MPD's analysis thereof, could "contribute significantly to public understanding of government operations" does not invalidate the purpose of Exemption 3(A)(i), which is to prevent interference of enforcement proceedings. As discussed, any investigatory details revealed would potentially interfere with enforcement efforts; therefore, the investigatory records have been properly withheld from disclosure pursuant to Exemption 3(A)(i).

Reasonable Redaction

On appeal, you assert that MPD should have provided to you redacted records instead of withholding them in their entirety. D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009). Here, we find that reasonable redaction is not possible, because the end product after redaction would be of no informational value.

Conclusion

Based on the foregoing, we affirm the 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,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)