

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-018**

January 28, 2020

VIA ELECTRONIC MAIL

Ms. Peter Hermann

RE: FOIA Appeal 2020-018

Dear Mr. Hermann:

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 challenge the Metropolitan Police Department’s (“MPD”) withholding of public records you requested under DC FOIA.

Background

On October 21, 2019, you submitted a request to MPD for the following records: “body camera recordings from Sgt. Kyle P. Kimball and Sgt. Stephen Patrick Amodeo from approximately 4:30 p.m. through 5 p.m. on 9/20/2019.” On October 24, 2019, MPD denied your request, withholding the body worn camera (“BWC”) footage 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 records compiled for law enforcement purposes would interfere with enforcement proceedings. MPD’s denial indicated that the records were a part of an ongoing criminal investigation and disclosure of the BWC footage would impede law enforcement efforts “by revealing the direction and pace of the investigation [and] could lead to attempts to destroy or alter evidence, reveal information about potential witnesses who could then be subjected to intimidation as part of an effort to frustrate future investigative activities, or could place witnesses in danger.”

On appeal, you challenge MPD’s denial of your FOIA request, stating that the Washington Post, your employer, was informed that the U.S. Attorney’s Office for the District of Columbia (“USAO”) had declined prosecution of the underlying incident. Therefore, you contend that because there is no longer an active investigation, MPD should release the records.

On November 15, 2019, MPD responded to your appeal and reasserted its position that the records are protected from disclosure by Exemption 3(A)(i) and further claimed that disclosure of the BWC footage would constitute an unwarranted invasion of personal privacy under D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C).¹

¹ MPD’s response is attached for your reference.

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)

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.*

The records you seek here were compiled for law enforcement purposes. While MPD admits that USAO declined to prosecute the underlying incident, as you noted in your appeal, MPD contends that the matter is still being investigated by MPD and that such administrative investigations are deemed “law enforcement proceedings” for purposes of Exemption 3(A)(i). 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.

On appeal, you argue that because there is no longer an active investigation, MPD should release the records. However, MPD has asserted that its internal administrative investigation is ongoing and that release of the subject BWC footage prior to the completion of the administrative investigation would interfere with the investigation and any future disciplinary proceedings. In light of the statutory purpose of Exemption 3(A)(i), we find that MPD remains justified in withholding from disclosure the investigatory records you requested. Having found the withholding permissible pursuant to Exemption 3(A)(i), we will not address the applicability of D.C. Official Code §§ 2-534(a)(2) and (a)(3)(C), which MPD advanced for the first time in its appeal.

Conclusion

Based on the foregoing, we conclude that MPD has sufficient authority to withhold the requested BWC video footage, and we hereby dismiss your appeal.

This constitutes the final decision of this Office with respect to your appeal. 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 DC FOIA.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Teresa Quon Hyden, Assistant General Counsel, MPD (via email)