

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-020**

January 15, 2020

VIA ELECTRONIC MAIL

Ms. Emily Weber

RE: FOIA Appeal 2020-020

Dear Ms. Weber:

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”), on the grounds that the Metropolitan Police Department (“MPD”) improperly denied your request for a copy of video footage of the arrest of an individual.

Background

On September 16, 2019, you submitted a FOIA request to MPD asking for the following: “Body cam and dash cam footage of an event that occurred at 1301 Independence Avenue SE at around midnight.” On November 1, 2019, MPD denied your request on the grounds that the records you are seeking are a part of an ongoing administrative investigation, and are therefore exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A)(i) (“Exemption 3(A)(i)).

On appeal, you challenge MPD’s response – arguing that the footage is of an incident in your neighborhood and that “Body cams are paid for with taxpayer dollars and taxpayers should have the right to see the footage!” Your appeal did not present any authorization from the individuals captured in the footage associated with your request.

This Office notified MPD of your appeal, and the agency provided a response on November 15, 2019.¹ In its response, MPD stated that it denied your request on the grounds that the release of such information would constitute a clearly unwarranted invasion of personal privacy and was exempt from disclosure pursuant to D.C. Code § 2-534(a)(2) (“Exemption 2”), and added that D.C. Code § 2-534(a)(3)(C) is also applicable in this matter. MPD’s justification for withholding the requested records on appeal deviates from the justification advanced for the initial denial. Notwithstanding this divergence, this Office will analyze the withholding under Exemption 2.²

¹ A copy of MPD’s response is attached.

² 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

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.” 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 2

Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personally identifiable information. *Skinner v. U.S. Dep’t. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994).

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.* MPD asserted in its November 1, 2019 denial of your request for records that the records are a part of an ongoing administrative investigation. Therefore, we note that MPD would likely meet the threshold requirements for invoking Exemption 3(A)(i).

With regard to the privacy interest arising from investigative records of law enforcement agencies, the courts have long-recognized that “individuals, whether they be suspects, witnesses, or investigators” have a “strong interest” in “not being associated unwarrantedly with alleged criminal activity.” *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Stern v. FBI*, 737 F.2d 84, 91- 92 (D.C. Cir. 1984)). Without a doubt, “the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.” *Branch v. FBI*, 658 F.Supp. 204, 209 (D.D.C.1987); *see also Roth v. DOJ*, 642 F.3d 1161, 1175 (D.C. Cir. 2011) (noting that “being associated with a quadruple homicide would likely cause [third parties] precisely the type of embarrassment and reputational harm that Exemption 7(C) is designed to guard against”), reh'g en banc denied, No. 09-5428 (D.C. Cir. Nov. 14, 2011); *Neely v. FBI*, 208 F.3d 461, 464-66 (4th Cir. 2000) (finding that FBI Special Agents and third-party suspects have “substantial interest[s] in nondisclosure of their identities and their connection[s] to particular investigations”).

In this case, you contend that the video footage depicts an incident in your neighborhood, and that you should have the right to see the footage because body cameras are paid for with taxpayer dollars. However, such an assertion does not overcome our conclusion that individual(s) depicted in the video footage are entitled to the privacy protections afforded under D.C. Code § 2-534(a)(2) and (a)(3)(C).

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of “public interest” if it would shed light on an agency’s conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

This statutory purpose is furthered by disclosure of official information that “sheds light on an agency’s performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that “reveals little or nothing about an agency’s own conduct” does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773.

Id. at 1492-93.

The U.S. Supreme Court in *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989), limited the public interest standard to the FOIA's “core purpose” of “contribut[ing] significantly to public understanding of the operations or activities of the government.” *Id.* at 776. More succinctly put, the requested information must show “what the Government is up to” in order to satisfy the public interest requirement. *Id.* at 781. Here, while you mention that the cameras used to capture the footage are paid for with taxpayer dollars, such an assertion, without more, does not implicate the type of public interest required under FOIA (information that sheds light on an agency’s conduct) that would outweigh the privacy interest.

Conclusion

Based on the foregoing, we affirm MPD's decision to withhold the requested video footage and 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.

Respectfully,

Mayor's Office of Legal Counsel

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