

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-022**

January 28, 2020

VIA ELECTRONIC MAIL

Mr. Michael Varco

RE: FOIA Appeal 2020-22

Dear Mr. Varco:

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 responded to your October 1, 2019 request for an unedited copy of MPD’s YouTube video in a particular investigation along with a copy of all images containing the non-blurred image of any suspect, accused or individuals of interest in the YouTube video.

Background

On October 15, 2019, MPD responded to your October 1, 2019 FOIA request denying your FOIA request in its entirety. On November 4, 2019, you submitted an appeal challenging MPD’s denial. On November 22, 2019, MPD submitted a response to your appeal.¹ In MPD’s response, MPD states that the request was properly denied pursuant to D.C. Official Code § 2-534(3)(A)(i) and (a)(3)(C) (“Exemption 3”) because the information you sought is part of an ongoing criminal investigation. In addition, MPD contends that the disclosure of the information you have requested would constitute an unwarranted invasion of personal privacy under D.C. Official Code § 2-534(a)(2) (“Exemption 2”). MPD states that although the investigation had been suspended the case has not been closed.

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).

¹ A copy of MPD’s response to your appeal is attached to this decision. MPD concedes that its initial FOIA response contained incorrect factual information; however, MPD has confirmed that its response to the FOIA appeal is based on the correct information in the PD-251 incident report.

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)

Exemption 3(A)(i) protects from disclosure investigatory records that are compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. D.C. Official Code § 2-534(a)(3)(A)(i). 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 the law enforcement purpose of investigating an assault on you. Although MPD has asserted that the criminal investigation pertaining to the incident is currently suspended, MPD has not closed the investigation. And, MPD anticipates that the investigation will resume when additional information is gathered. The mere fact that the underlying incident occurred several years ago does not overcome the purpose of Exemption 3(A)(i), which is to protect against 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). 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.

As to the disclosure having an impact on any additional investigation, MPD states in its response that the premature disclosure of the unedited video will interfere with any possible future case against your assailants. MPD further states that a close review of the YouTube video reveals that the only individuals whose faces have been redacted are you and two witnesses who were not involved in the assault. MPD further states that the faces of the four persons identified by you as the persons involved in the attack on you were not redacted. Therefore, the only individuals whose faces would be exposed by the release of the unedited version of the YouTube video would be you and the two witnesses.

In this context, MPD states that the release of the unedited video will jeopardize the investigation because the suspects, currently unknown, will then have the unfettered opportunity to intimidate and potentially harm the now-identifiable witnesses. Given the propensity for violence already exhibited by the suspects and the seriousness of the charges that they are facing, we must take seriously the possibility that they will threaten or attempt to do harm to you and/or the witnesses.

Based on the foregoing and the statutory purpose of Exemption 3(A)(i), we find MPD had sufficient authority under DC FOIA to withhold the investigatory records you requested.

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).

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”).

Clearly, the witnesses to the assault on you have a privacy interest in the non-disclosure of the unedited YouTube video. And, as stated above, the faces of the four suspects/persons of interest are not redacted; only your face and the faces of the two uninvolved witnesses are redacted. And, even if you were willing to waive your privacy interests, you cannot waive the privacy interests of the two witnesses. The two witnesses 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.

In *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989), the Supreme Court 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. On this issue, MPD states that the unredacted YouTube video and the images you requested do not reveal any information about MPD’s conduct. Therefore, there is no public interest in the records in question that would outweigh the privacy interests at issue in this matter.

Conclusion

Based on the foregoing, we conclude that MPD had sufficient authority under DC FOIA to withhold the unredacted YouTube video or images of individuals who were witnesses to the assault on you. Therefore, 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 the DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

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