**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**EXECUTIVE OFFICE OF THE MAYOR**
**MAYOR'S OFFICE OF LEGAL COUNSEL**
**Freedom of Information Act Appeal: 2020-054**

January 28, 2020

VIA ELECTRONIC MAIL

Mr. Jeffrey Andrew Brown

RE: FOIA Appeal 2020-054

Dear Mr. Brown:

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 pursuant to DC FOIA.

Background

You submitted a FOIA request to MPD for records relating to a hit and run accident in October 2019. On December 10, 2019, MPD denied your request stating that the records you are seeking are considered investigatory records for law enforcement purposes and contain information the disclosure of which would constitute an unwarranted invasion of personal privacy. Therefore, the requested records are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(2) ("Exemption 2") and D.C. Official Code § 2-534 (3)A)(i)and (a)(3)(C) ("Exemption 3").

On December 10, 2019, this Office received your appeal challenging MPD's denial of your request. On January 24, 2020, we received MPD's response to your appeal.[1] In its response, MPD reaffirms its position that the responsive records are protected from disclosure pursuant to Exemptions 2 and 3.

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, the DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." *Id*. at § 2-532(a).

[1] A copy of MPD's response is attached.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *See Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

*Exemption 3 – Investigatory Records Compiled for Law-Enforcement Purposes*

D.C. Official Code § 2-534(a)(3)(A)(i) ("Exemption 3") 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 the law enforcement purpose of investigating a hit and run incident and MPD has asserted that the criminal investigation pertaining to the incident is ongoing. In the appeal response, MPD acknowledges that the investigation is presently in a "suspended" status. However, MPD correctly notes that an investigation's "suspended" or "dormant" status does not mean the investigation is no longer ongoing.[2] As a result, MPD has met the threshold requirements for invoking Exemption 3, and our analysis turns on whether disclosure would interfere with enforcement proceedings.

The fact that the accident occurred three months ago does not overcome the purpose of Exemption 3, 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 a 1975 disappearance remained ongoing and therefore was still "prospective" law enforcement proceeding.). MPD states that the investigation is ongoing and that disclosing the records you requested would reveal the direction of its ongoing investigation and allow involved persons to tailor their testimony. In light of the statutory purpose of Exemption 3, we find that MPD was justified in withholding from disclosure the records you requested.

Exemptions 2 and 3(C) (Privacy)

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[2] In National Public Radio v Bell, 431 F.Supp 509 (D.D.C. 1977), the District Court held that a "dormant" case was exempt from disclosure under the federal Exemption 7(a) the federal equivalent of the District's Exemption 3.

Exemptions 2 and 3(C) of the DC FOIA relate to personal privacy. Exemption 2 prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." 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). Exemption 3(C) provides an exemption for disclosure for "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . [c]onstitute an unwarranted invasion of personal privacy." D.C. Official Code § 2-534(3)(C). While Exemption 2 requires that the invasion of privacy be "clearly unwarranted," the word "clearly" is omitted from Exemption 3(C). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(C) is broader than under Exemption 2. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

The first part of the privacy 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*. The instant matter concerns a hit and run incident involving a family member. The records compiled relate to MPD's investigation into the incident. As such, these records constitute "investigatory records compiled for law enforcement purposes" under D.C. Code § 2-534(a)(3)(c). The witnesses, suspects and police officers involved in an investigation have an interest in protecting the privacy of the requested records against public disclosure. *See Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 863 (D.C. Cir. 1981)("[I]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption under [(3)(C)]."). An agency is justified in not disclosing documents that allege wrongdoing even if the accused individual was not prosecuted for the wrongdoing, because the agency's purpose in compiling the documents determines whether the documents fall within the exemption, not the ultimate use of the documents. *See Bast v. DOJ*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). Moreover, we note that you do not have privacy waivers from any of the individuals involved in the matter.

The second part of the privacy 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. The public interest in the disclosure of a public employee's disciplinary files was addressed by the court in *Beck v. Department of Justice, et al*., 997 F.2d 1489 (D.C. Cir. 1993). In *Beck*, the court held:

> The public's interest in disclosure of personnel files derives from the purpose of the [FOIA]--the preservation of "the citizens' right to be informed about what their government is up to." *Reporters Committee,* 489 U.S. at 773 (internal quotation marks omitted); *see also Ray,* 112 S. Ct. at 549; *Rose,* 425 U.S. at 361. 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. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.

*Id*. at 1492-93.

In this case, we find that disclosing the accident records would not "contribute *significantly* to public understanding of the operations or activities of the government." *See Berger v. I.R.S.*, 487 F. Supp. 2d 482, 505; *see also Hines v. D.C. Bd. of Parole*, 567 A.2d 909, 912 (D.C. 1989) (noting that "courts are generally reluctant 'to give third parties access to the presentence investigation report prepared for some other individual or individuals'"). While the public may be interested in such information, it is unclear how providing the requested records related to the accident investigation would further the understanding of the public of MPD's performance of its statutory duties. As a result of the existence of a privacy interest and the lack of a relevant public interest in the records at issue, MPD was justified in withholding the records.

Segregability

The final issue to address is segregability. Under D.C. Official Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). The phrase "reasonably segregable" is not defined under the 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). Segregablity is often an issue when the records are being withheld under privacy concerns. However, we have also upheld the withholding of the records as law enforcement records under Exemption 3. Segregability is not an issue with the documents withheld under Exemption 3.

Conclusion

Based on the forgoing, we conclude that MPD had sufficient authority under DC FOIA to withhold the responsive records identified and we hereby dismiss your appeal. This shall constitute the final decision of this Office in connection with 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 Hyden, Assistant General Counsel

MPD (via email)