

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2020-069**

July 8, 2020

VIA ELECTRONIC MAIL

Ms. Kathy Henderson

RE: FOIA Appeal 2020-069

Dear Ms. Henderson:

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 a copy of all police reports, including public and MPD in-house narratives, in which a specific detective was assigned to conduct an investigation relating to you (including any damage to property reports). MPD provided you with copies of three (3) police offense reports for three incidents (March 11, 2009, March 18, 2009 and September 27, 2018) involving you in which the detective in question was assigned to handle the investigation. The case notes for two of the incidents (March 18 and September 27) were also produced to you. Both the case notes and reports were redacted pursuant to D.C. Code § 2-534(a)(2) (“Exemption 2”) and D.C. Code § 2-534 (a)(3)A(i) and (a)(3)(C) (“Exemption 3”). You appealed contending that the production was incomplete. Specifically, you were concerned with the redactions of the supervisors’ names on the record. You also argued that the agency should not have withheld any records on the March 11, 2009 incident, since that matter was closed, and that MPD should have provided you with a copy of the arrest warrant related to the September 27, 2018 incident.

On January 30, 2020, MPD responded to your appeal.<sup>1</sup> In its appeal, MPD indicated that it would produce to you the internal versions of the three offense reports with redactions other than your name and that of the detective in question, in order to protect the privacy of individuals identified in the reports. MPD also indicated that it stood by the redaction of the names of the supervisors who approved the offense report and arrest affidavit arising from the September 27, 2018 incident. However, the names of the supervisors for the other two incidents (March 13 and

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<sup>1</sup> A copy of MPD’s response to your appeal is attached to this decision.

18, 2009) were not redacted. The names of the supervisors did not appear on the records because the supervisors' names did not get transferred in the migration of information from one record management system to a different system. Finally, MPD also indicated that a search warrant application regarding the September 27, 2018, incident was not produced because the warrant was declined by the United States Attorney's Office ("USAO"). D.C. Code § 2-534(a)(4) ("Exemption 4").

### 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).

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 4*

Under D.C. Code § 2-534(a)(4), Exemption 4 vests public bodies with discretion to withhold "inter-agency or intra-agency memoranda and letters which would not be available by law to a party other than an agency in litigation with the agency[.]" This exemption has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (discussing conditions under which new privileges may be recognized). As a result, Exemption 4 encompasses the deliberative process privilege. *See McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). The deliberative process privilege protects agency documents that are both pre-decisional and deliberative. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if it was generated before the adoption of an agency policy and it is deliberative if it "reflects the give-and-take of the consultative process." *Id.* Under D.C. Official Code § 2-534(e), the deliberative process privilege, attorney work product privilege and attorney-client privileges are expressly incorporated under the inter-agency memorandum exemption listed in § 2-534(a)(4).

MPD indicates that the application for the arrest warrant for the September 27, 2018 incident was prepared by MPD to assist the USAO in determining whether to prosecute assault charges against you. As such, the warrant application is pre-decisional. And, the warrant application is deliberative as it reflects the facts and information to support a determination of probable cause for the arrest. We therefore conclude that the application for the warrant is subject to the deliberative process privilege and may be withheld under Exemption 4.

### *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 for the March 11, 2009 incident in which a white powdery substance was poured into your vehicle’s gas tank were compiled for the law enforcement purpose of investigating that incident. Although you contend the investigation is closed, MPD states that the investigation is currently “suspended” under the terms of General Order 401.01 Field Reporting System. Although the case is currently “suspended”, the investigation remains open because additional information (e.g., new evidence, arrest of a suspect in a subsequent case) may be forthcoming and would be pursued at that time. *See National Public Radio v Bell*, 431 F.Supp 509 (D.D.C. 1977) (a “dormant” case was exempt from disclosure under the federal Exemption 7(a) the federal equivalent of the District’s Exemption 3). As a result, MPD has met the threshold requirements for invoking Exemption 3, and our analysis turns on whether disclosure of the investigatory records would interfere with enforcement proceedings.

MPD states that disclosure of the investigative file will interfere with any prospective law enforcement proceeding. According to MPD, the requested file details every investigative effort made to solve the case and the evidence collected or not collected. Release of such inner workings of the investigation would allow the currently unknown perpetrator to destroy evidence, create alibis and/or intimidate witnesses. Finally, the fact that the incident occurred almost ten years 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.). In light of the statutory purpose of Exemption 3, we find that MPD was justified in withholding from disclosure the records regarding the March 11, 2009 incident that you requested.

### Exemptions 2 and 3(C) (Privacy)

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 FOIA requests seek information regarding investigation involving you and a particular detective. The records compiled from MPD’s investigations 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). More specifically, courts have found that disclosure of an investigator’s name would expose investigators to unwanted contact and harassment. *See Nix v. United States*, 572 F.2d 998, 1006 (4<sup>th</sup> Cir. 1978) (holding that the public identification of FBI agents could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives); *see also New England Apple Council v. Donovan*, 725 F.2d 139, 142 (1<sup>st</sup> Cir. 1984).

We agree with MPD’s assessment that even the supervisors of investigative staff have similar privacy interests. However, MPD also states that, for many of the records, the names of the supervisors were not provided because the names were not preserved in the transfer of the records from one records management system to a new records management system. In any event, MPD also states it will now release to you records previously withheld with redactions of employee names but no redaction of your name or that of the detective identified in your FOIA request.

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 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). While the public may be interested in such information, it is unclear how providing the requested records related to the investigations 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 some of the records and producing other records with redactions.

### 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). Segregability is often an issue when the records are being withheld under privacy concerns. And, in this instance, MPD indicates that it will produce additional records to you with names of individuals (excluding you and the detective identified in your request) redacted under Exemption 2.

### Conclusion

Based on the forgoing, we remand this matter to MPD to complete the supplemental production of records discussed in MPD's response to your appeal. You may file a new appeal related to the production of additional records once you have received the records. 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)