

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-178**

September 29, 2021

VIA ELECTRONIC MAIL

Mr. Simba Hodari

RE: FOIA Appeal 2020-178

Dear Mr. Hodari:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you claim that the Metropolitan Police Department (“MPD”) improperly denied your request for records under the DC FOIA.

Background

You submitted a request under the DC FOIA to MPD seeking photos and body-worn camera footage arising out of an automobile collision, in which one of your clients was allegedly injured. MPD denied your request under D.C. Code §§ 2-534(a)(2), (a)(3)(A)(i) and (a)(3)(C), asserting that disclosure would interfere with an ongoing criminal investigation and that the disclosure of the requested records would constitute an unwarranted invasion of personal privacy

On appeal, you challenge MPD’s decision, stating that “while there may be information on Body Worn Camera [sic] that falls under those exemptions, it is improbable that the contents of the whole file” qualify under the exemptions MPD invoked. MPD responded to your appeal by reaffirming the applicability of the exemptions it cited.¹ In particular, MPD explained that the driver of the striking vehicle was arrested for “Leaving After Colliding” and has been charged with “Assault with a Dangerous Weapon.” MPD provided a docket sheet from the District of Columbia Superior Court showing that the striking driver’s case was still being investigated by a grand jury at the beginning of this year. In addition, MPD again pointed to the DC FOIA’s privacy-related exemptions, claiming that releasing “these records would violate [the striking driver’s] privacy interests as well as the privacy interests of the witnesses, bystanders, officers, and other victims.” MPD further argues that you have not articulated a cognizable public interest under the DC FOIA in the disclosure of these records and notes that a private citizen’s interest in obtaining records to assist in private litigation does not qualify as a public interest.

¹ A copy of MPD’s response to your appeal is attached.

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, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute may be examined to construe the local law.

Exemption 3

D.C. Official Code § 2-534(a)(3)(A)(i) (“Exemption (3)(A)(i)”) provides an exemption for disclosure for “[i]nvestigatory records compiled for law-enforcement purposes” to the extent that disclosure would interfere with enforcement proceedings. Here, MPD argues that the records at issue were both gathered for law-enforcement purposes and that their release would interfere with enforcement proceedings:

In applying the exemption for investigatory records compiled for law enforcement purposes that would interfere with enforcement proceedings under D.C. Code § 2-534 (a)(3)(A)(i), MPD has the burden of showing: (1) the documents requested by FOP have been "compiled for law enforcement purposes," and (2) disclosure of those documents would "interfere with enforcement proceedings." *Bevis v. Department of State*, 801 F.2d 1386, 1388, 255 U.S. App. D.C. 347 (D.C. Cir. 1986). The BWC footage and photos taken during the investigation of the underlying incident were clearly compiled for law enforcement purposes.

.....

MPD also satisfies [the second] prong as a Superior Court Grand Jury is still investigating the case against [the striking driver]. Moreover, premature disclosure of the BWC footage and photos will certainly interfere with any possible future criminal prosecution. Given the seriousness of charge, release of the BWC footage and photos depicting all the of the investigatory efforts immediately after the incident—from canvassing witnesses, collecting evidence, reconstructing the events—would disclose the pace and direction of the investigation as well as lead to witness intimidation and tampering and the destruction of evidence. Therefore, MPD properly withheld the requested BWC footage and photos

This Office has independently reviewed the Superior Court docket and confirmed that, as of the date of this letter, the striking driver’s case remains pending before a grand jury.

MPD's decision to withhold the requested records on this basis accords with a decision issued by this Office in 2017. Specifically, in FOIA Appeal 2017-105, a requestor sought body-worn-camera footage from the scene of a shooting. MPD withheld the entire footage on the basis that disclosure would interfere with an ongoing investigation and enforcement proceedings. We upheld MPD's decision to withhold the records.

As we noted at that time, 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).

The same rationale would apply to this request, and under our precedent, we affirm MPD's decision to withhold the records under Exemption 3(A)(i) while the investigation and law enforcement proceeding continues.

Exemption 2

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). The first part of the analysis is determining whether a sufficient privacy interest exists. *Id.*

A privacy interest is cognizable under the DC FOIA if it is substantial, which is anything greater than *de minimis*. We previously found a privacy interest in body-worn camera footage containing a private person's identification card that was captured by a law enforcement officer in the course of his or her duty. In FOIA Appeal 2019-085, we determined that disclosure of such a record to someone who does not possess authorization would be an invasion of privacy because, "as a categorical matter . . . a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy" *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989). That same rationale applies here with respect to the requested body-worn camera footage, which according to MPD similarly captures footage of a private citizen.

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. *Id.* at 772-773. In this matter, you suggest that the footage would be helpful in resolving private litigation. However, the interest of a private litigant is not considered a public interest in the context of FOIA. See, e.g., *Horowitz v. Peace Corps*, 428

F.3d 271, 278 (D.C. Cir. 2005). Rather, in the context of the DC FOIA, a record is deemed to be of “public interest” if it would shed light on an agency’s conduct. *See Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993).

As we have stated in prior appeals, the release of body-camera footage in this instance would not shed light on MPD’s performance of its duties. Further, the release to a third party of police records, under DC FOIA, identifying named individuals would be an unwarranted invasion of privacy and would not “contribute significantly to public understanding of the operations or activities of the government.” *Berger v. I.R.S.*, 487 F. Supp. 2d 482, 505 (citations omitted); *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’”). As a result of the existence of a privacy interest and the lack of a demonstrated public interest in the records at issue, our precedent holds that MPD had sufficient justification for withholding the requested records, pursuant to Exemption 2 of the DC FOIA.

Conclusion

Based on the forgoing we affirm MPD’s decision and deny your appeal.

This shall constitute 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)