

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-071**

September 28, 2022

VIA ELECTRONIC MAIL ONLY

Nikhel Sus

RE: FOIA Appeal 2021-071

Dear Mr. Sus:

This letter is in response to the administrative appeals that you have submitted to the Mayor pursuant to the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531, *et seq.* In your appeals, you have challenged the response of the Metropolitan Police Department ("MPD") to your January 12, 2021 FOIA request, identified as 2021-FOIA-02344, which sought the following:

1. All records from December 1, 2020 to January 6, 2021 relating to efforts to secure the U.S. Capitol Building or surrounding areas during the January 6, 2021 congressional session to count electoral votes, including without limitation any responsive communications with the U.S. Capitol Police, the Federal Bureau of Investigation, the Department of Justice, the Department of Defense, the Army, the National Guard, the Department of Homeland Security, the D.C. Mayor's Office, or the D.C. Homeland Security and Emergency Management Agency;
2. All records from December 1, 2020 to January 6, 2021 reflecting any planned demonstrations, gatherings, disruptions, attacks, or riots in Washington, D.C. on January 6, 2021 that were identified by MPD or other agencies through social media monitoring, threat assessments, or other means;
3. All records from December 1, 2020 to January 6, 2021 reflecting any tips, complaints, referrals, allegations, or reports submitted to MPD regarding planned demonstrations, gatherings, disruptions, attacks, or riots in Washington, D.C. on January 6, 2021; and
4. All records from December 1, 2020 to January 6, 2021 reflecting communications with other entities—including without limitation the U.S. Capitol Police, the Federal Bureau of Investigation, the Department of Justice, the Department of (Date Range for Record Search: From 12/1/2020 To 1/6/2021)

On January 13, 2021, MPD denied your request because the release of the records would constitute a clearly unwarranted invasion of personal privacy, by and through potential acts

including but not limited to witness intimidation, and would therefore be exempt from disclosure under D.C. Code §2-534(a)(2) and (a)(3)(c). Additionally, MPD asserted the documents and body cameral footage are part of an ongoing criminal investigation, the release of which could interfere with the direction and pace of the investigation, and would therefore be exempt from disclosure pursuant to DC Official Code §2- 534(a)(3)(A)(i).

In your appeal, you have asserted that MPD has failed to assert a privacy interest, and *assuming arguendo*, any privacy interest exists, it does not outweigh the public interest in disclosure. Further, you state MPD must show that the records were “prepared or assembled in the course of investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified [persons], [or] acts which could, if proved, result in civil or criminal sanctions.” (citation omitted).

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. Code § 2-531. In aid of that policy, FOIA creates the right “to inspect...and...copy any public record of a public body...” D.C. Code § 2-532(a).

Under D.C. Code § 2-534(a)(3)(A)(i), records compiled for law enforcement purposes that pertain to investigations are exempt from disclosure to the extent the production of the records would interfere with an enforcement proceeding. *See Rural Housing Alliance v. United States Dep’t of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974)(records compiled for law enforcement purposes that pertain to an investigation are exempt from disclosure if the focus of the investigation is on acts that could, if proven, result in civil or criminal sanctions). To satisfy D.C. Code § 2–534(a)(3)(A)(i), the records: 1) must have been compiled for law enforcement purposes; and 2) disclosure of those records would “interfere with enforcement proceedings.” *Bevis v. Department of State*, 801 F.2d 1386, 1388 (D.C.Cir.1986)

The term “compiled for law enforcement purposes” does not limit the exemption to records that were “originally compiled” or created for that reason. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989). An agency can also establish that such records were later gathered or used for law enforcement purposes at some time before the agency invokes the exemption, even if the information was “generated on an earlier occasion and for a different purpose.” *John Doe*, 493 U.S. at 154, 110 S.Ct. 471

Interference with enforcement proceedings is “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. 214, 232, 98 S.Ct. 2311, 57 L.Ed.2d 159 (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 records exemption] applies.” *Juarez v. Department of Justice*, 518 F.3d 54, 59 (D.C.Cir.2008). While “blanket” or “generic” determinations are generally disfavored, assertions that the disclosure of a particular kind of investigatory record would generally interfere with an enforcement proceeding, within the meaning of the FOIA exemption, is not

precluded.. *Robbins Tire & Rubber Co.*, supra, 437 U.S. at 236.

Based on MPD's representation that the requested documents and/or media are part of an ongoing criminal investigation and the publicly available information detailing ongoing proceedings, we hold that MPD may withhold the identified information. As such, the issue as to whether the subject information may be withheld under D.C. Code §2-534(a)(2) and (a)(3)(c) is moot at this time.

Finally, while it was not specifically raised by MPD, the request broadly uses the term "all" to describe an expansive list of documents sought for which MPD is then tasked with identifying and disclosing. Such a request does not reasonably describe the records sought and is insufficient to permit the identification and location of records within an agency without an unreasonable amount of effort. *See* 1 DCMR § 402.4 ("A request shall reasonably describe the desired records. Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied"); *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) (a request for "any and all" records does not describe the records sought with reasonably sufficient detail). "[T]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Assassination Archives & Research Ctr. v. CIA*, 720 F.Supp. 217, 219 (D.D.C.1989).

An agency's obligations commence upon receipt of a valid request. *See Crooker v. CIA*, 577 F.Supp. 1225 (D.D.C.1984); *Lilienthal v. Parks*, 574 F.Supp. 14, 17 (E.D.Ark.1983). Potentially segregable information may be available by submitting a more detailed request.

This constitutes the final decision of this Office. You may challenge any subsequent response to your request by separate appeal to this Office. If you are dissatisfied with this decision, you may commence a civil action in the Superior Court of the District of Columbia in accordance with D.C. Code § 2-537.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Brandynn Reaves, MPD FOIA Officer (via email only)