

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-139**

September 28, 2022

VIA ELECTRONIC MAIL ONLY

Mr. Jeffrey Light

RE: FOIA Appeal 2021-139

Dear Mr. Light:

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 behalf of your client Jason Leopold. In your appeal, you assert the Office of Unified Communications (“OUC”) failed to properly respond to your client’s FOIA request.

Background

On January 13, 2021, your client submitted a DC FOIA request to OUC, identified as 2021-FOIA-02427, seeking the “disclosure of the Background Event Chronology for any 911 calls or radio runs for the time period of 12 Noon eastern to 9 pm eastern relating to events at the US Capitol.”

On March 30, 2021, the request was closed by OUC which explained:

It has been determined that the information you are seeking is part of an ongoing open criminal investigation and enforcement proceedings. The release of such information could interfere with the enforcement proceedings by revealing the direction and pace of the investigation. It could also lead to attempts to destroy or alter evidence, reveal information about potential witnesses who could then be subjected to intimidation as part of an effort to frustrate future investigative activities, or could place witnesses in danger. For these reasons information about this incident is exempt from disclosure pursuant to D.C. Official Code § 2-534 (a)(3)(A)(i) and (a)(3)(B).

You filed the instant appeal challenging OUC’s withholding of the background event chronologies in their entirety. In your appeal you assert that “Event Chronologies do not reveal any *investigative* activities of OUC or other District agencies. They simply document information like the receipt of unsolicited 911 calls by members of the public and the location of where the incident is taking place (i.e., the U.S. Capitol).” You also assert that “even if the Background Event Chronologies do contain information about pending investigations,

disclosure would not reasonably be expected to compromise the investigation. The only evidence that would be revealed is the fact that 911 calls took place, and there is no possibility that disclosure would increase the risk that 911 calls would be destroyed.”

On April 7, 2021, OUC responded to your appeal in an email to this Office. In it OUC explained:

Throughout the review process, OUC personnel contacted MPD to see if the documentation requested was releasable due to the contents being included in an active MPD investigation. MPD notified the OUC that the incident remains under investigation and the background event chronology documentation would be exempt from disclosure as the content could interfere in the active enforcement proceeding. OUC therefore denied the original request. After this appeal, OUC discussed with MPD again and agreed that certain information such as the date and times listed on the background event chronologies may be released to the requester. However, the content of the call, including the caller’s name, phone number, and other information remain exempt and shall not be released as they may pose a risk of being harmful to an enforcement proceeding, as there are still outstanding suspects who have not been charged in the matter at issue, as well as investigations into both suspects and events which took place at the U.S. Capitol Building and the surrounding areas. The disclosure of these records could reveal information used or to be used in the investigation, and such information should be withheld.

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, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” D.C. Code § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. D.C. Code § 2-534.

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 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 (a)(3)(A)(i) protects from disclosure investigatory records that are compiled for law enforcement purposes where the 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 are being used as part of an investigation into the events which took place at the U.S. Capitol and surrounding areas, and OUC has asserted that the criminal investigations and enforcement proceedings pertaining to the events are ongoing. As a result, OUC has met the threshold requirements for invoking Exemption (a)(3)(A)(i), and our analysis turns on whether disclosure would interfere with enforcement proceedings.

OUC maintains that disclosing the records you requested could reveal the direction of MPD's ongoing investigation and allow suspects to avoid detection, arrest, and prosecution. In light of the statutory purpose, we find that OUC properly withheld from disclosure the investigatory records you requested.

Conclusion

Based on the foregoing, we affirm OUC's decision to only release the redacted event chronologies and hereby dismiss your appeal.

This constitutes 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.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Jared Siegel, OUC FOIA Officer (via email only)