

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-202**

November 2, 2022

VIA ELECTRONIC MAIL

Rend Smith

RE: FOIA Appeal 2021-202

Dear Mr. Smith:

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 have challengef the response of the Metropolitan Police Department (“MPD”) to your DC FOIA request.

Background

On April 23, 2021, you submitted a DC FOIA request to MPD, identified as 2021-FOIA-04673, seeking all records related to the “Freeway Phantom” homicide investigations. On May 27, 2021, MPD denied your request in full because “the information you are seeking is part of an open investigation” and is exempt from disclosure under D.C. Code §§ 2-534 (a)(2), (a)(3)(A)(i), and (a)(3)(C). Specifically, MPD stated the “release of this 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.”

In your June 18, 2021 appeal, you assert that MPD has an obligation to make an evidentiary showing (1) that the records are to be used in a prospective law enforcement action and (2) that the disclosure of the records would be prejudicial to such an action. (citation omitted).

On June 22, 2021, we notified MPD of your appeal and requested a response. MPD responded on September 16, 2022 reiterating its position. Further, MPD explained that “[i]n addition to the destruction of evidence and witness intimidation/tampering, the release of the investigatory files regarding the Freeway Phantom murders would hinder the investigation/prosecution by making it more difficult for MPD to: (a) verify and corroborate future witness statements and evidence; (b) discern which tips, leads, and confessions have merit and deserve further investigation and which are inconsistent with the known facts and can be safely ignored, and (c) conduct effective interrogations of suspects.”

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 3(a)(3)(A)(i)

Exemption 3(a)(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).

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.” *Robbins Tire & Rubber Co.*, 437 U.S. at 232. “[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.*, 437 U.S. at 236.

The records you seek were compiled as part of an investigation into specific homicides, and MPD has asserted the investigation is ongoing. As a result, MPD has met the threshold requirements for invoking Exemption 3(a)(3)(A)(i), and our analysis turns on whether disclosure would interfere with enforcement proceedings.

The old age of the cases does not overcome the purpose of Exemption 3(a)(3)(A)(i), which is to protect 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 1975 disappearance remained ongoing and therefore was still “prospective” law enforcement proceeding). MPD maintains that disclosing the records you requested could reveal the

direction of its ongoing investigation and allow suspects to avoid detection, arrest, and prosecution. In light of the statutory purpose of Exemption 3(a)(3)(A)(i), we find that MPD properly withheld from disclosure the investigatory records you requested.

Conclusion

Based on the foregoing, we affirm MPD's decision 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.

Sincerely,

The Mayor's Office of Legal Counsel

cc: Brandy Reaves, FOIA Officer, MPD (via email)