GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-263

November 30, 2022

VIA ELECTRONIC MAIL

Mr. Brad Heath

RE: FOIA Appeal 2021-263

Dear Mr. Heath:

This letter is in response to the administrative appeal 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 appeal, you have challenged the response of the Metropolitan Police Department ("MPD") to your September 7, 2021 FOIA request, identified as 2021-FOIA-07826, which sought the following:

> Please provide me with copies of the following records regarding the Jan. 6, 2021 shooting of Ashli Babbitt by U.S. Capitol Police Lt. Michael Byrd:
>
> * Copies of any correspondence, including emails, between the department and the U.S. Attorney's Office.
> * Copies of any reports produced by or for the department.
> * Copies of any statements by witnesses or by Lt. Byrd.
> * Copies of any video or audio recordings gathered during the course of the Investigation, including any recordings of interviews with Lt. Byrd or other witnesses.
> * Copies of any correspondence, including emails, with the U.S. Capitol Police.

On September 8, 2021, MPD denied your request because a release of the records, audio or video would constitute a clearly unwarranted invasion of personal privacy and, as such, they are exempt from disclosure pursuant to D.C. Code § 2-534(a)(2) and (a)(3)(C). Additionally, MPD asserted the materials you seek are exempt from disclosure pursuant to D.C Code §2-534(a)(3)(A)(i) and (a)(3)(B) because:

> The material you seek remains the subject of open and ongoing criminal investigation(s); could interfere with enforcement proceedings by revealing the direction and pace of (the) investigation(s); 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; place any witnesses in danger; and, could deprive a person of a right to a fair trial or an impartial adjudication.

In your September 17, 2021 appeal, you have asserted other agencies have "publicly declared that their investigations…have ended", there is no risk of interference with any proceeding, a "body of information" is already public, and there is public interest in disclosure.

Discussion

D.C. Code § 2-534(a)(2) ("Exemption 2") applies to "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

D.C. Code § 2-534(a)(3)(C) ("Exemption 3") is more expansive than Exemption 2, and protects from public disclosure information contained in an investigatory file that "would constitute an unwarranted invasion of privacy." Exemption 3 lacks the key word "clearly" that is contained in Exemption 2, and therefore is a broader privacy privilege.

In assessing MPD's decision to withhold the requested information, the first part of the analysis is determining whether a sufficient privacy interest exists. *Id*. A privacy interest is cognizable under D.C. FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep't. of Justice*, 806 F. Supp. 2d 105, 113 (D.C. Cir. 2011). Information such as names, personal phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g*., *Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). Moreover, the D.C. Circuit has held individuals have a "strong interest" in not being associated with unwarrantedly with alleged criminal activity whether they be suspects, witnesses, or investigators. *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990). Images are also considered to be personally identifiable information. *See, e.g*., *Mingo v. DOJ*, 793 F. Supp. 2d 447, 456 (D.C. Cir. 2011).

In considering the privacy rights of the deceased, courts have found that "one's own ... interest in privacy ordinarily extend beyond one's death." *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001). Rather, the privacy interest of an individual may only be diminished, not eliminated, if that individual is deceased. *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) ("We have recognized that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased"); *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) ("The fact of death, therefore, while not requiring the release of identifying information, is a relevant factor to be taken into account in the balancing decision whether to release information").

The second part of a 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. In the context of D.C. FOIA, a record is deemed to be of "public interest" if it would shed light on an agency's conduct. *Beck v. Department of Justice, et al*., 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

> 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.

Id. at 1492-93.

The public nature of information does not necessitate the subsequent release of related documents. *Reporters Comm. for Freedom of Press*, 489 U.S. at 762 (1989); *Long v. United States DOJ*, 450 F. Supp. 2d 42, 68 (D.C. Cir. 2006) ("the fact that some of the personal information contained in these records already has been made public in some form does not eliminate the privacy interest in avoiding further disclosure by the government."); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 53 (D.C. Cir. 2003) (finding that media identification of persons mentioned in a law enforcement file "does not lessen their privacy interests or 'defeat the exemption,'").

In the absence of any identified countervailing public interest, we hold that MPD may withhold the identified information. As such, any discussion as to whether the subject information may be withheld under D.C Code §2-534(a)(3)(A)(i) and (a)(3)(B) is deferred.

Finally, 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). "'Entire records are exempt from disclosure when it is shown that the exempt and nonexempt information are 'inextricably intertwined,' such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little information value.' *See D.C. v. Fraternal Ord. of Police Metro. Police Lab. Comm.*, 33 A.3d 332, 346 (D.C. 2011).

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