

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-069**

January 18, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Janelle Kuehnert

RE: FOIA Appeal 2022-069

Dear Ms. Kuehnert:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the Metropolitan Police Department (“MPD”) to your DC FOIA request.

Background

On January 10, 2022, you submitted a DC FOIA request to MPD, identified as 2022-FOIA-02451, which sought the following:

Our minor client, [name omitted], was involved in a pedestrian accident on December 10, 2021. The Major Crash Investigations Unit responded to the scene, investigated, and wrote a report, CCN # 21180221. The Public Incident Report describes video footage of the accident. We are thus requesting all video footage and/or photographs relating to the accident involving [name omitted]. (Date Range for Record Search: From 12/10/2021 To 12/10/2021)

On January 11, 2022 MPD denied your request in full for the following reasons:

A search was conducted by personnel assigned to the Metropolitan Police Department (MPD) it has been determined that the records you are seeking are a part of an ongoing criminal enforcement proceeding. The release of such records could interfere with the enforcement proceeding by revealing the direction and pace of the investigation. It could 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 they are exempt from disclosure pursuant to D.C. Official Code §2-534 (a)(3)(A)(i),(a)(3)(B) and (a)(3)(C).

On January 20, 2022, you filed an appeal with Office asserting, in part, “the FOIA denial

should be overturned because MPD has not shown that any enforcement proceeding even exists”, MPD has not complied with D.C. Code §2-534(a)(3) and “MPD makes extremely conclusory and speculative assertions that the disclosure of the requested records ‘could’ produce various harms.” You have also referenced claims against the District and other persons and/or entities.

We notified MPD of your appeal on February 24, 2022 and requested a response. MPD responded on September 27, 2022. In its response, MPD reasserted its position that the records are protected from disclosure by D.C. Code §§ 2-534 (a)(3)(A)(i),(a)(3)(B) and (a)(3)(C). Further, in the absence of a proof or representation and client identification, “a release of such information would constitute a clearly unwarranted invasion of personal privacy, and is exempt from disclosure pursuant to D.C. Code §§ 2-534(a)(2) and (a)(3)(C).”

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).

D.C. Code §2-534 (a)(3)(A)(i) (“Exemption 3(A)(i)”)

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.

The types of "law enforcement proceedings" to which the § 2-534(a)(3)(A) exemption applies has been broadly interpreted by the courts. Such proceedings have been held to include not only criminal actions, but civil actions and regulatory proceedings as well. *See, e.g., Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1164 n.5 (3d Cir. 1995). They include "cases in which the agency has the initiative in bringing an enforcement action and those . . . in which it must be prepared to respond to a third party's challenge." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

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.*, 437 U.S. at 236.

Conclusion

Based on MPD's representation that the requested information remains the subject of an open investigation, and your assertion as to an imminent or ongoing civil proceeding, we affirm MPD's decision and hereby dismiss your appeal. The applicability of the other exemptions cited by MPD is deferred at this time.

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 Superior Court.

Sincerely,

The Mayor's Office of Legal Counsel

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