

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2022-202**

December 20, 2022

**VIA ELECTRONIC MAIL ONLY**

Mr. Jackie Li

RE: FOIA Appeal 2022-202

Dear Mr. Li:

This letter responds to an administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code § 2-537 ("DC FOIA"). In your appeal, you have challenged the response of the Metropolitan Police Department ("MPD") to your DC FOIA request.

Background

On July 13, 2022, you submitted a DC FOIA request to MPD, identified as 2022-FOIA-08115, which sought the following:

[M]y polygraph results/conclusion from my application.

On July 28, 2022, MPD denied your request in full because "all applicants sign a waiver upon applying for employment with MPD." This waiver states:

I hereby voluntarily submit to a polygraph examination (psycho-physiological detection of deception) by the Metropolitan Police Department, Washington, D.C. I understand this session is completed with video/audio recording equipment. I understand and agree that the results of the polygraph examination may be made available to the proper authorities. In consideration of being given a polygraph examination without cost to me, I, for myself, my heirs, personal representatives and assignees, hereby agree to hold harmless, the Metropolitan Police Department, Washington, D.C., its members, employees, agents, and any members, employees, and agents from any agency or organization that provides quality control or oversight during polygraph examination or polygraph review process from any liability for, or any damage to me, as a result of said examination.

I hereby remise, release, waive, forever discharge and exonerate the Metropolitan Police Department, Washington, D.C., its members, employees, agents, any members, employees, and agents from any other agency or organization that provides quality control or oversight during the polygraph examination or polygraph review process, from any and all action or cause of action, claim, or demand which I have now or may

ever have resulting directly, indirectly, or remotely from said examination or making known any reactions, statements, information, and incidental opinions made by me as part of the examination.

On August 15, 2022, you filed an appeal with this Office stating that you are “a Police Officer undergoing a background investigation for a different department” and that department asked you “to obtain polygraph/psychological records for [your] background packet and background interview.”

We notified MPD of your appeal on August 15, 2022 and requested a response. MPD responded on August 29, 2022 stating it denied your request due to the polygraph waiver and D.C. Code § 2-534(a)(3)(E) which exempts from disclosure techniques and procedures compiled for law-enforcement purposes that are not generally known outside the government.

### Discussion

It is the public policy of the District of Columbia 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 created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for 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). Accordingly, 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)(E) (“Exemption (a)(3)(E)”)*

Exemption (a)(3)(E) protects from disclosure “[i]nvestigatory records compiled for law-enforcement purposes... but only to the extent that the production of such records would...[d]isclose investigative techniques and procedures not generally known outside the government[.]”

To properly invoke Exemption (a)(3)(e), an agency must show that the requested materials were compiled “for law enforcement purposes” and that disclosure of the materials would cause the harm that Exemption (a)(3)(e) is designed to prevent. *Perrone v. FBI*, 908 F.Supp. 24, 28 (D.D.C.1995); *Cowsen–El v. Dep’t of Justice*, 826 F.Supp. 532, 533 (D.D.C.1992).

Background security investigations by governmental units which have authority to conduct such functions have been held by most courts to meet the threshold requirement of being compiled for a “law enforcement purpose.” *See, e.g., Mittleman v. OPM*, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996) (OPM background investigation); *Pontecorvo v. FBI*, No. 00-1511, slip op. at 37-38 (D.D.C. Sept. 30, 2001) (background investigation of potential employee); *Melius v. Nat’l Indian Gaming Comm’n*, No. 92-2210, 1999 U.S. Dist. LEXIS 17537, at \*\*6, 15 (D.D.C. Nov. 3, 1999) (“suitability investigations” for gaming contracts); *Assassination*

*Archives*, 903 F. Supp. at 132 (FBI "background investigations"); *Bostic v. FBI*, No. 1:94 CV 71, slip op. at 2, 11 (W.D. Mich. Dec. 16, 1994) (FBI pre-employment investigation); *Doe v. United States Dep't of Justice*, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (background investigation of individual conditionally offered employment as attorney); *Miller v. United States*, 630 F. Supp. 347, 349 (E.D.N.Y. 1986) (USIA background-security investigation of federal job applicant); *Koch v. Dep't of Justice*, 376 F. Supp. 313, 315 (D.D.C. 1974) (background investigations fall within Exemption 7 because they involve determinations as to whether applicants engaged in criminal conduct that would disqualify them for federal employment).

MPD withheld the requested polygraph results and/or conclusions pursuant to Exemption (a)(3)(E) because the release would reveal the use of various investigative techniques which are not widely known by the public. The release of this information would disclose logistical considerations involved in polygraph examinations. Such disclosure would enable subjects of MPD investigations to circumvent similar techniques. It is widely recognized that release of information with regard to an individual test could foreseeably circumvent the entire polygraph process. See *Shores v. FBI*, 185 F.Supp.2d 77, 85-5 (D.D.C.2002) (finding the Government's withholding of all information concerning a polygraph examination proper under Exemption 7(E));

Releasing questions, answers and results of MPD administered polygraph examinations has the potential to allow a cunning individual to extrapolate a pattern or method to the MPD's questioning technique. Armed with this knowledge, the individual could anticipate and avoid the questioning strategy of MPD. Avoiding this strategy diverts the polygraph examination's function—the discerning of truth. For this reason, MPD's withholding of polygraph results and/or conclusions was proper under Exemption (a)(3)(E).

### Conclusion

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

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,

Mayor's Office of Legal Counsel

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