

July 26, 2018

Sent via e-mail

The Mayor's Office of Legal Counsel, FOIA Appeal
1350 Pennsylvania Avenue, N.W., Suite 407
Washington, D.C. 20004
foia.appeals@dc.gov

**Re: Denial of FOIA Request for Body-Worn Camera and
Other Footage of June 13 and June 25 MPD Actions on
Sheriff Road NE**

To Whom It May Concern:

We write, pursuant to D.C. Code § 2-537 and 1 DCMR 412, to appeal the denial of our recent request under the D.C. Freedom of Information Act (FOIA) seeking body-worn camera (BWC) and surveillance recordings of, and other records relating to, two recent interactions between Metropolitan Police Department (MPD) officers and members of the public on the 5200 block of Sheriff Road NE, in the Deanwood neighborhood of Washington, D.C. The attached request describes the general details of the two incidents, which took place on June 13 and June 25, 2018, respectively.

On July 9, 2018, the American Civil Liberties Union of the District of Columbia (ACLU-DC) submitted our request for (1) “a copy of the footage obtained from all Body-Worn Cameras recorded by any MPD officer in the 5200 block of Sheriff Rd. NE at the time of” the June 13 and June 25 incidents, (2) “any other existing footage—such as dashboard or CCTV surveillance camera—that exists from” those incidents, and (3) “any records related to these incidents, including but not limited to: any after-action reports, any PD-251, PD-76 or other incident reports, and any disciplinary records relating to MPD’s actions on June 13 and June 25, 2018.” The request for BWC footage was made pursuant to D.C. Code § 2-532(c)(2) and 24 DCMR 3902.6, while the other footage and records request was made pursuant to D.C. Code § 2-532(a).

On July 13, 2018, MPD sent a letter denying the entirety of our FOIA request. The letter stated the reason for the denial as follows:

ACLU

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

District
of Columbia

915 15th St. NW, 2nd Floor
Washington, D.C. 20005
(202) 457-0800
acludc.org

The records you are seeking are a part of an ongoing administrative investigation. The release of documents could interfere the investigation with 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 DC Official Code §2-534(3)(B).

Inspector Vendette T. Parker, Letter to Shana Knizhnik re: FOIA Request 2018-BWC-00166, at 1 (July 13, 2018) (attached).

The D.C. Court of Appeals has made clear that “[g]iven the broad disclosure policy reflected in the District’s FOIA,” the Act should be “construe[d] . . . with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information.” *Fraternal Order of Police, Metro. Labor Comm. v. Dist. of Columbia*, 82 A.3d 803, 813 (D.C. 2014). That is, “provisions of the Act giving citizens the right of access are to be generously construed, while the statutory exemptions from disclosure are to be narrowly construed, with ambiguities resolved in favor of disclosure.” *Id.*

The specific exemption cited by MPD applies to “[i]nvestigatory records compiled for law-enforcement purposes . . . but only to the extent that the production of such records *would* . . . [d]eprive a person of a right to a fair trial or an impartial adjudication.” D.C. Code § 2-534(3)(B) (emphasis added).

As your office has previously explained, a statement by an agency that “the enumerated harms *could* occur . . . does not meet the standard.” D.C. Executive Office of the Mayor, Freedom of Information Act Appeal: 2012-03, at 3 (Nov. 23, 2011) (emphasis added), *available at <https://dc.gov/sites/default/files/dc/sites/DC/publication/attachments/201203.pdf>*. In that case, as MPD does here, the government asserted the exemption based on “a possibility that the investigation could be harmed or that the information contained in [the requested] documents could prejudice the public in such a way that the subjects of the investigation would be deprived of a right to a fair and impartial adjudication.” *Id.* at 2. However, such speculative claims are insufficient to meet the pro-disclosure standard of DC’s FOIA statute.

Likewise, D.C. federal courts interpreting the identical exemption of the Federal FOIA, codified at 5 U.S.C. § 552(b)(7)(B), have held that in order to claim the fair trial or adjudication exemption, “the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.” *Washington Post Co. v. U.S. Dep’t. of Justice*,

863 F.2d 96, 102 (D.C. Cir. 1988). In other words, the government cannot meet its burden “by mere conclusory statements; the agency must show how release of the particular material would have the adverse consequence that the Act seeks to guard against.” *Id.* at 101.

MPD makes no attempt to meet this burden. First, it does not describe what adjudication or trial would even possibly be made unfair through the disclosure of the requested materials. No one was arrested during the June 13, 2018 incident, and the cases of the four individuals arrested during the June 25, 2018 incident were “no papered.” Thus, MPD has failed to meet its burden of demonstrating that there is any pending or imminent trial or adjudication to qualify for the exemption.

Even if some adjudication did exist, MPD’s conclusory, speculative, and conditional assertions that the release of the requested records “could” produce various harms fail to show that any such harms are remotely likely.

First, MPD claims that release of the requested records could “reveal[] the direction and pace of the investigation.” But they do not explain how BWC or surveillance video could reveal anything about the investigation. The requests for footage concern only the images themselves, not investigatory memoranda or other internal MPD analyses of the footage. Thus, disclosing the footage requested would shed no light on what, if anything, MPD is doing by way of investigation with any particular video. The same is true for the specific forms requested (such as PD-251s): the forms themselves cannot reveal what investigatory steps MPD is or is not taking based on these forms. To the extent that the broad category of “records related to these incidents” could include a recommendation or discussion about the direction of an ongoing MPD investigation, the ACLU-DC acknowledges that such documents could be exempt, but in order to assert that exemption properly, MPD would have to identify the specific types of documents that it believes are exempt and explain how their disclosure *would* (not merely *could*) cause the harms specified in the statutory text. MPD’s claim that *all* records related to these incidents would reveal the direction and pace of the investigation is not credible; to the extent some small subset of “related” records could be exempt, MPD has failed to carry its burden to show that the exemption applies.

Second, MPD claims that release of the requested records could “lead to attempts to destroy or alter evidence.” Again, MPD does not explain how this could be true. All we will receive are *copies* of records. MPD will retain the originals, which will not be susceptible to alteration or destruction.

Finally, MPD claims that release of the requested records could “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.” This explanation is not only speculative but also far too broad, as it could

apply to any record of any kind in MPD's possession. MPD has offered no reason to believe that any specific record responsive to our FOIA request would reveal identifying information about potential witnesses, or that witness intimidation is at all likely in this situation, in which police officers abused community members.

If the government's assertions regarding the release of the requested footage and records is accepted, it would result in the denial of all requests for body-camera or surveillance camera footage, or any other records of any kind, while any incident is under investigation. Such an all-encompassing interpretation of the "fair trial or impartial adjudication" exemption has no basis in D.C.'s FOIA statute, and flies in the face of the pro-disclosure policy underlying it.

For these reasons, we respectfully request that MPD's denial of FOIA Request 2018-BWC-00166 be overturned and that the Department be directed to release the requested records.

Respectfully,



Shana Knizhnik, Dunn Fellow
ACLU Foundation of the District of Columbia
sknizhnik@acludc.org
(202) 601-4278