

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR**



**Mayor's Office of Legal Counsel**

August 16, 2018

VIA E-MAIL

Ms. Shana Knizhnik

RE: FOIA Appeal 2018-145

Dear Ms. Knizhnik:

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 assert that the Metropolitan Police Department (“MPD”) improperly withheld records you requested pertaining to two interactions between MPD officers and members of the public.

Background

On July 9, 2018, you submitted a FOIA request on behalf of the American Civil Liberties Union of the District of Columbia for records related to MPD’s actions on the 5200 block of Sheriff Road NE on June 13, 2018 and June 25, 2018. Your request sought three categories of records related to the interactions: (1) video recorded by body-worn cameras (“BWC”), (2) video recorded by other means such as dashboard cameras or surveillance cameras, and (3) documents created as a result of the interactions such as after-action reports, PD-251 forms, PD-76 forms, incident reports, and disciplinary records. Your request also asserts that no arrests resulted from the June 13 interaction, that the June 25 interaction resulted in four arrests, and that all of the arrested individuals’ charges were dismissed prior to appearing before a judge.

On July 13, 2018, MPD denied your request in its entirety pursuant to D.C. Official Code § 2-534(a)(3)(B) (“Exemption 3(B)”). MPD’s denial stated that the responsive records were part of an ongoing administrative investigation and that disclosure could potentially: reveal the direction and pace of the investigation, lead to attempts to destroy or alter evidence, or alter testimony of potential witnesses.

This Office received your appeal on July 26, 2018, and contacted MPD for its response.<sup>1</sup> On appeal, you assert that MPD’s application of Exemption 3(B) is improper and that MPD has not met its burden to withhold responsive records pursuant to Exemption 3(B). You argue that MPD

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<sup>1</sup> Due to administrative error, MPD was not notified of your appeal until August 8, 2018. You were subsequently notified of the error and did not object to a delayed timeline for this determination.

has not met the standard for withholding responsive records, based on a previous administrative appeal and case law precedent pertaining to the analogous provision of federal FOIA. You assert that MPD has failed to demonstrate that there is any pending or imminent trial or adjudication necessary to invoke Exemption 3(B). Finally, you challenge each of MPD's stated reasons for withholding, arguing that MPD's conclusory assertions are insufficient.

On August 14, 2018, MPD sent you a response to your appeal.<sup>2</sup> In that response, MPD reconsidered its original denial and disclosed a public incident report for each of the interactions at issue. On the same day you contacted this Office to acknowledge that MPD had disclosed incident reports; however, you asserted that MPD's response following your appeal did not address BWC footage, the primary substance of the request, or your arguments pertaining to Exception 3(B).

### 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. Official 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. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534.

The 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).

Following your appeal, MPD reconsidered its initial denial and voluntarily disclosed incident reports that were previously withheld. In response to MPD's revised position, you indicated to this Office that you are primarily concerned with MPD's continued withholding of BWC footage.

The primary issue remaining to address on appeal is MPD's withholding of video recordings pursuant to Exemption 3(B). Exemption 3(B) exempts from disclosure investigatory records that were compiled for law enforcement purposes and whose disclosure would "deprive a person of a right to a fair trial or an impartial adjudication." D.C. Official Code § 2-534(a)(3)(B). As stated in your appeal, the standard for withholding under this exemption has been interpreted to require "(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. DOJ*, 863 F.2d 96, 102 (D.C. Cir. 1988).

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<sup>2</sup> MPD sent this Office a copy of its response on the same day.

Here, MPD has relied on conclusory assertions and speculation in denying the request for public records and failed to argue that it satisfies the burden of proof set forth in *Washington Post Co. v. DOJ*. *See id.* at 101.

### Conclusion

Based on the forgoing, we find that your appeal is moot in part, insofar as it seeks documents created as a result of the interactions at issue. You are free to challenge the adequacy of MPD's disclosure of these documents by separate appeal to this Office.

We remand this matter to MPD in part, insofar as the appeal seeks BWC and video recorded by other means. Within five business days from the date of this decision, MPD shall review and disclose to you non-exempt portions of such BWC and video recorded by other means or provide a reasonable explanation of the basis for withholding in accordance with Exemption 3(B), as interpreted by *Washington Post Co. v. DOJ*, or other relevant exemptions under DC FOIA. You are free to challenge MPD's forthcoming substantive response by separate appeal to this Office.

This shall constitute 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 in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)