



**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA**



VIA ELECTRONIC MAIL

September 22, 2023

[REDACTED]
D.C. Open Government Coalition
[REDACTED]
[REDACTED]@aol.com

RE: Metropolitan Police Department's Compliance with the District of Columbia Freedom of Information Act #OOG-2023-003_AO

Dear Mr. Mulhauser:

On August 21, 2022, you contacted the Office of Open Government (“OOG”) to request an advisory opinion on behalf of the D.C. Open Government Coalition (“DCOGC”). Your request concerned the Metropolitan Police Department’s (“MPD”) compliance with the District of Columbia Freedom of Information Act (“D.C. FOIA”). You inquired about the denial of an individual’s FOIA request concerning a police disciplinary investigation and cited the following text that MPD included in its determination:

“Please note, that while the District of Columbia (DC) Comprehensive Policing and Justice Reform Amendment Act (“Act”) is now law in the District of Columbia, the language in section 134 pertaining to the release, by posting, of certain disciplinary records is not yet in effect. Section 301(a) of the Act states: “301. Applicability. (a)(1) Sections 105, 125, 134, and 135, amendatory section 4c in section 138, and section 139 shall apply upon the date of inclusion of their fiscal effect in an approved budget and financial plan. (2) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification. (3)(A) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register....”¹

You are concerned that MPD did not properly implement D.C. FOIA when it issued a justification for a denial of records that inaccurately described relevant law. You request that MPD change the text of the justification moving forward and notify requesters of the inaccurate language used in its denial to describe sections 134 and 135 of Subtitle X of Title I of the Comprehensive Policing and Justice Reform Amendment Act (“Comprehensive Policing Act”) of 2022.²

¹ See DCOGC’s complaint, page 1.

² D.C. Law 24-345. Comprehensive Policing and Justice Reform Amendment Act of 2022.

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.”³ A person has a right to inspect and copy any public record except when a public body determines the information should be protected from disclosure.⁴ To support the District’s public policy, I am authorized to issue advisory opinions on the implementation of D.C. FOIA.⁵

Here we have an inaccurate description of law included in a D.C. FOIA determination to deny records. The MPD’s denial of records includes an inaccurate description of sections 134 and 135 of the Comprehensive Policing Act. The inaccurate language, however, was not applied in the analysis to deny the police disciplinary records. The descriptions of the sections therefore do not substantively impact MPD’s decision to deny the release of records.

I. BACKGROUND

In recent years, submissions of D.C. FOIA requests have greatly increased. The public’s interest in transparency and accountability has intensified with the police force in many jurisdictions. In 2022, MPD received 2084 D.C. FOIA requests and applied the personal privacy exemption 913 times in responding to the requests.⁶

On April 21, 2023, the Comprehensive Policing Act became law.⁷ Pursuant to section 134 of the Comprehensive Policing Act, D.C. FOIA was amended to prohibit the use of the personal privacy exemption to categorically exclude the release of disciplinary records for MPD.⁸ Section 135 of the Comprehensive Policing Act amended the Office of Citizen Complaint Review Establishment Act of 1998. Section 135 requires the Office of Police Complaints (“OPC”) to establish and maintain a publicly accessible database that includes information related to certain sustained allegations of misconduct.⁹

On August 24, 2023, I provided MPD with a copy of your advisory opinion request and on September 7, 2023, MPD submitted a written response. In its response, MPD admits to mistakenly including the phrase “by posting” in its justification to deny a FOIA request.¹⁰ MPD states, that its inclusion of the phrase “by posting” is not relevant to MPD’s denial of a FOIA request for disciplinary records. MPD expressed that it will not include the phrase in future responses unless it is otherwise relevant.¹¹ However, MPD disagrees in part with your assertion that the provisions of section 135 of the Comprehensive Policing Act have been funded. MPD

³ D.C. Official Code § 2-531.

⁴ D.C. Official Code § 2-532 (a); D.C. Official Code § 2-534.

⁵ D.C. Official Code § 1-1162.05c(d).

⁶ [Fiscal Year 2022 Individual Agency FOIA Report.](#)

⁷ [Comprehensive Policing and Justice Reform Amendment Act of 2022.](#)

⁸ See Report of the Committee on the Judiciary & Public Safety, Bill 24-0320, the Freedom of Information Amendment Act of 1976, at Subtitle X, Public Release of Records Related to Misconduct and Discipline.

⁹ See Report of the Committee on the Judiciary & Public Safety, Bill 24-0320, the Freedom of Information Amendment Act of 1976, at Subtitle X, Public Release of Records Related to Misconduct and Discipline.

¹⁰ See MPD’s response to complaint, page 1.

¹¹ See MPD’s response to complaint, page 1.

also declines to notify requesters of the error included in the justification to deny police disciplinary records.

In your request for an advisory opinion, you allege that MPD is not properly implementing the D.C. FOIA by providing an inaccurate description of the relevant law. This advisory opinion will discuss sections 134, 135, and 301(a)(1) of the Comprehensive Policing Act as they apply to MPD's implementation of D.C. FOIA requests for police disciplinary records. As your request takes issue with the language MPD used to convey its decision and does not suggest that MPD incorrectly withheld the requested disciplinary records, this opinion does not address the denial of records.

II. DISCUSSION

You state in your request for an advisory opinion that the text that accompanied the recent MPD denial of a DC FOIA request "appears incorrect in several ways – it's wrong about what Sec. 134 does and it's wrong that release by posting is not funded." The DCOGC's understanding of the intent of sections 134 and 135 of the Comprehensive Policing Act as two access protocols for police discipline records is correct. You also correctly state that Section 301(a) of the Comprehensive Policing Act made implementation of sections 134 and 135 subject to appropriations. At issue is MPD's implementation of D.C. FOIA and MPD's application and description of sections 134 and 135 of Subtitle X of Title I of the Comprehensive Policing Act.

A. MPD's language for denying a request for records concerning a police disciplinary investigation did not accurately describe sections 134 and 135 of the Comprehensive Policing Act.

In MPD's response to the OOG, MPD discussed its reliance on D.C. FOIA's personal privacy exemption.¹² MPD currently applies the personal privacy exemption to withhold police disciplinary records.¹³ In this instance, MPD applied the D.C. FOIA personal privacy exemption to withhold records on a police disciplinary investigation. MPD's justification for the denial determination included language that did not accurately describe sections 134 and 135 of the Comprehensive Policing Act. MPD admitted to the mistake and agreed to "change its text going forward." "MPD agreed to not include the phrase "by posting" in future FOIA request language discussing section 134. MPD also agreed to delete references to section 135 and other sections of the Comprehensive Policing Act that are not relevant to a specific FOIA request."¹⁴

Based on my review of the Comprehensive Policing Act, review of MPD's denial language included in DCOGC's complaint, and MPD's use of D.C. FOIA's personal privacy exemption to withhold the requested information, I find that MPD complied with DC FOIA. MPD's application of the personal privacy exemption was proper in this instance. The inaccurate description of sections 134 and 135 of the Comprehensive Policing Act does not change the substance of the denial of the police disciplinary records. Having established MPD's misinterpretations of sections 134 and 135 of the Comprehensive Policing Act, the discussion below focuses on why the

¹² D.C. Official Code § 2-534(a)(2).

¹³ See MPD's response to DCOGC's complaint, page 2.

¹⁴ See MPD's response to DCOGC's complaint, page 3.

misinterpretations of the Comprehensive Policing Act do not have an impact on MPD's D.C. FOIA compliance at this time.

B. The Comprehensive Policing Act is current law but provisions impacting MPD are currently not funded.

While the Comprehensive Policing Act became law approximately 5 months ago, the new provisions regarding more public access to police investigative records, have not been funded. The implementation and applicability of sections 134 and 135 depend on section 301(a)(1) of the Comprehensive Policing Act. The appropriations and funding shall apply upon the date of inclusion of their fiscal effect in an approved budget and financial plan.¹⁵ Until the funding contingency is met, sections 134 and 135 will not take effect.¹⁶ I consulted with the Office of the Budget Director to confirm the relevant sections continue to be unfunded.¹⁷

MPD is aware of its obligation to adhere to sections 134 and 135 of the Comprehensive Policing Act when the provisions are properly funded. MPD's practice of applying the privacy exemption¹⁸ to withhold disciplinary and investigative records currently remains unchanged by the Comprehensive Policing Act.

II. CONCLUSIONS AND RECOMMENDATIONS

In summary, your request for an advisory opinion concerning MPD's implementation of D.C. FOIA reflects valid concerns about the language used in MPD's response to requests for police disciplinary records. The language used in MPD's denial determination included inaccurate descriptions of sections 134 and 135 of Subtitle X of Title I of the Comprehensive Policing Act and the inaccuracies should be addressed. While MPD must adhere to sections 134 and 135 once those provisions are in effect, the provisions are still subject to appropriation and are not currently being implemented.

I commend MPD for looking into the matter and addressing the denial language which inaccurately describes or references sections of the Comprehensive Policing Act. While I note MPD respectfully declined to proactively follow up with requesters who received the inaccurate language, I recommend that MPD promptly respond to requesters who have questions or concerns about the inaccurate language.

Currently, MPD's implementation of D.C. FOIA and its use of the personal privacy exemption to withhold MPD disciplinary and investigative records remains the same. As detailed above, I find that MPD is in full compliance with D.C. FOIA.

¹⁵ [Comprehensive and Justice Reform Amendment Act of 2022, Section 301\(a\)\(1\)](#).

¹⁶ [Legislation Passed Subject to Appropriations](#), page 3.

¹⁷ [Legislation Passed Subject to Appropriations](#), page 3.

¹⁸ D.C. Official Code § 2-534(a)(2).

Sincerely,



Niquelle M. Allen, Esq.
Director of Open Government
Board of Ethics and Government Accountability

cc: Mark Viehmeyer, General Counsel
Katherine Kelley, Assistant General Counsel
Brandy Reaves, FOIA Officer