



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



September 15, 2023

VIA ELECTRONIC MAIL

**RE: Metropolitan Police Department—Body-Worn Camera Footage
Under the Freedom of Information Act of 1976
OOG-2023-002_AO**

Dear [REDACTED]:

This advisory opinion responds to your February 22, 2023, letter to the Office of Open Government (“OOG”). You asked for an advisory opinion evaluating whether the Metropolitan Police Department (“MPD”) properly applied Exemption 2 of the Freedom of Information Act of 1976 (“D.C. FOIA”)¹ in denying your request for public records related to a traffic incident, including unredacted audio and video of body-worn camera (“BWC”)² recordings.

As Director of Open Government, I am authorized to “issue advisory opinions on the implementation of [D.C. FOIA]” pursuant to section 205c(d) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011.³

Based on the analysis below, I conclude that (1) MPD incorrectly applied Exemption 2 to redact the faces or badge numbers of on-duty officers in uniform since the officers do not have an expectation of privacy; and (2) MPD correctly applied Exemption 2 in redacting the faces of any third-party passersby and the driver’s statement, because you have not articulated a public interest in their disclosure.

¹ Title II of Pub. L. 90-614, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*). Exemption 2 is codified at D.C. Official Code § 2-534(a)(2).

² Under the rules for MPD’s BWC Program, “‘Body-worn camera[?]’ or ‘BWC’ . . . means a camera system with secured internal memory for storage of recorded audio and video that is designed to be worn on the clothing of or otherwise secured to a person.” 24 DCMR § 3999.

³ Effective October 30, 2018 (D.C. Law 19-124; D.C. Official Code § 1-1162.05c(d)).

I. **BACKGROUND**

According to your letter,⁴ on December 31, 2022, you requested “the unredacted [BWC] footage from all officers who assisted at the scene” where a driver hit you while crossing a street in the District of Columbia.⁵

A D.C. FOIA Specialist at MPD (“the Specialist”) did respond with some video, but did not entirely satisfy your request. He sent “heavily redacted footage in which all faces except [yours] have been blurred out, and the witness statement from the driver of the vehicle . . . has been cut out completely.” He cited D.C. FOIA’s Exemption 2, which permits agencies to withhold “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”⁶

The Specialist explained further that, “[w]ithout authorization and/or a privacy waiver on file from individuals . . . who can be seen and/or heard in the video footage, we redact their images and their voices[]to protect their privacy. In addition, the images of, and the badges worn by, MPD police officers are also redacted in BWC footage, as they too have some expectation of privacy although they are acting in their official capacity.”⁷

MPD’s Supervisory FOIA Specialist wrote separately that “MPD cannot release . . . images and/or . . . interviews contained in a police record of someone other than yourself without authorization from those . . . individuals and/or their legal representative (if applicable). . . . Although[] the [driver’s] statement was given and/or recorded in a public space, it does not constitute as [*sic*] a primary benefit to the general public to make release to you under a FOIA without the driver’s consent.”

In essence, your position is that MPD incorrectly relied on D.C. FOIA’s Exemption 2 to blur faces and badges from videos in which the events occurred in public, and to withhold the

⁴ For purposes of this opinion, I am assuming the accuracy of your facts and the authenticity of your attachments. My conclusions are limited to the incident as you presented it, and without the benefit of any knowledge of MPD’s or the witnesses’ positions.

⁵ You also requested “a list of those officers,” but did not raise that as a legal point in your request for this advisory opinion.

⁶ It is unclear why MPD did not use the easier standard of withholding in Exemption 3(C) (“[i]nvestigatory records compiled for law-enforcement purposes . . . to the extent that the production of such records would . . . [c]onstitute an unwarranted invasion of personal privacy” (not “clearly unwarranted” as with Exemption 2)). But, because a letter of denial must contain “[t]he specific reasons for the denial, including citations to the *particular* exemption(s) under section 204 of [D.C. FOIA (D.C. Official Code § 2-534)] relied on as authority for the denial” (emphasis added), I will confine my analysis to Exemption 2 and consider Exemption 3 waived.

⁷ The Specialist did advise that “you can make a request to view the footage at the police district,” though you would not be allowed to re-record it yourself or take written notes.

I assume that the Specialist was referring to MPD’s form entitled “Request To Review Body-Worn Camera Recording,” go.mpdonline.com/go/go_302_13.pdf at 39 (attachment C to General Order SPT-GO-302.13) (Mar. 11, 2016), for which the requester must be the actual “subject of the recording” or her legal representative, *see id.* (emphasis omitted). The requester “must be the only individual in the recording except [law enforcement] officers.” *Id.* For recordings involving others, requesters “need to contact the MPD Freedom of Information Act . . . Office,” *id.*, which, of course, you already did. So, it does not appear that the Specialist’s alternative of viewing the footage in person would give you your desired access to the full footage, including third parties’ identities.

driver’s statement. Based on the following analysis (and limited to the factual history as you present it), I conclude that:

- (1) The redaction of on-duty, uniformed MPD officers’ faces or badges is an incorrect application of Exemption 2.
- (2) Though Exemption 2 is fact-dependent, the subjects of an audio recording may carry a higher expectation of privacy in their voices than in their video appearance. Your request does not present, and I do not find, a public interest to weigh against such a privacy interest.
- (3) There is no public interest in seeing the faces of third-party witnesses to the incident, therefore MPD’s blurring those faces in the video footage was appropriate.
- (4) Given her possible exposure to criminal or civil liability, revealing the face or the voice of the driver is clearly unwarranted in the absence of a competing public interest.⁸

An analysis of the facts and law that led me to reach the conclusion above follows.

II. ANALYSIS

You correctly note that I issued an advisory opinion on November 5, 2020, that considered MPD’s D.C. FOIA policy and practices. I concluded in that opinion that (1) police officers, when performing their duties in uniform and in a public place, do not have an expectation of privacy as to their faces, badge numbers, or identities; and (2) “D.C. FOIA does not support MPD’s redaction of third parties in BWC video footage in every instance,” but rather “[t]he validity of . . . redaction of third parties’ faces . . . depends on the nature of the activity recorded,” *e.g.*, whether the BWC captured “‘alleged criminal activity.’”⁹ Next, I will consider your specific facts in light of the 2020 opinion.

A. **UNIFORMED POLICE OFFICERS, WHEN PERFORMING THEIR DUTIES, DO NOT HAVE A PRIVACY INTEREST APPLICABLE TO D.C. FOIA EXEMPTION 2.**

As the 2020 advisory opinion held, “MPD police officers do not have an expectation of privacy^[10] when performing their duties in a public place, so MPD’s redaction of police officers’ faces, badge numbers, and other information that would identify the police officers does not have a basis in D.C. FOIA.”¹¹

⁸ You did not mention a public interest or a personal motivation, but the courts have found a mere general desire for government oversight, or an individual interest in preparing for litigation using D.C. FOIA rather than traditional civil discovery, to be insufficient to overcome a privacy interest.

⁹ [BWC Advisory Opinion 11 5 2020.pdf \(open-dc.gov\)](#) at 3, 5 n.20, 6, 9, 10 (quoting *Stern v. Fed. Bureau of Investig.*, 737 F.2d 84, 91, 92 (D.C. Cir. 1984)). The opinion also listed five other findings that are not pertinent to your request. For the full summary, see the introductory paragraph to part II of the opinion, *id.* at 3.

¹⁰ The scope of this discussion of “expectation of privacy” was confined to D.C. FOIA and does not necessarily apply to other legal questions such as the constitutionality of a search or seizure.

¹¹ *Id.* at 3.

The opinion clarifies that there *are* scenarios in which identifying elements are properly withheld under Exemption 3(F) (disclosure would “[e]ndanger the life or physical safety of law-enforcement personnel”), and may be redacted, “[f]or instance, where an *undercover* MPD officer’s face, badge number or identification appears in the BWC footage.”¹² However, that concern does not appear in your recitation of the facts; and, even if it did, the Specialist did not invoke Exemption 3.

There is also a BWC-specific exemption, Exemption 2A, which applies to “[a]ny [BWC] recordings recorded by [MPD]: (A) Inside a personal residence; or (B) Related to an incident involving domestic violence . . . , stalking . . . , or sexual assault.”¹³ However, none of those factors appears to apply here, and MPD did not cite Exemption 2A.¹⁴

In summary, I conclude that MPD misapplied Exemption 2 insofar as it partly redacted images of uniformed officers without proper justification.

B. THERE IS NO APPARENT PUBLIC INTEREST IN THE UNREDACTED FACES OR AUDIO OF THE THIRD-PARTY WITNESSES SUFFICIENT TO COUNTER THEIR PRIVACY INTEREST.

1. Even on a public street, third parties recorded on a BWC video may retain a privacy interest under Exemption 2 depending on the facts.

Third party civilians appearing in a BWC video require a more case-specific analysis. As the 2020 advisory opinion stated, “[t]he validity of MPD’s redaction of third parties’ faces from BWC video footage depends on the nature of the activity recorded by the BWC.”¹⁵ If the passersby witnessed wrongdoing, their privacy interest increases, and withholding under Exemption 2, especially if limited to blurring their faces, is more likely to be justified.

The Mayor’s Office of Legal Counsel’s (“MOLC”)¹⁶ opinion in Freedom of Information Act Appeal 2016-45 (“*Gibson*”)¹⁷ has similar facts and legal issues. In that case, the requestor-appellant, an attorney, had requested records related to her client’s being hit by a car.¹⁸ MPD had denied the request in part, including withholding a video that included depictions of third party

¹² *Id.* at 6 & n.25 (emphasis added) (citing D.C. Official Code § 2-534(a)(3)(F) (section 204(a)(3)(F) of D.C. FOIA)).

¹³ *See* D.C. Official Code § 2-534(2A) (section 204(a)(2A) of D.C. FOIA).

¹⁴ Note that many other D.C. FOIA exemptions also have privacy implications even though they do not expressly contain the word “privacy,” such as Exemptions 6 (withholding mandated by “other” statute), 11 (Social security numbers, *etc.*, if in the custody of the Business License Center), 12 (whistleblower protection), 14 (sealed criminal records), 16 (educator evaluations), 17 (taxi manifests), 18 (“information and records of the” Clemency Board), and 19 (certain unclaimed-property records). Again, they do not appear relevant based on your narrative and, in any case, MPD only cited Exemption 2.

¹⁵ [BWC Advisory Opinion 11 5 2020.pdf \(open-dc.gov\)](#) at 9.

¹⁶ Any person denied access to a public record may pursue judicial relief by filing a complaint for injunction or declaration in the Superior Court or (with two exceptions not pertinent here) may first seek administrative review by appealing to the Mayor’s designated agent. Since January 2, 2015, that designated agent has been the MOLC. *See* D.C. Official Code § 2-537(a)-(a-2) & nts; Mayor’s Order 2019-067, 66 DCR 008796 (July 26, 2019).

¹⁷ 63 DCR 008062 (May 27, 2016) (decided Mar. 25, 2016).

¹⁸ The car happened to be an MPD vehicle, but that did not matter to the MOLC’s analysis.

“pedestrians.”¹⁹ MPD asserted that it withheld the *Gibson* video in its entirety because it did not have the technological capability to redact faces “to maintain the privacy interest of third party pedestrians captured by the footage.”²⁰ The MOLC disagreed with MPD and stated that “an individual recorded walking or standing on a public street” does not have “a presumptive privacy interest that would be breached if the recording were publicly disclosed.”²¹ So, even if MPD had the ability to blur faces in *Gibson*, doing so would not have been appropriate because the third party pedestrians “do not have a cognizable privacy interest.”²² The MOLC followed the applicable two-part analysis for Exemption 2: (1) is there a privacy interest; and (2) does the privacy interest outweigh the public interest. In *Gibson*, because the MOLC found no privacy interest *at all* in the third parties who appeared in that video, the MOLC directed MPD to disclose the video in full.²³ The MOLC did not undertake a public interest analysis in *Gibson* because it did not find a privacy interest.

The facts presented here differ from *Gibson*, but the analysis the MOLC applied is applicable. As in your present facts, MPD cited Exemption 2 as its justification for not releasing the unredacted BWC video footage.²⁴ I will examine, based on the facts you presented, whether there is a privacy interest that warrants redaction under Exemption 2 and is unlike *Gibson*. The Exemption 2 analysis is fact-specific; and, while I have only a limited set of facts of your case, *Gibson* appears to differ from your case in two important respects. First, the BWC footage in *Gibson* was video-only (no audio). Second, the *entire* video was withheld in *Gibson* and not released to the requester, while you received the video with just the faces blurred and audio.

The third party pedestrians mentioned in *Gibson* appear without sound and are merely passing by, unlike the video at issue in this matter, which includes audio. The presence of audio is significant because audio is arguably more intrusive of privacy than mere video images. Moreover, individuals that have their image and voice captured on the video recording and who have not heard a warning from police that their voices are being captured by BWC, may have a right to notice from MPD. These individuals’ consent may be required to release their image and voice recording featured in the video.

Since the third parties in the recording at issue may have a privacy interest, Exemption 2 requires their interest to outweigh the public interest. You do not offer any facts describing a public interest in viewing unblurred faces versus blurred faces of third parties. So, I have no facts to consider. Thus, I find that MPD was justified in protecting the privacy interest of the featured third parties. MPD appropriately released a redacted video recording under Exemption 2 because the other people in the footage you requested have at least some privacy interests, which are not countered by any apparent public interest.

Next, I will further discuss the significance of the audio recording.

¹⁹ *Id.*

²⁰ *Id.* at 008063.

²¹ *Id.* at 008065.

²² *See id.* at 008063–008065.

²³ *Id.*

²⁴ *Id.*

2. Third parties have a greater expectation of privacy in voice recordings, even on a “public” street, because voices are not audible from afar, as faces are.

In the context discussed in *Gibson*, there were “no images . . . of criminal activity or persons being arrested. The video was taken during the day, on a highly trafficked street The beginning of the video captures pedestrians walking on the street. The video then shows the aftermath of the collision between the MPD vehicle and [the requestor’s] client, in which [the] client is lying on the ground and being attended to while pedestrians continue to walk, observe, and in some cases, speak to MPD officers. *There is no audio recording in any part of the video.* Moreover, there are no images of anyone being associated with a crime or otherwise displaying objectionable behavior.”²⁵ The MOLC concluded that, “[i]f the video were disclosed, the only individual whose privacy would be invaded is” the client of the requestor-lawyer “seeking the video from MPD.”²⁶

On the other hand, it appears that the video footage that you seek does include *audio*—which may carry a tighter expectation of privacy due to its smaller range. One expects one’s voice—even on a public street—to remain audible to only an immediate radius, as opposed to one’s *visual* presence, which, at least during lit conditions, is apparent from much further away.²⁷ In your scenario, there might have been witnesses or non-witness passersby who thought they were only speaking to each other, and not being voice-recorded under the police’s BWC program (if they were even aware of the existence of *video*-BWC). I can only speculate based on the text of your request but, unless MPD officers warned those in attendance that their voices were subject to recording, their privacy interest in their statements remains at least “cognizable” because they would reasonably expect the conversation to stay extemporaneous and not preserved by recording.

I realize that General Order SPT-GO-302.13 directs officers to warn potential subjects of the use of BWC recording,²⁸ but I suggest expanding this directive to mention audio specifically. This is not to say that a mere warning of audio recording “waives” any witnesses’ expectation of privacy in their voices, but, for MPD to rely in the future on the fact-dependent Exemption 2, it would help MPD—as well as citizens—to have an advance warning of *audio* recording

²⁵ *Id.* at 008064 (emphasis added) (footnote omitted).

²⁶ *Id.*

²⁷ Of course, one could argue that today’s sophisticated eavesdropping techniques should lead the public to expect the unexpected, and that anybody might hear them from anywhere. But the fact that some eavesdropping occurs in extraordinary cases should not be seen to remove any of the expectation of privacy that pedestrians enjoy in basic circumstances, namely that their voices will carry only to intended, nearby, recipients, and not be accessible from afar like their *visual* appearance. The existence and constitutionality of anti-eavesdropping statutes, even decades ago, confirm this. *E.g.*, *Berger v. New York*, 388 U.S. 41, 47 (1967) (“Since 1940 eavesdropping has become a big business. . . . A microphone concealed in a book, a lamp, or other unsuspected place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half mile. . . . As science developed . . . detection techniques, [state] lawmakers, sensing the resulting invasion of individual privacy, have provided some statutory protection for the public.”).

²⁸ go.mpdconline.com/go/go_302_13.pdf at 2, 3 (Parts III.7, IV.E) (“When practicable, members [(defined as “sworn MPD employee[s] and] Reserve Corps members”)] shall inform contact subjects that they are being recorded at the beginning of the contact (e.g., ‘Ma’am/Sir, I am advising you that our interaction is being recorded.’)[.]”). Additionally, the General Order prohibits recording the conversations of even fellow officers “without their knowledge during routine, non-enforcement related activities.” *Id.* at 5 (Part IV.L.10). *A fortiori*, the audio of third parties may carry a tighter expectation of privacy.

incorporated into standard procedure—at least until BWC is more widely known and understood by the public.

Based on the facts in your request, I must conclude that, because voices are not perceptible to as remote an audience as visuals, the third parties retained at least some privacy interest that was not applicable to the video-only recording in *Gibson*. Therefore, given no apparent public interest in disclosure (I find none to be obvious on your facts, nor do you argue for a public interest²⁹), MPD justifiably used Exemption 2 to withhold recordings that included audio.

3. In *Gibson*, MPD withheld the entire video, whereas you received the entire footage of third parties, with faces redacted (blurred).

Also, it appears from your narrative that you *did* receive the entire contents of the third-party participants to your incident, apart from their faces being blurred. In *Gibson*, MPD was withholding the *entire* video.

The mere blurring of civilians’ faces does not encroach on any apparent public interest, because you do not allege any relevant additional factors such as a third party being a government employee in their own right, or some other public figure.³⁰ Because the rest of the third parties’ bodies, the context of the incident, the lighting, the size of the crowd, the relative locations of police and citizens, *etc.*, are all available to you from the video you received from MPD, no public interest remains unfulfilled by the mere fact that faces are obscured rather than fully viewable. Accordingly, *Gibson* is inapposite, and I conclude that MPD’s redaction of faces was a permissible exercise of Exemption 2.

4. Summary

Like *Gibson*, my 2020 advisory opinion recognized that a primary purpose of Exemption 2 is to prevent citizens from being associated unwarrantedly with alleged criminal activity.³¹ That interest is even higher where the requested footage includes both the video and the *audio* of “third parties” who are “witnesses or victims to” a graphic situation that may lead to litigation if not criminal charges. Given that you received the requested footage of civilian third parties except for

²⁹ See MOLC, Freedom of Information Act Appeal 2017-53 (Apr. 27, 2017), 64 DCR 009188, 009190 (Sept. 15, 2017) (quoting *Beck v. U.S.D.O.J.*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (“[W]here we find that the request implicates no public interest at all, ‘we need not linger over the balance; something . . . outweighs nothing every time.’”) (citation omitted) (ellipsis in original)) (quoting *Bartko v. U.S.D.O.J.*, 79 F. Supp. 3d 167, 173 (D.D.C. 2015) (“[S]omething in the privacy bowl outweighs nothing in the public interest bowl every time.”)).

³⁰ *Cf. WP Co., LLC v. District*, Case No. 2018 CA 005576 B, at 5, 6 (D.C. Super. Ct. Jan. 7, 2019) (denying District’s motion to dismiss D.C. FOIA claim for access to BWC video of a subject who was a public figure known for “sharing concerns about the performance of MPD . . . for many years[,] . . . repeatedly report[ing] instances of police misconduct and question[ing] the legality of law enforcement tactics,” holding that “the public interest in clarifying interactions between [the public figure] and MPD, as well as the propriety of police officers during the encounter weigh in favor of disclosure”).

³¹ [BWC Advisory Opinion 11 5 2020.pdf \(open-dc.gov\)](#) at 9 (citing *Stern*, 737 F.2d at 91, 92). D.C. FOIA “was modeled on the corresponding federal statute, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), so 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).

the blurring of their faces, “there is a clear privacy interest” to uphold MPD’s application of Exemption 2 to obscure those third parties’ faces in the video MPD provided to you.³²

C. THE DRIVER-WITNESS RETAINS A PREDOMINATING PRIVACY INTEREST UNDER D.C. FOIA.

The driver has a heightened privacy interest in the BWC audio and video that depicts her in allegedly “objectionable behavior,”³³ which must be weighed against the public interest, if any, in disclosure. Even if no crime has been charged *yet*, and no lawsuit filed *yet*, she could still potentially be a witness and/or defendant in the future. Also, unlike in *Gibson*, the driver’s participation in the BWC video includes her audio statements. That is, the footage includes not just her appearance but her words. Those words were not received under the customary circumstances of a public street, where one’s presence and appearance are open to public *view* from far away; but in close quarters with officers, including the recording of *speech* that would normally be inaudible to an uninvolved observer.³⁴

Accordingly, there is at least some quantum of privacy interest to *balance* against any public interest. However, you do not articulate, and I do not find, a public interest in disclosure to outweigh the driver’s privacy interest.

While D.C. FOIA enables the public to keep an eye on “the official acts of . . . public officials and employees,” a “generalized interest in oversight alone” is not infinite so as to overcome the heightened privacy interest that is in play here.³⁵

Nor is an interest in obtaining the video of the driver for litigation purposes a sufficient public interest *under D.C. FOIA*. For a requestor considering litigation, the discovery process is the best fit, not D.C. FOIA. The Supreme Court has noted that “[t]he primary purpose of the [federal Freedom of Information law] was not to benefit private litigants or to serve as a substitute for civil discovery,”³⁶ and the same principle extends to D.C. FOIA, where “the interest of a private litigant is not considered a public interest.”³⁷ This is not to say that any litigation motive invalidates a requestor’s entitlement to public records, but neither does it supply a public interest,³⁸ let alone one sufficient to overbalance a privacy interest such as the driver’s in your case.

³² *Id.*

³³ *See Gibson*, 63 DCR at 008064.

³⁴ See discussion of the heightened expectation of privacy in voices *supra*, pt. II.B.2.

³⁵ MOLC, Freedom of Information Act Appeal 2015-55 (Apr. 24, 2015), 62 DCR 010475, 010480 (July 31, 2015); *see also* MOLC, Freedom of Information Act Appeal 2015-12 at 2, 6 & n.3 (Dec. 19, 2014), 62 DCR 008788, 008789, 008793 (June 19, 2015) (“The primary public interest stated by Appellant, that ‘the requested records will help the public understand how the law[-]enforcement officer[s] tasked with protecting their safety and well-being[are conducting themselves],’ does not . . . overcome the individual privacy interest here.”).

³⁶ *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982).

³⁷ MOLC, Freedom of Information Act Appeal 2019-85 (Mar. 8, 2019), 66 DCR 014666 (Nov. 1, 2019); *accord Ehringhaus v. F.T.C.*, 525 F. Supp. 21, 24 (D.D.C. 1980) (construing federal FOIA as neither “intended to function as a private discovery tool nor . . . intended to reveal the identity and testimony of potential witnesses” (citations omitted)).

³⁸ *See N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978) (construing federal law) (emphasis added).

D. MPD’S GENERAL ORDER # SPT-GO-204.05 INCORRECTLY IMPLIES THAT SOME D.C. FOIA EXEMPTIONS MUST BE USED WHENEVER APPLICABLE TO WITHHOLD PUBLIC RECORDS, AS OPPOSED TO BEING DISCRETIONARY.

Finally, I opine that agencies should consider *discretionary* disclosure of records even where an exemption would apply. MPD’s broad mandate to withhold records to the fullest extent possible creates an appearance that the agency is intentionally processing requests with the intent to withhold them and also runs afoul of the D.C. FOIA regulations.

MPD’s General Order # SPT-GO-204.05 (“Freedom of Information Act Requests”)³⁹ predates the deployment of BWCs but remains in force,⁴⁰ and it concerns me with the breadth of its *mandate* to withhold under six of the D.C. FOIA exemptions. Part V.C of the General Order requires that, “[i]n accordance with D.C. Official Code § 2-534, certain types of information *shall* be withheld from public disclosure,” and then paraphrases D.C. FOIA’s Exemptions 1, 2, and 3 through 6.⁴¹ This General Order misconstrues D.C. FOIA by implying that each exemption must be exercised to its fullest extent. To the contrary, D.C. FOIA does not *mandate* that an agency withhold any public record subject to an exemption. D.C. FOIA provides that certain “matters *may* be exempt from disclosure,” not that they “*shall* be exempt” or “*shall* be withheld.”

Even if an exemption would otherwise permit withholding of a particular record or portion of a record, the Mayor’s Freedom of Information regulations require subordinate agencies to at least consider whether they can release any or all of the requested content as a discretionary exercise of transparency.⁴² Similarly, a reviewing agency must consider not just the exemptions but whether the public interest supports withholding. 1 DCMR § 406.1 provides that “[n]o requested record shall be withheld from inspection or copying unless both of the following criteria apply: (a) It comes within one of the classes of records exempted by the [*sic*] D.C. Law 1-96[(the Freedom of Information Act of 1976)]; and (b) There is need in the public interest to withhold it.”

A blanket requirement that MPD withholds to the fullest extent runs contrary to the Mayor’s regulations.

III. CONCLUSION

My conclusions are based on an analysis of the narrative offered in your correspondence, the underlying traffic incidents, your pursuit of public records with MPD, and the exhibits you included with your request viewed in light of D.C. FOIA. As I held in the November 5, 2020,

³⁹ go.mpdonline.com/GO/GO_204_05.pdf.

⁴⁰ See mpdc.dc.gov/node/423092 (“policy statements . . . currently in effect”).

⁴¹ go.mpdonline.com/GO/GO_204_05.pdf at 5, 6.

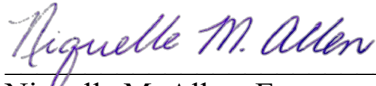
⁴² 1 DCMR § 400.4 (“[R]ecords exempt from mandatory disclosure shall be made available as a matter of discretion when disclosure is not prohibited by law or is not against the public interest.”); see also *id.* subsec. 400.3 (“Employees may continue to furnish to the public, informally and without compliance with these procedures, information and records[] which they customarily furnish in the regular performance of their duties.”).

advisory opinion on this matter, D.C. FOIA's privacy exemptions do not support the redaction of faces or badge numbers from on-duty officers in uniform. As for third parties and the driver herself, because you have not articulated a public interest in disclosure to overcome their privacy interest, I conclude that MPD correctly applied its discretion to withhold under Exemption 2.

Generally, agencies should consider withholding discretionary rather than mandatory under D.C. FOIA.

Please contact me at niquelle.allen@dc.gov, or OOG's staff at open.govoffice@dc.gov, if you have any questions or want to discuss this matter further.

Sincerely,



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

CC:

Pamela Smith, Acting Chief of Police, Metropolitan Police Department

Mark Viehmeyer, General Counsel, Metropolitan Police Department