

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



June 28, 2018

VIA ELECTRONIC MAIL

Mr. F [REDACTED] Mulhauser
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VIA ELECTRONIC MAIL

Inspector Vendette Parker
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RE: OOG-0001_1.04.18_FOIA AO

Dear Mr. Mulhauser:

This is in response to your January 4, 2018, request for a Freedom of Information Act (FOIA) advisory opinion on the propriety of a requirement imposed by the Metropolitan Police Department (MPD) on those requesting records about themselves (on their own or through counsel). Currently, on the District's online FOIA portal and its website, MPD requires individual FOIA requesters of certain records about themselves (first-party request) to attach to the request proof of their identity at the time of the submission; and that attorneys making FOIA requests on behalf of clients supply proof of identification for the client or the attorney, such as a copy of the client's or attorney's government-issued identification, and proof of representation such as a signed authorization or a retainer agreement.

For the reasons that follow, the OOG opines that: (1) absent statutory or regulatory authority, MPD's identity-verification requirement does not have the force of law; (2) in the District of Columbia, the Duncan Ordinance controls the release of adult arrest records, but that the release of arrest records under the Duncan Ordinance is nonetheless subject to FOIA; (3) pursuant to the Duncan Ordinance a defense attorney submitting a request to obtain their client's adult arrest records who meets the requirements of 1 DCMR § 1004.1, is not legally required to provide a copy of the retainer agreement, proof of representation or a copy of the client's or attorney's identification; (4) with respect to first-party requests, the Duncan Ordinance is silent as to how the MPD is to ensure the release of adult arrest records are properly to the applicant to whom the records relate; (5) to obtain copies of adult arrest records, designees must present releases in appropriate form executed by the person to whom the records relate, however the ordinance does not specify that the designee identify themselves; and (6) it is inconsistent with FOIA, to require that individual FOIA requesters of MPD incident reports, accident reports and 911 calls (about

themselves) or their attorneys attach to the request proof of the attorney or client's identity or proof of representation or a release executed by the client.

This non-binding advisory opinion resolves these issues by addressing the impact of FOIA when the party submitting the requests for MPD incident reports, accident reports, 911 transcripts¹ and adult arrest records is: (1) the person to whom the records relate; (2) an attorney on behalf of the person to whom the records relate; and (3) a designee on behalf of the person to whom the records relate.²

BACKGROUND

FOIA mandates that “[A]ny person has the right of access to public records, and may inspect and obtain copies of public records, unless the requested records are subject to withholding as expressly provided under D.C. Official Code § 2-534.³ This directive applies whether the requester is the subject of the records, an attorney seeking the records for a client, or a designee of the subject of the records.

As a general rule, the identity of a FOIA requester is irrelevant, and DC FOIA does not require a requester to provide or prove his or her identity.⁴ The exceptions are when an individual requests records pertaining to himself or herself and, therefore, possesses the ability to waive his or her own privacy interests, or when a requester seeks a fee waiver based on affiliation with educational, news media, or other entities. Further, there is ample case law interpreting the federal FOIA that provides that a person requesting records pertaining to himself has rights that on occasion differ from those of a third party requester. For example, to establish a client's standing to appeal a FOIA determination and to receive records, case law stipulates that an attorney submitting a FOIA request on a client's behalf must adequately identify themselves as an attorney that is representing the client for the purpose of obtaining the records.⁵ The request must also name the client.

Requesters seeking to submit a FOIA request to the MPD via the District government's online FOIA Public Access Website at foia-dc.gov, view the following Action Office Instruction prior to submitting a request:

If requesting police records regarding yourself, provide the date, time, and place of the incident/accident/arrest/911 call, and the Central Complaint No., if available. In a single file, you will also need to attach proof of your identity, or as an attorney your client's identity, e.g. copy of your/their Driver's License or other government issued

¹ MPD's website states that 911 records are maintained and managed by the Office of Unified Communications.

² The OOG is issuing this opinion pursuant to section 503(c) of the District of Columbia Administrative Procedure Act, effective March 31, 2011(D.C. Law 18-350; D.C. Official Code § 2-593(c)). This statute empowers the OOG to issue advisory opinions on the implementation of Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 et seq.), the Freedom of Information Act of 1976.

³ See, D.C. Official Code § 2-532(a).

⁴ See D.C. Official Code § 2-532(b-1)(2), and a July 31, 2017 Opinion of the Mayor's Office of Legal Counsel (FOIA Appeal 2017-90R).

⁵ In *Brown v. EPA*, 384 F. Supp. 2d 271, 276, the FOIA request included as a separate page an authorization executed by the client which stated the client had retained the attorney to obtain the records.

identification. In addition please attach to the same document proof that you represent your client. e.g. Retainer agreement or client authorization.

The same instruction appearing on the MPD website under the About MPDC/Open Government and FOIA tab on the MPD homepage: <https://mpdc.dc.gov/page/open-government-and-foia-mpdc>,⁷ yet adds an additional caveat for third party requesters seeking information about another person. Such requesters are required to supplement their request authorization, with a copy of the government issued identification, from the person whose information is being requested.

On the same landing page, the MPD includes a detailed listing of documents the public may request that do not require the submission of a FOIA request. Those records include: (1) Police Reports (PD-251) and Accident Reports (PD-10). Requests for these records may be submitted directly to the Public Documents Section in person, by mail or by phone for a \$3 processing fee for a copy of an Accident Report. Copies of Incident Reports are made available free of charge. (2) Criminal Records Checks/Police Clearances (PD-70). Requests for these records must be submitted in writing, along with a notarized letter from the person to which the inquiry pertains. The MPD's fee for supplying the records is \$7; (3) Crime Data and Statistics are made available free of charge at www.crimemap.dc.gov; (4) MPD Policies and Procedures made available online: <https://mpdc.dc.gov/node/237172>; and (5) Employee Information.⁸ Per the MPD website and the FOIA Portal the proof of identity and representation requirements concern requests for the following four (4) categories of records: incident reports; accident reports; 911 calls and arrest records.

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). Any person has the right of access to public records, and may inspect and obtain copies of public records, unless the requested records are subject to withholding as expressly provided under D.C. Official Code § 2-534 (D.C. Official Code § 2-532(a)).⁹

D.C. FOIA is modeled on the federal Freedom of Information Act, and although not binding, we look to decisions interpreting like provisions in the federal act when we interpret the meaning of the D.C. FOIA.¹⁰ D.C. Official Code § 2-532(a) and 5 U.S.C. § 552(a)(3)) are comparable provisions of District and federal FOIA which both state a FOIA request can be made by any

⁶ Website last accessed on 4.27.18. and on <https://mpdc.dc.gov/node/136472>

⁷ Website last accessed on 4.27.18. and on <https://mpdc.dc.gov/node/136472>

⁸ The OOG notes that the MPD link to the list of records made available without the necessity of a FOIA request is pursuant to D.C. Official Code § 2-536. However, the employee-related records such as names of employees, employment dates, salaries and titles are not provided. The link from the MPD website is broken and takes the viewer to the West Law State Government site at https://govt.westlaw.com/SiteList?_lrTS=20180511160903722. Last viewed on May 11, 2018.

⁹ See, *Wemhoff v. District of Columbia*, 887 A.2d 1004, 2005 D.C. App. LEXIS 645. “[T]he right of public access is limited by statutory exceptions, which consistent with the general public policy of access, must be read narrowly; *Dunhill v. Director, District of Columbia Department of Transportation*, 416 A.2d 244, 247 n.5 (D.C. 1980), “[A]ny restriction on access must be construed narrowly.”

¹⁰ *District of Columbia v. Fraternal Order of Police Metro. Police Labor Comm.*, 33 A.3d 332, 342 n.8 (D.C. 2011).

person. Therefore, a review of federal FOIA statutory and case law which construe or impact 5 U.S.C. § 552(a)(3)) may be helpful in interpreting D.C. Official Code § 2-532(a)).

FEDERAL FOIA AND THE PRIVACY ACT OF 1974

Regulations Implementing the Federal Privacy Act of 1974, Require First-Party FOIA Requesters to Verify Their Identity using a Certification of Identification or an Unsworn Declaration.

The primary purpose of the Privacy Act of 1974, approved December 31, 1974 (88 Stat. 1896; U.S.C. § 552a *et seq.*)(Privacy Act) is to safeguard individual privacy from misuse of federal records, and to provide that individuals be granted access to records concerning them which are maintained by federal agencies.¹¹ The Privacy Act seeks to protect the release of information about individuals to others, while allowing the individual access to the information. Pursuant to the Privacy Act federal agencies must have in place regulations to include an identity-verification regulation for requesters seeking information about themselves (first party-request). The identity verification regulations apply to federal FOIA requests.

Therefore, to protect the privacy rights of first-party requesters and to limit the release of the records to a named designee, federal FOIA requires the subject of the records to execute and submit with the request a Certification of Identification form or an unsworn declaration to properly identify the subject as the requester or as the authorizer of the designee.¹² The unsworn declaration must subject the signer to perjury.

The court's decision in *Rios v. United States*, 275 F.Supp. 3d 88 (D.D.C. 2017), illustrates the Department of Justice (DOJ) rule implementing the Privacy Act.¹³ The DOJ's regulation for submitting a first-party request provides in relevant part:

Verification of identity. When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. . . . [N]o specific form is required[.] . . . In order to help the identification and location of requested records, you may also, at your option, include your social security number. *Rios*, at 94.

The plaintiff in *Rios* submitted a first-party request and a request for records pertaining to an investigation of a DEA Special Agent ("third-party records"). The *Rios* court held that including within the FOIA request the requester's place and date of birth, prison address, social security number and declaration under penalty of perjury pursuant to 28 U.S.C. § 1746, was sufficient to satisfy the Privacy Act's self-identification requirements.¹⁴ With respect to the third-party

¹¹ Taken from the long title of the Privacy Act, 88 Stat. 1896

¹² See 28 U.S.C. § 1746.

¹³ See 28 C.F.R. § § 16.41(d); 16.3(a)(4).

¹⁴ Form 361 was the DOJ self-certification form was not submitted with the FOIA request. The court noted: "[Because the regulation requires no specific form," the fact that Plaintiff failed to execute DOJ Form 361 is of no material consequence." *Rios*, at 94. View DOJ Form 361 here

https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/cert_ind.pdf.

request, the court's finding was that the plaintiff did not comply with Privacy Act requirements concerning records pertaining to the DEA Special Agent.¹⁵

Current District law does not have in place a statutory equivalent to the Privacy Act. An exhaustive review of the FOIA regulations indicates the absence of identity-verification requirements.¹⁶ However, a review of the legislative history of Bill 1-119, "The Freedom of Information Act of 1975," reveals that the legislative intent of FOIA was to provide agencies, *inter alia*, with the authority to establish reasonable rules governing the procedure by which a request shall be made.

MPD's website lists a General Order entitled "Freedom of Information Act Requests."¹⁷ The General Order does not contain identity verification provisions. At issue is whether the Council's intent was to provide District agencies authority to adopt regulations to require identity verification for first-party requests. FOIA's legislative history suggests that it was. Specifically, a provision of FOIA's legislative history states:

The Act, however, also recognizes that the Mayor and agencies of the government must be given some flexibility in the handling of requests for information. Government officials are therefore granted the authority to establish reasonable rules to control the time, place and procedure by which requests shall be made.¹⁸

FEDERAL SCHEME

Consistent with the Duncan Ordinance, federal FOIA does not require that attorneys provide a copy of their identification, the client's identification or a signed retainer or proof of representation to obtain records for a client. However, for the purpose of establishing the client's standing to lodge a federal FOIA action, and the right to receive records, case law stipulates that an attorney seeking records for a client must adequately identify that the attorney is representing the client to obtain records. The request must also name the client.

Federal FOIA provides, "[E]xcept with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly *available to any person*." (5 USC § 552(a)(3)). "Any

¹⁵ *Rios*, at 89. This requirement provides: "Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in {sic} 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, each component can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure." *Ibid*.

¹⁶ 1 DCMR § 400.1 provides: "[T]his chapter contains the rules and procedures to be followed by all agencies, offices, and departments (hereinafter "agency") of the District of Columbia Government which are subject to the administrative control of the Mayor in implementing the Freedom of Information Act, D.C. Law 1-96, 23 DCR 3744 (1977) (hereinafter "the Act") and all persons (hereinafter "requesters") requesting records pursuant to the Act."

¹⁷ MPD's regulations and policies concerning FOIA are here: https://go.mpdconline.com/GO/GO_204_05.pdf. November 16, 2010 is the Order's effective date.

¹⁸ Report on the Committee on Government Operations on Bill 1-119, the Freedom of Information Act of 1975, at page 14 (Council of the District of Columbia July 23, 1975).

person” includes an attorney or other person which the requester authorizes to obtain the record on behalf of the requester. At issue are the lawful requirements under District FOIA, its implementing regulations, and existing law, if any, a first-party requester or that requester’s attorney must follow when initiating a FOIA request to obtain records that pertain to the client or at the client’s request.

While it is clear that “any person” may submit a FOIA request, there is a caveat. Courts have consistently¹⁹ dismissed FOIA claims for lack of standing for an attorney’s failure to include in the FOIA request: (1) the client’s name; and (2) a statement that the request was being submitted by the attorney on the client’s behalf. In at least one administrative appeal, the Mayor’s Office has held that an anonymous person is entitled to submit a FOIA request under D.C. law. In comparison, federal courts have held that for a requester to withstand a motion to dismiss for lack of standing the requests must: (1) adequately identify the attorney as representing the client to request the records; and, (2) name the client on whose behalf the request is being made. In the absence of the aforementioned, courts deem the attorney submitting the request as the requester. The cases below are illustrative of the court’s holding.

In *Brown v. EPA*, 384 F.Supp.2d 271 (2005), the Court held that the plaintiff had the right to obtain records and had standing to lodge a FOIA action where the plaintiff’s counsel stated in the first line of the FOIA request, that counsel was representing the plaintiff and was retained by plaintiff to obtain certain records pursuant to FOIA. Additionally, the request contained a separate page containing an authorization that was signed and dated by the plaintiff stating that the plaintiff authorized the attorney to obtain the records on plaintiff’s behalf. The Court noted, “[N]o court has ever indicated that a plaintiff lacks standing to bring a FOIA claim in these circumstances.” *Ibid*, at 276.

Additionally, *Burka v. United States HHS*, 142 F.3d 1286 (1998), illustrates the consequences of an attorney’s failure to adequately identify that he or she was representing a client to obtain records and failing to include the client’s name in the FOIA request. Counsel in *Burka* was seeking attorney’s fees for representing a client’s whose name did not appear within the FOIA request. The Court held that: (1) counsel at all times had been the only named party in the case; (2) that counsel and not his undisclosed client was in fact the requester and therefore the real party in interest; and (3) counsel’s representation of an undisclosed client did not entitle him to attorney’s fees. Relevant here is the court’s ruling which states:

A FOIA request can be made by any person. 5 U.S.C. § 552(a)(3). As a result, *Burka* had standing to bring this suit when his FOIA request was denied; he was not required to demonstrate that he had any particular need for the information. Therefore *Burka*, not his undisclosed client, is the real party-in-interest to this suit. *Burka*, at 1290, 1291.

Based on the above cited cases it is clear that federal FOIA does not require that an attorney representing a client provide a copy of either the attorney or the client’s government issued identification or provide proof of representation, such as a copy of the retainer agreement to obtain records on behalf of a client, but that failing to do so, the client would not have standing to challenge a denial. This holds true if the request is for MPD incident reports, accident reports or 911 calls that pertain to the client. Furthermore, requiring an attorney to provide a copy of the

¹⁹ See *Three Forks Ranch Corp. v. Bureau of Land Mgmt.*, 358 F.Supp.2d 1, 2-3 (D.D.C. 2005).

retainer agreement with a client may run afoul of attorney-client confidentiality, and if released by the attorney raise ethical concerns under the District of Columbia Rules of Professional Conduct. An analysis of FOIA’s impact on the release of adult arrest records follows.

The Duncan Ordinance is the Regulatory Scheme Governing the Release of Adult Arrest Records in the District of Columbia.

To regulate the release of adult arrest records in the District of Columbia, on October 31, 1967, the District of Columbia Board of Commissioners adopted the Duncan Ordinance from a report drafted by the Committee to Investigate The Effect of Police Arrest Records on Employment Opportunities in the District of Columbia. Germane to a determination in this matter is the interplay between the Duncan Ordinance and FOIA. The Duncan Ordinance found at 1 DCMR § 1004.1 *et seq.*,²⁰ enumerates three (3) categories of persons who may receive adult arrest records. These three (3) categories of persons are: (1) law enforcement agents; (2) the subject of the arrest records; and (3) authorized designees of the subject of the arrest records. MPD’s FOIA instructions on its website and the FOIA portal require an attorney to provide proof of representation such as a retainer agreement or copies of the client’s identification or attorney’s identification to request adult arrest records.²¹ The requirements each person must adhere to obtain the records pursuant to the Duncan Ordinance follow.

Law Enforcement Agents.

1 DCMR § 1004.1, authorizes the release of adult arrest records to law enforcement agents. 1 DCMR § 1004.2,²² includes within the definition of law enforcement agents defense attorneys, “with respect only to the records of their client defendants.” 1 DCMR § 1004.1, makes it mandatory to release adult arrest records to defense attorneys “without cost, and without authorization of the persons to whom the records relate and without any other prerequisite, provided that the law enforcement agents represent that those records are to be used for law enforcement purposes.”

The aforementioned provisions do not expressly require that a defense attorney seeking copies of the adult arrest records of a client provide a client’s authorization, the client’s identification, the attorney’s identification or proof of representation to obtain the records. However, the 1967 Ordinance also fails to address what measures the MPD is to follow to prevent an unauthorized release of the arrest records, including how MPD is to determine that the records “are to be used for law enforcement purposes.”

²⁰ Amendments to the Duncan Ordinance are: (1) Section 7 of the Re-Entry Facilitation Amendment Act of 2012, effective June 15, 2013 (D.C. Law 19-319; 60 DCR 2333 (March 1, 2013)); and, (2) Section 5 of the Post-Arrest Process Clarification Amendment Act of 2014, effective April 24, 2015 (D.C. Law 20-243; 61 DCR 8320 (August 15, 2014)).

²¹This webpage page provides that Arrests Records to Third Party will not be provided without Authorization, which complies with 1 DCMR § 1004.7.

²² In its entirety 1 DCMR § 1004.2 reads: “[T]he term “law enforcement agent” shall be limited in this context to persons having cognizance of criminal investigations or of criminal proceedings directly involving the individuals to whom the requested records relate. The term includes judges, prosecutors, defense attorneys (with respect only to the records of their client defendants), police officers, federal agents having the power of arrest, clerks of courts, corrections, parole, and probation and supervision officers.”

Applicants Who Are the Subject of the Arrest Records.

1 DCMR § 1004.6, provides for the release of copies or extracts of adult arrest records or statements of the non-existence of such records to the applicant to whom the arrest records relate. Further, 1 DCMR § 1004.2, states:

Subject to the provisions of §§ 1004.1-1004.3, copies or extracts²³ of adult arrest records, as provided under D.C. Official Code § 4-132²⁴ (1994 Repl.) or statements of the non-existence of those records shall be released to applicants therefore upon the payment of fees to be based upon the cost of editing and producing such copies, extracts or statements.

With respect to the applicant who is the person to whom the records relate, this provision does not explain the process of confirming that requester's identity. As previously mentioned, the FOIA regulations in 1 DCMR § 400 *et seq.*, do not contain self-identification rules. The MPD's failure to confirm the identification of the requester in this instance could constitute a violation of the Duncan Ordinance or District privacy laws.

Applicants Who Are Designees of persons to whom those records relate.

The Duncan Ordinance allows designees of the subject of arrest records to obtain the records upon providing an appropriate and executed release. 1 DCMR § 1004.7 states:

Applicants who are not the persons to whom those records relate shall, in addition to the required fees, present releases in appropriate form executed by the persons to whom the records may relate.

To properly interpret 1 DCMR § 1004.7, the provision must be read in concert with 1 DCMR § 1004.6. This is because as originally adopted 1 DCMR §§ 1004.6, 1004.7 compromised a single paragraph 5 in the ordinance and not the two separate subsections in the current regulations. The appendix to *Morrow v. District of Columbia*, 417 F.2d 728,746, contains the Duncan Ordinance's original format as adopted by the D.C. Board of Commissioners. At that time paragraph 5 read as follows:

5. That, subject to the foregoing, copies or extracts of adult arrest records, as provided under D.C. Code, Section 4-134a, or statements of the non-existence of such records shall be released to applicants therefor upon the payment of fees to be based upon the cost of editing and producing such copies, extracts or statements; provided, that applicants who are not the persons to whom such records may relate must, in addition to the required fees, present releases in appropriate form executed by the persons to whom the records may relate; provided further, that no fee shall be required with respect to any record

²³1 DCMR § 1004.9 provides: "Notwithstanding Subsections 1004.4 and 1004.5, an individual may request production of his or her arrest record for the purposes of determining eligibility for sealing or expunging that record pursuant to § 16-801 *et seq.*, or similar sealing statutes in the District or in another jurisdiction and may request production of his or her arrest record for filing a sealing or expungement motion. For the purposes of this subsection, an "arrest record" shall contain a listing of all adult arrests, regardless of the disposition of each arrest, and regardless of the date on which the arrest, conviction, or completion of the sentence occurred."

²⁴Re-codified as D.C. Official Code § 5-113.02.

solicited by any agent of the Federal or District of Columbia Government for a governmental purpose.

Hence the phrase “those records” in 1 DCMR § 1004.7 means the copies or extracts of adult arrest records which are releasable to the subject of those records in 1 DCMR § 1004.6. Therefore, to obtain these records the designee must: (1) pay the required fees; and, (2) present releases in appropriate form executed by the persons to whom the records may relate. The purpose of the third party authorization is to prevent an unlawful release in compliance with the Duncan Ordinance. The Ordinance does not require the designee to provide identification to obtain the records, but does require an appropriate release. In discussing the Duncan Ordinance’s interplay with FOIA the D.C. Court of Appeals has stated:

The MPD has misconceived the issue in the case by framing it in terms of whether the Council implicitly repealed the Duncan Ordinance when it enacted the FOIA. Although the Duncan Ordinance is not a statute within the meaning of Exemption 6, the ordinance continues to have vitality outside the arena of the FOIA. The Duncan Ordinance will continue to restrict the government's use and dissemination of arrest records, ensuring that such records are released only for legitimate law enforcement purposes, and will protect against the routine dissemination of arrest records for non-law enforcement purposes, e.g., employment applications, licensing agencies, and credit institution . . . Moreover, the FOIA itself protects against the routine dissemination of police records.²⁵

While the Duncan Ordinance is not a withholding statute within the meaning of D.C. Official Code § 2-534(6), “[A]s has been recognized in the past, the Duncan Ordinance establishes the guidelines which control the dissemination of arrest records in this jurisdiction” *Utz v. Cullinane*, 520 F.2d 467, 486 (1975).

On its face the Duncan Ordinance does not require verification of the requester’s identity as a prerequisite to release adult arrest records. This may be inconsistent with and in violation of District privacy laws, and the Duncan Ordinance does not trump the FOIA statute that would permit the MPD to withhold or redact certain records in the absence of a requester establishing his or her identity.

The Release of MPD Incident Reports, Accident Reports and 911 Transcripts.

The release of MPD Incident Reports, Accident Reports and 911 transcripts are governed solely by FOIA. Thus, irrespective of the requester’s identity, FOIA’s exemptions provide the MPD with authority, when appropriate, to withhold records or redact portions of these records prior to release. Although proof of identity is not a requirement under FOIA, absent such proof by a first party requester, the requester may receive these records, if at all, subject to applicable FOIA exemptions. This position is consistent with the D.C. Court of Appeals holding in *Newspapers, Inc. v. Metro. Police Department*, 546 A.2d 990 (D.C. 1988), which recognized that “the FOIA itself protects against the routine dissemination of police records.” See, 546 A.2d 990, at fn 20.

²⁵ Citing, D.C. Code § 1-1524 (a) (3) (exempting from disclosure "Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would: . . . (C) Constitute an unwarranted invasion of personal privacy.). *Newspapers, Inc. v. Metropolitan Police Department*, 546 A.2d 990, 1001 (1988).

RECOMMENDATIONS FOR COMPLIANCE WITH FOIA

The OOG recommends to the MPD the following (1) immediately include language on its webpage and the District's FOIA portal which provides that a FOIA request may be submitted without the identity-verification requirements by first party-requesters or their attorneys when seeking incident reports, accident reports and 911 transcripts; (2) immediately remove the requirement that attorneys making FOIA requests on behalf of clients supply a copy of their retainer agreement as proof of representation.

The existence of statutory identity-verification requirements to obtain records is not a novel process and exists outside the realm of FOIA in the District. One such example concerns vital records. To ensure the privacy and the proper release of records, regulations governing the disclosure of vital records limit their release to persons with a direct and tangible interest in the record. To establish such individuals, when requesting vital records the law states that in addition to submitting a proper application the "Registrar may also require identification of the applicant or a sworn statement."²⁶

Current District law does not have in place a statutory equivalent to the Privacy Act. It is unclear whether agencies may under the existing FOIA statute promulgate rules to require the identity verification of first-party requesters. However, the legislative history of FOIA implies that they do. To that end, the enactment of identity verification rules with provisions comparable to those of the Federal Privacy Act would remove any ambiguity.

CONCLUSION

On the basis of the legal analysis herein, the OOG opines as follows: (1) absent statutory or regulatory authority MPD's identity-verification request does not have the force of law; (2) in the District of Columbia, the Duncan Ordinance controls the release of adult arrest records, but that the release of arrest records under the Duncan Ordinance is nonetheless subject to FOIA; (3) pursuant to the Duncan Ordinance a defense attorney submitting a request to obtain their client's adult arrest records who meets the requirements of 1 DCMR § 1004.1, is not required to provide a copy of the retainer agreement, proof of representation or a copy of the client's or attorney's identification; (4) with respect to first-party requests, the Duncan Ordinance is silent as to how the MPD is to ensure the release of adult arrest records are properly to the applicant to whom the records relate; (5) to obtain copies of adult arrest records, designees must present releases in appropriate form executed by the person to whom the records relate, however the ordinance does not specify that the designee identify themselves; and (6) it is inconsistent with FOIA, to require that individual FOIA requesters of MPD incident reports, accident reports and 911 calls (about themselves) or their attorneys attach to the request proof of the attorney or client's identity or proof of representation or a release executed by the client.

Where the requester is seeking information about themselves concerning accident reports, incident reports, or records about 911 calls, MPD may not require proof of the requester's identity to process the request. Where an attorney submits a FOIA request for these records

²⁶ See 29 DCMR § 2821. 6.

about a client, MPD may not require that the attorney attach proof of the client's identity, the attorney's identity and proof of representation. This is because District FOIA and its regulations do not mandate these requirements. In these instances MPD may treat the FOIA request as a third party request, and properly redact or withhold the record as appropriate. To the extent that the District's online FOIA portal does not permit such requests to be made, the requests should be submitted to MPD outside of the online portal.

OOG Attorney Advisor Johnnie Barton participated substantially in drafting this opinion. Please contact the OOG at (202) 481-3411 with any questions concerning this matter.

Sincerely,

/s/

BRIAN K. FLOWERS

Interim Director, Office of Open Government

Board of Ethics and Government Accountability