

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

AMERICAN CIVIL LIBERTIES UNION
OF THE DISTRICT OF COLUMBIA
915 15th Street NW, 2nd Floor
Washington, D.C. 20005,

Plaintiff,

v.

DISTRICT OF COLUMBIA,
c/o Office of Attorney General for D.C.
400 6th Street NW
Washington, DC 20001,

Defendant.

No. 2021 CA 000452 B
Judge William M. Jackson
Next Court Date: May 21, 2021
Event: Initial Scheduling Conference

PLAINTIFF’S OPPOSED MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to D.C. Super. Ct. R. Civ. P. 65(a), Plaintiff American Civil Liberties Union of the District of Columbia hereby moves for a preliminary injunction requiring the Metropolitan Police Department to produce unlawfully withheld agency records—specifically, data collected pursuant to the Neighborhood Engagement Achieves Results (NEAR) Act from January 1, 2020 onward.

Plaintiff is statutorily entitled to these records under the Freedom of Information Act, D.C. Code § 2-531 *et seq.*, and will suffer irreparable harm without the requested relief. These records are critical to the public’s understanding of police stops and searches, an issue of major current debate, and are urgently required in advance of a critical D.C. Council oversight hearing on the Metropolitan Police Department that will take place on March 11, 2021. Enjoining Defendant to produce these records will merely require Defendant to comply with the law (and with its own

promises) and is clearly in the public interest. Plaintiff seeks an order enjoining Defendant from withholding the requested records and requiring Defendant to produce them by March 8, 2021.

Plaintiff emailed opposing counsel on February 16, 2021 to seek consent for this motion pursuant to D.C. Super. Ct. R. Civ. P. 12-I(a). Opposing counsel represented that Defendant opposed the motion. Additionally, opposing counsel represented that the Metropolitan Police Department could make a portion of the requested data available in the requested format sometime next week and a portion of the data available in the requested format sometime in March (without committing to any dates). Because of the urgency of Plaintiff's need for information, the inadequacy and vagueness of Defendant's proposed timeline, and MPD's long history of not adhering to its commitments and obligations regarding NEAR Act data, Plaintiff's need for relief remains acute.

An accompanying memorandum of points and authorities in support of this motion is filed herewith.

Respectfully submitted,

/s Michael Perloff

Michael Perloff (D.C. Bar No. 1601047)

Megan Yan*

Arthur B. Spitzer (D.C. Bar No. 235960)

Scott Michelman (D.C. Bar No. 1006945)

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February 16, 2021

Counsel for Plaintiff

* Not a D.C. bar member; practicing under supervision pursuant to D.C. App. R. 49(c)(8A).

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**MEMORANDUM IN SUPPORT OF
PLAINTIFF’S OPPOSED MOTION FOR A PRELIMINARY INJUNCTION**

INTRODUCTION

D.C. law requires the Metropolitan Police Department (MPD) to collect and publish data on police stops, a matter of great public interest. MPD failed to obey that law for three years, until this Court ordered it to do so. It then promised to publish that data semiannually but has published none for the year 2020. As a result, Plaintiff sought access to the data through a Freedom of Information Act (FOIA) request, but MPD again failed to uphold its legal obligations and is unlawfully withholding them. It should now, again, be ordered to comply with D.C. law.

In June 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, D.C. Code § 5-113.01(a)(4B), requiring the MPD to collect data on police stops as a means of “address[ing] questions and suspicions that vex many citizens: whether the police are targeting or profiling members of certain racial groups.” *Black Lives Matter D.C. v. Bowser*, No. 2018 CA 003168 B, 2019 WL 4050218, at *10 (D.C. Super. Ct. June 27, 2019) (Campbell, J.)

(hereafter “*BLMDC*”). “The central purpose of the legislation . . . [was] not just to collect information about police encounters, but to have that information become ‘open,’ able to be ‘shared,’ and thus accessible to the public.” *Id.* at *1. MPD refused to collect the required records for *three years* after the statute’s enactment. *Id.* at *2; *see also id.* at *8 (referencing the “defendants’ inability, over the past three years, to offer any substantial explanation for their non-action”). It took an order from this Court for the Department to finally comply. *See id.* at *11. That case was voluntarily dismissed after MPD overhauled its data collection practices and committed in writing to publishing the NEAR Act data semiannually.

Plaintiff American Civil Liberties Union of the District of Columbia (ACLU-DC) files this lawsuit because MPD has again chosen secrecy over transparency and intransigence over compliance with D.C. law. On January 19, 2021, MPD received a D.C. Freedom of Information Act (FOIA) request filed by ACLU-DC that sought NEAR Act data from January 1, 2020 onward. By statute, MPD had 15 business days to either grant the request or deny it and explain its reasoning. D.C. Code § 2-532(c)(1). MPD did neither and this delay violated the D.C. FOIA. *See id.* More fundamentally, had MPD chosen to respond, its only choice would have been to grant Plaintiff’s request. As this Court previously recognized, NEAR Act data are “subject to disclosure under FOIA.” *BLMDC*, 2019 WL 4050218, at *3.

MPD’s conduct is egregious. Its non-response comes after three years of non-compliance with the NEAR Act. Despite this Court’s conclusion that the NEAR Act “encompasses a mandate . . . to make [the data] accessible to the public,” *id.*, and despite MPD’s own public commitment to release the NEAR Act records twice per year, the only data that MPD has ever published covers the period of July 22, 2019 to December 31, 2019. MPD has not published any records regarding stops from 2020.

On March 11, 2021, the D.C. Council will hold a public oversight hearing to assess MPD’s performance during the past year. The question of racial bias in policing will be a central issue at that event—one on which Plaintiff and many other community members will want to comment. Without the NEAR Act data, the public testimony will be less informed, the NEAR Act’s purposes—which center on promoting “police accountability[] and community involvement,” *id.* at *8—will be thwarted, and the Council’s ability to assess MPD’s performance and develop policies that reduce bias in policing, will be hampered. These irreparable harms flow directly from MPD’s inarguable violation of the D.C. FOIA. Plaintiff’s motion should be granted, and the Court should order Defendant to produce the requested records no later than March 8, 2021, so the data can be available for the March 11 hearing.

STATEMENT OF FACTS

In 2016, the D.C. Council unanimously passed the NEAR Act, requiring the Metropolitan Police Department to record information about all stops made by its officers including the date, location, and time of the stop; the violation that led to the stop; whether a search was conducted; whether an arrest or citation resulted from the stop; and the gender, race and date of birth of the person stopped. D.C. Code § 5-113.01(a)(4B). Despite this clear statutory mandate, MPD waited three years to begin systematically maintaining the required records, and did so only after this Court issued an order demanding that it collect the data. *BLMDC*, 2019 WL 4050218, at *11.

MPD’s non-compliance began almost as soon as the NEAR Act was passed. In October 2016, the D.C. Council allocated funds to MPD to implement the NEAR Act’s data collection requirements. Months later, in April 2017, MPD responded to a FOIA request from the ACLU-DC, Black Lives Matter D.C., and Stop Police Terror Project D.C. seeking stop data by stating that the law had not been implemented. *Id.* at *2. “A full year later, almost two years after the Act was

passed, matters had not progressed.” *Id.* At various D.C. Council oversight hearings in 2018, MPD officials acknowledged that they were not collecting data and “provided no timetable for implementing the requirements of the statute.” *Id.*

In March 2018, the ACLU-DC, along with other community organizations, filed a second FOIA request seeking NEAR Act data or plans for implementation. *Id.* In answering that request two months later, MPD provided “no response to the request for documents reflecting an implementation plan” and showed “no change in data collection practices since the Act’s passage.” *Id.* In essence, “no progress was made towards achieving [the NEAR Act’s goal] between [its] effective date” and the filing of *BLMDC* in May 2018. *Id.* It was only after this Court issued a preliminary injunction mandating MPD collect the required records that the Department implemented new data collection methods in the summer of 2019—more than three years after the statute was enacted. *Id.* at *11.

On September 9, 2019, MPD promised in writing that it would continue to collect the NEAR Act data and that “[f]ull data . . . will be published . . . in 6-month increments”¹ After MPD made this public commitment, and adopted reforms to its data collection procedures, the plaintiffs in *BLMDC* agreed to a motion to vacate the injunction. But MPD could not even keep its word for a full year. Since the injunction, MPD has published NEAR Act data only twice: once in September 2019, then most recently on March 4, 2020. In total, this data covers stops conducted from July 22, 2019 through December 31, 2019.² MPD has not published any data since.

¹ MPD, *Stop Data Report (September 2019)*, at 7, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Stop%20Data%20Report_September%202019_lowres_0.pdf.

² MPD, *Stop Data Reports* (Mar. 4, 2020), <https://mpdc.dc.gov/stopdata>.

Because MPD failed to release the data as it promised, Plaintiff filed a FOIA request with MPD seeking NEAR Act data from January 1, 2020 onward. Ex. A (FOIA request). Pursuant to the statutory requirements of D.C. Code § 2-532(c)(1), MPD is required to “either make the requested public record accessible” or provide notice of a determination not to make the records accessible within 15 business days. Plaintiff’s request was received on January 19, 2021 and assigned Request No. 2021-FOIA-02491.³ The FOIA portal provided an estimated delivery date of February 10, 2021. Ex. B (FOIA Portal printout). Additionally, on January 22, 2021, Plaintiff emailed Mark Viehmeyer, General Counsel of MPD, a courtesy copy of the request, which Mr. Viehmeyer confirmed that he received. Ex. C (Jan. 22, 2021 email correspondence). MPD’s statutory deadline for responding to Plaintiff’s FOIA request expired on February 10, 2021 and Plaintiff has yet to receive a response.

Meanwhile, the D.C. Council is preparing to hold a consequential oversight hearing on MPD on March 11, 2021. Plaintiff’s request seeks data critical to its and the public’s advocacy to the Council regarding how MPD is interacting with community members and whether it is complying with D.C. law and the U.S. Constitution. Plaintiff’s need for the data is therefore acute. Because MPD is violating the D.C. FOIA by withholding critical public records, and because those records are urgently needed, Plaintiff filed this suit and now moves for a preliminary injunction.

³ Because the D.C. Council permitted agencies to refrain from processing FOIA requests during the “initial COVID-19 closure,” *see* D.C. Code §§ 2-532(c)(3)(A), Plaintiffs did not submit a FOIA request for this data during that period. That closure ended on January 15, 2021, *see* D.C. Code § 2-539(c)(2), and Plaintiff submitted its FOIA request thereafter. MPD confirmed receipt of the FOIA on January 19, the first business day after the initial COVID-19 closure ended (January 16 and 17 were weekend days; January 18 was a holiday). *See* Ex. B.

ARGUMENT

Preliminary injunctive relief is warranted where “the moving party has clearly demonstrated (1) that there is a substantial likelihood [it] will prevail on the merits; (2) that [it] is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to [it] from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order.” *In re Estate of Reilly*, 933 A.2d 830, 834 (D.C. 2007) (citation omitted). Additionally, “[a]lthough the primary reason for granting a preliminary injunction is to prevent irreparable harm, this factor is less decisive where the likelihood of success on the merits is very strong,” as it is here. *District of Columbia v. Greene*, 806 A.2d 216, 223 (D.C. 2002). Plaintiff has satisfied all four requirements.

I. Plaintiff Is Likely to Succeed on the Merits.

Plaintiff is likely to succeed on the merits of its claim. MPD violated FOIA by failing to respond within the proscribed statutory time limit of D.C. Code § 2-532(c) and by withholding the requested NEAR Act data, to which Plaintiff is statutorily entitled. There is no question that the records at issue are subject to FOIA. Under definitions incorporated into FOIA, *see* D.C. § 2-539(a) (cross-referencing the definitions of D.C. Code § 2-502), the requested stop data are public records “prepared, owned, used, in the possession of, or retained by a public body,” D.C. Code § 2-502(18)—the “public body” being MPD, a D.C. agency, D.C. Code § 2-502(18A).

MPD has plainly violated the time limit set forth in D.C. Code § 2-532(c), which provides that, within 15 business days of the receipt of a FOIA request, public bodies must “either make the requested public record accessible or notify the person . . . of its determination not to . . . and the reasons therefor.” Plaintiff’s FOIA request was received on January 19, 2021 and MPD was

required to respond by February 10, 2021.⁴ MPD failed to do so, thus violating D.C. Code § 2-532(c). As a result, Plaintiff has been “deemed to have exhausted . . . administrative remedies” and may seek relief in this Court. D.C. Code §§ 2-532(e), 2-537(a)(1). MPD cannot excuse its failure to abide by FOIA’s statutory time limit. In “unusual circumstances,” the 15-day limit may be extended “by written notice” for a maximum of 10 business days, D.C. Code § 2-532(d)(1), but MPD has provided no such notice. And, although the Council allowed MPD to refrain from processing FOIA requests during the “initial COVID-19 closure,” *see* D.C. Code §§ 2-532(c)(3)(A), Plaintiff filed its request soon after that period ended on January 15, *see* D.C. Code § 2-539(c)(2), and the statute makes clear that, after January 15, the ordinary statutory deadlines apply. *See* D.C. Code § 2-532(c)(1).

MPD’s withholding of the requested NEAR Act data is unlawful. Because MPD has failed to comply within the time limit, it is deemed to have denied Plaintiff’s request. D.C. Code § 2-532(e). MPD has not provided any reason for its denial, and no lawful reason exists. Public records must be provided, except as expressly exempted under D.C. Code § 2-534. No statutory exemption applies here. This Court previously analyzed MPD’s obligations under the NEAR Act, recognizing that “[t]here is no dispute that MPD is subject to FOIA, and specifically that the [NEAR Act data] is subject to disclosure under FOIA.” *BLMDC*, 2019 WL 4050218, at *3. Indeed, the NEAR Act “encompasses a mandate” both to collect data and “to make it accessible to the public in order to further ‘opportunities for community participation and collaboration in policing.’” *Id.*

⁴ That date falls 15 days after January 19, excluding Saturdays, Sundays, and Inauguration Day, which is a D.C. holiday. *See* D.C. Code § 1-612.02(c).

MPD flunked its requirement to respond to Plaintiff's FOIA request by the statutory deadline and has no basis for withholding the information sought. Plaintiff is not merely likely but certain to succeed on the merits.

II. Plaintiff Will Suffer Irreparable Harm in the Absence of the Requested Relief.

Access to the NEAR Act data is crucial to the ability of both Plaintiff and the public at large to participate in the ongoing debate on D.C. policing—including during the Council's March 11 oversight hearing on MPD's performance.

Federal courts have recognized that a plaintiff suffers irreparable harm when the lack of response to a FOIA request prevents the plaintiff from "obtaining in a timely fashion information vital to . . . current and ongoing debate," *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006), and, in such circumstances, granted preliminary injunctions ordering processing or release of records. *See id.* at 43; *accord Am. Immigration Council v. Dep't of Homeland Sec.*, 470 F. Supp. 3d 32, 37-39 (D.D.C. 2020); *Ctr. for Pub. Integrity v. Dep't of Def.*, 411 F. Supp. 3d 5, 12-15 (D.D.C. 2019). Currently, there is a raging public debate about policing in the District. In the wake of police killings of George Floyd and Breonna Taylor, massive crowds gathered throughout the District to protest police brutality,⁵ community groups demanded fundamental changes to policies such as stop and frisk,⁶ and the D.C. Council unanimously passed

⁵ Mary Tyler March, et al., *On a Day of Historic Protests in D.C., Massive Crowds Celebrate and Mourn Together*, DCist (June 6, 2020), <https://dcist.com/story/20/06/06/live-updates-d-c-s-biggest-day-of-protests-begins-with-large-gathering-at-the-lincoln-memorial/>.

⁶ *See, e.g.*, Martin Austermuhle, *Here's What Black Lives Matter D.C. Is Calling For, and Where the City Stands*, WAMU (June 8, 2020), <https://wamu.org/story/20/06/08/heres-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands/>; Martin Austermuhle, *Residents and Activists Tell D.C. Council to Reject Bowser's Police Budget Increase*, DCist (June 15, 2020), <https://dcist.com/story/20/06/15/residents-and-activists-tell-d-c-council-to-reject-bowsers-police-budget-increase/>.

temporary emergency legislation that reformed police practices from the way police can respond to protests to the procedures for releasing body-worn camera footage. The public fervor has not ebbed since then, particularly as two Black men, Deon Kay and Karon Hylton, were killed during interactions with the MPD last fall,⁷ and the Council considered a larger, more permanent bill on policing.⁸ In recent weeks, Mayor Bowser named Robert J. Contee III the District's newest police chief amid controversy regarding community input into police chief selection and continued concerns about over-policing of Black neighborhoods.⁹ The past few months of community outcry, legislative activity, and now selection of a new police chief reflect current and ongoing debate akin to that recognized by the federal district court for D.C. as requiring timely production of information. *See Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 33-34, 41 (issue that was subject of FOIA request had generated newspaper articles, upcoming congressional hearings, and the President's "invit[ation of] meaningful debate" on the subject).

While no concrete deadline is required to establish irreparable harm, *see Am. Immigration Council*, 470 F. Supp. 3d at 38, Plaintiff's urgency is further heightened in the context of an imminent event related to the ongoing controversy. Here, the next inflection points in the debate on policing in the District approach rapidly. On March 11, 2021, the D.C. Council will host a

⁷ *See, e.g.,* Alejandro Alvarez, *D.C. Sees 2nd Night of Protests Over Fatal Moped Chase*, WTOP News (Oct. 29, 2020), <https://wtop.com/dc/2020/10/protests-continue-in-dc-for-2nd-night-over-fatal-moped-chase/>; Margaret Barthel, *MPD Chief and Deputy Mayor Grilled by D.C.'s New Police Reform Commission Over Deon Kay Killing*, DCist (Sept. 4, 2020), <https://dcist.com/story/20/09/04/dc-police-reform-commission-chief-newsham-shooting/>.

⁸ Lex Juarez, *D.C. Council Discussed Law Enforcement Reform with Metropolitan Police Department*, WDVM (Oct. 15, 2020), <https://www.localdvm.com/news/washington-dc/d-c-council-discussed-law-enforcement-reform-with-metropolitan-police-department/>.

⁹ Peter Hermann, et al., *Mayor Chooses Veteran Officer Robert J. Contee as District's Next Police Chief*, Wash. Post (Dec. 22, 2020), https://www.washingtonpost.com/local/public-safety/washington-police-chief-newsham-bowser-contee/2020/12/22/34739df8-30ef-11eb-bae0-50bb17126614_story.html.

public, virtual performance oversight hearing on MPD.¹⁰ The Council will receive testimony from both MPD and the public about how the agency has performed its duties during 2020. Furthermore, in the coming weeks, the Council will hold a hearing on MPD's proposed budget and a confirmation hearing for Robert J. Contee III, the Mayor's nominee for police chief. In both these hearings, racial disparities in policing will take center stage.

Data on how MPD conducted stops and frisks in 2020 is crucial to evaluating MPD's performance and its potential new leadership. Analysis of the previously published NEAR Act data uncovered stark racial disparities in MPD's stop practices, with Black people making up 72% of individuals stopped by police despite composing only 47% of D.C.'s population.¹¹ Furthermore, 86% of stops did not lead to a warning, ticket, or arrest, and 91% of searches that did not lead to a warning, ticket, or arrest, were of Black people—a finding that provides support for the inference that Black people are more likely to have been stopped without justification.¹² Public knowledge about whether MPD's practices have changed or remained the same in 2020—or whether they have become even worse—is essential to the Council's assessment of MPD's performance in 2020 and decisions about its future.

Federal courts have granted injunctive relief in settings like this one, where material requested under the FOIA is crucial for meaningful participation in a key moment of a public debate. For example, in *American Oversight v. Department of State*, 414 F. Supp. 3d 182 (D.D.C. 2019), the court issued a preliminary injunction ordering release of records related to an

¹⁰ Council of the District of Columbia, *2020-2021 Performance Oversight & FY 2022 Budget Schedules*, at 9, <https://dccouncil.us/2020-2021-performance-oversight-fy-2022-budget-schedules/>.

¹¹ ACLU-DC, *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, at 1 (June 16, 2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.

¹² *See id.*

impeachment inquiry while it was ongoing, *see id.* at 186-88, because the “harm of delay beyond the anticipated timeline of the impeachment inquiry would be irreparable,” *see id.* at 187. The requested records “potentially [went] to the heart of one of the issues that the Congress [was] considering,” making the public’s need for information “significant.” *Id.* at 186; *see also Ctr. for Pub. Integrity*, 411 F. Supp. 3d at 12-13, 15 (granting preliminary injunction ordering processing and release of documents related to topic of impeachment inquiry before it concluded). Similarly, a court granted preliminary injunctive relief over records related to possible political interference with mail-in voting because they were “time sensitive due to the impending election.” *Protect Democracy Project, Inc. v. Dep’t of Justice*, 2020 WL 6381936, at *7 (D.D.C. Oct. 30, 2020); *see id.* at *9 (granting preliminary injunction in part). These cases clarify that when key events make “time . . . clearly of the essence,” *Am. Oversight*, 414 F. Supp. 3d at 186, the public’s inability to access relevant information constitutes irreparable harm.

The same is true here. Plaintiff requests release of the NEAR Act data before the March 11 oversight hearing so that the facts about MPD’s 2020 performance of stops and frisks can be meaningfully considered at that hearing. Without timely production of that information, neither Plaintiff nor the public will be able to use the data to influence debate at this key annual event. That result would hamper Plaintiff and the public in their ability to participate in the legislative process, and the Council in receiving the information necessary to craft informed policy. It would also undermine the goals of the NEAR Act: the very purpose of its data collection mandate is to “promote transparency, police accountability, and community involvement,” *BLMDC*, 2019 WL 4050218, at *8, which would be hindered if the public could not obtain the requested data in time to use it effectively. In sum, Plaintiff has demonstrated that immediate injunctive relief is necessary to prevent irreparable harm.

III. The Balance of Harms Favors the Requested Relief.

It is clear that “more harm will result to [Plaintiff] from the denial of the injunction than will result to the [Defendant] from its grant.” *District of Columbia v. Greene*, 806 A.2d 216, 223 (D.C. 2002) (cleaned up). Absent an injunction, Plaintiff and the public will continue to be in the dark on MPD’s current stop and frisk practices, as they will lack information that the legislature has recognized as central to government transparency and accountability. MPD delayed implementation of the NEAR Act for three years and now continues to delay in releasing stop data, depriving Plaintiff and other stakeholders of information that the Council mandated be provided.

In contrast, no harm will result to Defendant if the Court issues an injunction because the “Government cannot suffer harm from an injunction that merely ends an unlawful practice.” *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (cleaned up). Defendant’s withholding of the requested data is unlawful, and compliance with its FOIA obligations is not a harm.

IV. The Public Interest Favors the Requested Relief.

Finally, enjoining Defendant from withholding the requested NEAR Act data is in the public interest. MPD has an obligation under FOIA to produce the requested records and, as this Court recognized in a related context, “it is beyond debate that requiring” MPD to comply with its duty “is in the public interest.” *BLMDC*, 2019 WL 4050218, at *10. This is particularly true where, as here, Defendant’s obligation is in furtherance of FOIA’s purpose of public knowledge of government activities and related to an issue of urgent public importance.

CONCLUSION

Plaintiff is entitled to the records it has requested under the D.C. FOIA. For the reasons given above, this Court should grant Plaintiff's Motion for a Preliminary Injunction¹³ and order MPD to process and produce the records sought in Plaintiff's FOIA request by March 8, 2021.

ORAL HEARING REQUESTED

Plaintiff respectfully requests oral argument on this motion.

Respectfully submitted,

s/Michael Perloff

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February 16, 2021

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¹³ Because the entry of an injunction will not harm the government, the security required by D.C. Super. Ct. R. 65(c) should be set at zero or at a nominal amount, such as \$10. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (“The district court retains discretion as to the amount of security required, *if any*.” (internal quotation marks omitted)); *Doctor’s Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (“[T]he district court did not abuse its discretion in dispensing with the bond.”); *Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (“[T]he Court, in its discretion, concludes that no security is necessary in this case.”).

* Not a D.C. bar member; practicing under supervision pursuant to D.C. App. R. 49(c)(8A).

CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2021, a copy of Plaintiff's Opposed Motion for Preliminary Injunction, Memorandum in Support, exhibits, and Proposed Order, along with the complaint, were served on Defendant by mailing it to the attorney named below, with whom Plaintiff conferred about Defendant's position on this motion earlier today. Additionally, Plaintiff emailed a courtesy copy of these documents to the counsel named below.

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CERTIFICATE OF RULE 12-I(a) COMPLIANCE

I hereby certify that on February 16, 2021, Plaintiff emailed opposing counsel to seek consent on this motion. Opposing counsel represented that Defendant opposes this motion.

/s Michael Perloff

Michael Perloff (D.C. Bar No. 1601047)
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Exhibit A



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January 16, 2021

Via Public FOIA Portal

MPD FOIA Officer
Metropolitan Police Department
300 Indiana Avenue NW, Room 4125
Washington, D.C. 20001

Re: FOIA Request –NEAR Act Data

To whom it may concern:

This is a request under the D.C. Freedom of Information Act (FOIA), D.C. Code § 2-531 *et seq.*, on behalf of the American Civil Liberties Union of the District of Columbia (ACLU-DC). We request all data collected pursuant to the Neighborhood Engagement Achieves Results (NEAR) Act of 2016, D.C. Code § 5-113.01(4B) from January 1, 2020 until the date of your search. Pursuant to D.C. Code § 2-532(a-1), we request that the data be produced in the same CSV format MPD used in producing NEAR Act stop data for the period covering July 22, 2019 through December 31, 2019. See Metropolitan Police Department, *Stop Data Reports* (Mar. 4, 2020), <https://mpdc.dc.gov/stopdata>.

If the requested format is not available, we request the underlying records for the same data—stop and/or frisk data collected pursuant to the NEAR Act from January 1, 2020 until the date of search. Per MPD General Order 304.10, Attachment B, this includes all Notices of Infraction or warning Notices of Infraction issued after a stop; all Notices of Violation or warning Notices of Violation issued after a stop; all event and person cards in MPD’s record management system containing information related to the fields listed in D.C. Code § 5-113.01(4B); and any other documentation MPD used to record stop information pursuant to the NEAR Act.

I. Background

In the NEAR Act of 2016, the D.C. Council amended the D.C. Code to require that MPD officers record the following information about all stops made in the District of Columbia:

- A. The date, location, and time of the stop;
- B. The approximate duration of the stop;

- C. The traffic violation or violations alleged to have been committed that led to the stop;
- D. Whether a search was conducted as a result of the stop;
- E. If a search was conducted:
 - i. The reason for the search;
 - ii. Whether the search was consensual or nonconsensual;
 - iii. Whether a person was searched, and whether a person's property was searched; and
 - iv. Whether any contraband or other property was seized in the course of the search;
- F. Whether a warning, safety equipment repair order, or citation was issued as a result of a stop and the basis for issuing such warning, order, or citation;
- G. Whether an arrest was made as a result of either the stop or the search;
- H. If an arrest was made, the crime charged;
- I. The gender of the person stopped;
- J. The race or ethnicity of the person stopped; and
- K. The date of birth of the person stopped.

D.C. Code § 5-113.01(4B). The statute incorporates by reference the meanings of “contact”, “frisk”, and “stop” as defined in MPD General Order 304.10, which establishes internal policies and procedures governing stops and frisks. See D.C. Code § 5-113.01(4D). Pursuant to MPD General Order 304.10, MPD officers are required to “maintain records of all stops.” MPD Gen. Order 304.10, Attach. B at 1. Stops resolved using a Notice of Infraction (NOI) or Notice of Violation (NOV)—referred to as “NOI stops”—must be documented through issuance of a warning NOI or NOV, a NOI, or a NOV. MPD Gen. Order 304.10, Attach. B, at 1-4. All other stops are documented in the record management system as events where a stop was involved. MPD Gen. Order 304.10, Attach. B at 4.

On June 27, 2019, the D.C. Superior Court issued a preliminary injunction ordering the MPD to comply with the NEAR Act by collecting the required data and “keep[ing] and maintain[ing] the data collected.” *Black Lives Matter D.C. v. Bowser*, No. 2018 CA 003168 B, 2019 WL 4050218, at *11 (D.C. Super. Ct. June 27, 2019). Subsequently, MPD implemented new data collection methods to allow for “more comprehensive information about each police stop” to be collected “in an aggregated manner.” MPD, *Explanatory Note – Stop Data* (Mar. 4, 2020), <https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Explanatory%20Note.pdf>. The plaintiffs agreed to a motion to vacate the injunction after MPD publicly committed in writing to continue to collect NEAR Act

data and publish it semi-annually. *See MPD, Stop Data Report (September 2019)*, at 7, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Stop%20Data%20Report_September%202019_lowres_0.pdf (“Full data . . . will be published . . . in 6-month increments.”). Despite this guarantee, no data has been released since March 4, 2020. *Stop Data Reports* (Mar. 4, 2020), <https://mpdc.dc.gov/stopdata>. Because MPD has failed to uphold its commitment to release the data proactively on a regular basis, the ACLU-DC files this FOIA request.

II. Request

We request all stop and/or frisk data collected pursuant to the NEAR Act from January 1, 2020 until the date of your search, inclusive. Pursuant to D.C. Code § 2-532(a-1), we request that the records be produced in the format and per the specifications below.

1. Dataset format: The dataset should be in a machine-readable CSV format (i.e. a spreadsheet).
2. Dataset structure: Each row of the dataset should represent a single stop or other reportable incident.
3. Dataset time range: The dataset should include all recorded MPD stops that occurred between January 1, 2020 and the date of your search, inclusive.
4. Dataset columns: The dataset should include 52 columns matching the columns in the already-produced datasets covering July 22, 2019 through December 31, 2019. *See MPD, Stop Data (1 of 3), Stop Data (2 of 3), Stop Data (3 of 3)*, <https://mpdc.dc.gov/node/1487566> (.csv attachments). This includes all data fields required by the NEAR Act, D.C. Code § 5-113.01(4B).

Should the data requested not be available in the above format, we request, in the alternative, the underlying records for the same data—all stop and/or frisk data collected pursuant to the NEAR Act from January 1, 2020 to the date of search. This includes:

1. All Notices of Infraction or warning Notices of Infraction issued after a stop;
2. All Notices of Violation or warning Notices of Violation issued after a stop;
3. All event, person, incident, arrest, and/or offense records in MPD’s record management system where the question “Was a stop involved?” was answered with “Yes,” as well as all event, person, incident, arrest,

- and/or offense records that otherwise document information responsive to one or more of the fields in D.C. Code § 5-113.01(4B); and
4. Any and all other forms of documentation that MPD used to record information responsive to one or more of the fields contained in D.C. Code § 5-113.01(4B) during the time period references above.

Please note that we do *not* seek individually identifying information such as complainant or suspect names, home addresses or dates of birth, and any such information should be redacted. Any such information may be redacted. We also do *not* seek body-worn camera recordings.

III. Segregability and Fee Waiver

If you determine that some or all of the records are exempt, you must provide a written explanation including a reference to the specific statutory exemption on which you rely. D.C. Code § 2-533(a). If a segregable portion of any record is not exempt, you must provide those portions along with your explanation of the exemption. D.C. Code § 2-534(b). We reserve the right to appeal any such decision.

We request a fee waiver pursuant to D.C. Code § 2-532(b), which permits you to waive or reduce any fee for searching and reproducing records if “furnishing the information can be considered as primarily benefiting the general public.” The ACLU is a nonprofit public interest organization with limited resources, dedicated to the protection of civil rights and civil liberties. The public is the primary beneficiary of the ACLU’s work to protect fundamental rights, whether by litigation, legislative advocacy, or publication. It is on this ground that federal and state agencies, as well as courts, generally grant waivers of fees for ACLU FOIA requests. The present request satisfies the statutory criteria for a fee waiver.

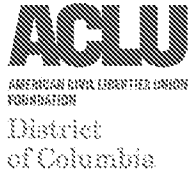
If you determine no waiver is appropriate, and if the proposed fee is greater than \$25.00, we ask that you notify us prior to fulfilling the above requests.

Please furnish all applicable records to Megan Yan via email at myan@acludc.org. If you have questions, please contact me at myan@acludc.org. We look forward to your reply to this records request within 15 business days, as required by D.C. Code § 2-532(c). Thank you for your prompt attention to this matter.

Sincerely,



Megan Yan, Liman Fellow
ACLU-DC



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

cc: Mark Viehmeyer, General Counsel
Metropolitan Police Department
300 Indiana Avenue NW
Room 4125
Washington, D.C. 20001

Exhibit B

Request - **2021-FOIA-02491** **Create Appeal (CreateAppeal.aspx?reqno=2021-FOIA-02491)** **✉ Inbox**
1 **(0)** **✉ Compose Message** **🔔 Sent Messages** **Withdraw Request** **←**
Back (RequestStatus.aspx)

Requester Details

To modify request details please update your requester profile or contact our office for assistance.

Megan Yan

ACLU
 915 15th Street NW
 Second Floor
 Washington D.C., DC 20005
 Phone 301-693-8509
 myan@acludc.org

Requester Default Category: Private Individual

Request Details

Date Requested	01/16/2021
Received Date	01/19/2021
Estimate Delivery Date	02/10/2021
Status	Assigned for Processing

General Request Information

Select a Request Type

Select Request Type

IMPORTANT - Please leave the request type as 'FOIA' when selecting the action offices listed below except when:

- Submitting a request for **Body-Worn Camera** footage, select **Body-Worn Camera** and then **ONLY** select **MPD - Metropolitan Police Department** FOIA office.
- Submitting a request to **Office of the Inspector General**, select **FOIA-OIG** and then **ONLY** select **OIG - Office of the Inspector General** FOIA office. (NOTE: Selecting any agency other than **OIG** with the FOIA-OIG request type, will result in your request being voided.).

Select a FOIA Office MPD - Met ▼

FOIA Office Additional Info. URL: <https://mpdc.dc.gov/page/open-government-and-foia-mpdc> NOTE: 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.

Requester Category Private Indi ▼

Preferred Delivery Mode Download ▼

Request Information

Date Range for Record Search: From(mm/dd/yyyy) To (mm/dd/yyyy)

Detailed Request Description We request all data collected pursuant to the Neighborhood Engagement Achieves

Description Document [Add Attachment -2021 01 16 NEAR Act FOIA for updated data vF.pdf](#) (AddAttachment.aspx?id=69905&mode=corres)

Fee Information

Amount Willing to Pay (\$) 25.00

Willing to Pay All Fees

You may request a waiver or reduction of fees in your request letter. You must include a statement describing how the requested records will be used to benefit the general public. Pursuant to DC Official Code § 2-532(b), if the public body determines that a waiver or fee reduction is in the public interest, i.e., furnishing the records primarily benefits the general public, a waiver or reduction may be granted.

Fee Waiver Requested [Add Attachment -2021 01 16 NEAR Act FOIA for updated data vF.pdf](#) (AddAttachment.aspx?id=69906&mode=corres)

Fee Waiver Granted TBD

If you are requesting a fee waiver please include a brief description below of the reason for your request and if you have any documentation supporting your request for the fee waiver you can attach it above.

Fee Waiver Request Reason

See attachment, at page 4.

Cost Details :

Total Cost	\$0.00
Cost Incurred	\$0.00
Amount Paid	\$0.00
Balance Amount	\$0.00
Payment Status	No Charges

Session will time out after 30 minutes of inactivity.

Experiencing Technical Issues?

If you experience any technical issues in the portal, please refer to the HELP drop-down menu located on the top right-hand corner of the page.

For questions regarding your FOIA request, please contact the agency's FOIA office/officer.

Open Government and FOIA Contact Information (<https://dc.gov/node/818962>)

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Exhibit C

From: [Viehmeyer, Mark \(MPD\)](#)
To: [Megan Yan](#)
Subject: RE: NEAR Act FOIA Request
Date: Friday, January 22, 2021 10:15:57 AM

Received.

Mark Viehmeyer
General Counsel
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4126
Washington, DC 20001
Office: (202) 724-4255
E-mail: mark.viehmeyer@dc.gov

We are here to help.

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From: Megan Yan <myan@acludc.org>
Sent: Friday, January 22, 2021 10:12 AM
To: Viehmeyer, Mark (MPD) <mark.viehmeyer@dc.gov>
Subject: NEAR Act FOIA Request

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Dear Mark,

I hope this email finds you well. Please find attached, as a courtesy copy, a FOIA request filed by the ACLU-DC on January 16, 2021 through the online FOIA portal. Thank you.

Best,
Megan Yan

Megan Yan
she/her/hers
Legal Fellow*
ACLU of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005

(202) 457-0800
myan@acludc.org

* Not a D.C. bar member; practicing under supervision pursuant to D.C. App. R. 49(c)(8A)

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