

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-67**

June 15, 2015

VIA ELECTRONIC MAIL

Nabiha Syed

RE: FOIA Appeal 2015-67

Dear Ms. Syed:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Public Charter School Board (“PCSB”) improperly withheld records your client requested under the DC FOIA.

Background

On April 23, 2015, your client submitted a request under the DC FOIA to the PCSB seeking records that list student suspensions and expulsions for each D.C. public charter school for the 2011-12, 2012-13, and 2013-14 school years. Your client also requested that the records indicate whether a student who was disciplined was receiving special education or had an individualized education program (“IEP”).

On May 7, 2015, the PCSB responded to your client’s request, providing one document in a PDF format and two links to online spreadsheets that contained some of the information sought. The PCSB stated that it was withholding responsive documents that contained personally identifying information in accordance with D.C. Official Code §§ 2-534(a)(2)¹ and 2-534(a)(6)² (“Exemption 2” and “Exemption 6” respectively).

On May 14, 2015, you filed an appeal with the Mayor asserting that the PCSB’s response was inadequate because it did not contain: (1) data about students with special needs for the 2011-12 school year; and (2) data about the expulsion of students with special needs by charter schools for any school year. Further, you argue that the privacy exemptions invoked by the PCSB are not valid because the request did not seek any personally identifying information of students. You cite cases supporting the assertion that FERPA does not justify withholding education records

¹ Section 2-534(a)(2) protects records containing “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

² Section 2-534(a)(6) allows for the protection of information specifically exempt from disclosure under other law and was asserted in conjunction with the Family Educational Rights and Privacy Act (“FERPA”) 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

entirely when the records can be disclosed with personally identifiable information redacted. Additionally, you argue that the requested data will provide oversight of a public agency providing education services and disclosure of the records would serve the public interest by demonstrating how charter schools are using discipline as part of their education policies.

On June 2, 2015, the PCSB provided your client with an “Amended Final Response Letter,” in which it disclosed two additional PDF files containing expulsion data for the 2012-13 and 2013-14 school years categorized by IEP status. Some of the entries pertaining to whether or not an expelled student had an IEP were redacted. The PCSB stated that it redacted information pursuant to Exemptions 2, 6, and FERPA when there were fewer than ten total expulsions per school to prevent disclosing personally identifying information of students.

The PCSB responded to your FOIA appeal in a letter to this office dated June 5, 2015.³ In its response, the PCSB reaffirmed its invocation of exemptions under the DC FOIA and clarified its reliance on FERPA in making further redactions, citing data and privacy policies from the Office of the State Superintendent of Education (“OSSE”),⁴ DC Public Schools (“DCPS”),⁵ and the PCSB.⁶ All of these policies prohibit reporting or disclosing student data involving ten or fewer students to protect the privacy of individual students. The PCSB argues that the rationale for these policies is that the risk of individual student identification increases as the size of a subgroup size shrinks. FERPA prohibits the disclosure of student “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.” 34 C.F.R. § 99.3. The PCSB asserts that due to the relatively small number of expulsions from public charter schools, it is likely that subcategorized expulsion data could be linked with particular students, especially by those familiar with the schools. The PCSB argues that release of such data would be a violation of FERPA protections of student privacy.

In addition to FERPA protections incorporated into DC FOIA through Exemption 6, the PCSB argues that identification of individual students would be exempt from disclosure under Exemption 2 as an unwarranted invasion of personal privacy. Regarding the lack of suspension and expulsion data for students with special needs for the 2011-12 school year, the PCSB represents that it has conducted an adequate search for the data but has not located the information in its possession.

³ PCSB’s letter is attached hereto.

⁴ District of Columbia Consolidated State Application Accountability Workbook, pages 28-29, available at <http://www2.ed.gov/admins/lead/account/stateplans03/dccsa.pdf>

⁵ DCPS Process and Requirements to Conduct Research or Obtain Confidential Data, page 3, available at <http://dcps.dc.gov/DCPS/Files/downloads/ABOUT%20DCPS/Strategic%20Documents/DCPS%20Process%20Requirements%20obtain%20Confidential%20Data.pdf>

⁶ Amendment to Existing FERPA Policy – Clarifying PCSB’s Practices on Anonymized Aggregate Data, pages 1-2, available at <http://bit.ly/1MsFX3E>

Discussion

It is the public policy of the District of Columbia that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body ...” *Id.* at § 2-532(a). The right created under DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534.

DC FOIA was modeled on the corresponding federal Freedom of Information Act. *See Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Decisions construing the federal statute are instructive and may be examined to construe local law. *See Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The first issue you raised on appeal, that PCSB did not address the request for suspension and expulsion data for students with special needs for the 2011-12 school year, relates to the adequacy of the search for requested records. DC FOIA requires that a search be reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government’s search for responsive documents was adequate. *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

To establish the adequacy of a search,

‘the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’ [*Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)]. . . The court applies a ‘reasonableness test to determine the ‘adequacy’ of a search methodology, *Weisberg v. United States Dep’t of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir. 1983) . . .

Campbell v. United States DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

In conducting an adequate search, an agency must make reasonable determinations as to the location of records requested and conduct a search for the records in those locations. *Doe v. D.C. Metro. Police Dep’t*, 948 A.2d 1210, 1220-21 (D.C. 2008) (citing *Oglesby*, 920 F.2d at 68). The determination as to the likely locations of records would involve a knowledge of the record creation and maintenance practices of the agency. Generalized and conclusory allegations do not establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

Here, the PCSB’s response to your appeal is general and conclusory, stating only that “PCSB has conducted an adequate search for suspension and expulsion data subcategorized by special education status for the 2011-12 school year, but has not located this information in its possession.” The PCSB did not describe with specificity the search it conducted. To determine that an adequate search was performed, the PCSB must state: (1) where responsive records in

this matter would be stored; and (2) that it conducted searches of these locations. To date, the PCSB has not sufficiently described its search in a manner that would allow us to evaluate the adequacy of the search.

The PCSB addressed the second issue you raised on appeal – the lack of requested data on special needs status of expelled students – in the amended response it sent to you on June 2, 2015. The amended response contains data of special needs status of expelled students; however, the subcategorized data is redacted for schools with fewer than 10 expelled students. Since these disclosures were made subsequent to the filing of your appeal, we recognize that you have not had an opportunity to challenge these redactions. Therefore, we consider the appropriateness of these redactions.

The PCSB relies on FERPA, incorporated in DC FOIA through Exemption 6, to redact information in the supplemental disclosures. FERPA prohibits the disclosure of student “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.” 34 C.F.R. § 99.3. The PCSB asserts that due to the small number of expulsions from some public charter schools, it is likely that the subcategorized expulsion data pertaining to a student’s special needs status could be linked with particular students, especially by those familiar with the school’s population.

For example, if a school expelled only one student, and the PCSB disclosed that the expelled student had an IEP, someone familiar with that school’s student population could know with absolute certainty that the student had an IEP. If a school expelled two students and the PCSB disclosed that one student had an IEP and the other did not, someone familiar with that school’s students could determine with reasonable certainty which student had an IEP. As the denominator increases – here the number of students expelled at a school – the possibility of identifying an individual student’s IEP status decreases. It is the policy of OSSE, DCPS, and PCSB to require that the denominator be at least ten to protect students from potential identification.⁷ Therefore, the PCSB’s redactions of this type of subcategorized data are necessary to comply with FERPA’s requirements to protect student information.

The PCSB argues that the identification of an individual student’s IEP status would also be exempt from disclosure under Exemption 2. Exemption 2 requires that the information at issue apply to a particular individual⁸ and that there is a significant privacy interest in the requested information.⁹ Exemption 2 does not apply when the information cannot be linked to a particular individual.¹⁰ Further, Exemption 2 can be overcome if a FOIA requester asserts a public interest

⁷ Given the privacy concerns, setting the minimum denominator at ten is not a clear violation of the DC FOIA; we consider it beyond the scope of our authority to determine the appropriateness of the numerical value of this policy. *See* D.C. Official Code § 2-537.

⁸ *See* 456 U.S. 595, 599-603 (1982).

⁹ *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

¹⁰ *See, e.g., Arieff v. U.S. Dep’t of the Navy*, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (holding that defendant must establish “more than a ‘mere possibility’ that the medical condition of a

in disclosure.¹¹ If there is a privacy interest in non-disclosure and a public interest in disclosure, the competing interests must be balanced to determine whether disclosure “would constitute a clearly unwarranted invasion of personal privacy.”¹²

Here, as discussed above, the subcategorized data requested would likely reveal the IEP status of individual students at certain schools. An invasion of privacy need not occur immediately upon disclosure.¹³ The PCSB cannot control how the requester disseminates the data it receives pursuant to this request; therefore, it must redact information it discloses that would constitute an invasion of personal privacy. IEP status is not a public student record, and disclosure of a student’s IEP status would constitute an unwarranted invasion of personal privacy.

Regarding the balancing of privacy interests against public interest, you assert that the information is fundamental to oversight of the PCSB and would illuminate how charter schools discipline students. In the instant matter, we find that disclosing the redacted records at issue would not shed light on the PCSB’s performance of its statutory duties and would constitute an invasion of students’ privacy interests under Exemption 2 of the DC FOIA. Consequently, the redactions here of subcategorized data for individual schools are proper under Exemption 2.

The PCSB acknowledges that the FOIA request seeks “generalized details about how frequently charter schools suspend and expel students.” Due to the redactions the PCSB made to the documents it produced in its amended response, it is not possible to deduce generalized information about expulsions. Accordingly, we direct the PCSB to disclose the total number of charter school students with an IEP who were expelled during the 2012-2013 and 2013-2014 school years and the total number of charter school students without an IEP who were expelled during these years. The disclosure of this data will serve the public interest of the FOIA request while minimizing the potential of individual identification.

Conclusion

Based on foregoing we affirm in part and remand in part the PCSB’s decisions with respect to your client’s DC FOIA request. For suspension and expulsion data subcategorized by special education status for the 2011-12 school year, we direct the PCSB to describe the search it conducted for these records, stating: (1) where responsive records would be stored; and (2) whether it conducted searches of these locations. If the PCSB locates data for the 2011-12 school year, it shall review, redact, and disclose the data in accordance with the guidance or this determination. In addition, the PCSB shall, within 7 business days of the date of this decision, disclose the total number of charter school students with an IEP and without an IEP who were expelled during the 2012-13 and 2013-14 school years.

particular individual might be disclosed” in order to protect a list of drugs ordered for use by some members of large group).

¹¹ See *NARA v. Favish*, 541 U.S. 157, 172 (2004).

¹² See *Wash. Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982).

¹³ See *National Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (“In virtually every case in which a privacy concern is implicated, someone must take steps after the initial disclosure in order to bring about the untoward effect.”).

This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Melissa C. Tucker

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cc: Nicole Streeter, General Counsel, PCSB (via email)

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