

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-80**

July 10, 2015

VIA ELECTRONIC MAIL

Nabiha Syed,

RE: FOIA Appeal 2015-80

Dear Ms. Syed:

This letter responds to the administrative appeal you filed with the Mayor on behalf of your client, BuzzFeed, under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In the appeal, BuzzFeed asserts that the Office of the State Superintendent of Education ("OSSE") improperly formatted and delivered records BuzzFeed requested under the DC FOIA.

Background

On January 12, 2015, BuzzFeed submitted a request under the DC FOIA to OSSE seeking:

- 1) Any records that list the number of withdrawals, suspensions, and expulsions for each school administered by OSSE (including both public and charter schools), for each school year from 2000-01 to the present. These records should, if possible, be comparable to the more recent DC school equity reports.
- 2) Records listing the individual student withdrawals from every school administered by OSSE (both public and charter schools) for each school year from 2000-01 through the present (where available) that includes, but isn't necessarily limited to:
 - a. The date of the withdrawal;
 - b. The type of withdrawal (e.g., transfer, expelled);
 - c. Whether the withdrawal was involuntary;
 - d. Whether the student was in special education;
 - e. The school name and any unique identifiers assigned to the school; and
 - f. The type of school (i.e., public or charter).
- 3) Record layouts (column names, and descriptions where available) for all OSSE databases containing any information about student withdrawals.

In its request, BuzzFeed specified that the information be provided as "Excel spreadsheets, comma separated values (CSV) files, or SQL schema files, and preferably not as a PDF or Word

document.” BuzzFeed also requested that the responsive documents be sent by email or FTP upload.

Following correspondence between BuzzFeed and OSSE, OSSE began providing responsive documents. On February 24, 2015, OSSE mailed a CD-ROM with Excel files as its first disclosure. While OSSE attempted to redact the Excel files of its initial response to protect private student information, after the disclosure both OSSE and BuzzFeed became aware that efforts to redact the information could be circumvented to reveal the private student information.¹ As a result, in subsequent disclosures OSSE provided BuzzFeed with redacted PDFs to prevent the inadvertent disclosure of private student information.

On or about May 20, 2015, through May 25, 2015, OSSE disclosed responsive records pertaining to withdrawals, suspensions, and expulsions of students in the form of redacted PDF documents. OSSE sent the PDFs through WatchDox, an online portal, on the grounds that the files were too large to be sent via email or FOIAXpress.

On June 9, 2015, BuzzFeed filed an appeal with the Mayor challenging several issues related to OSSE’s responses. Primarily, BuzzFeed claimed: (1) that OSSE’s method of disclosure was improper because the documents were produced as PDFs rather than the requested Excel files; and (2) that OSSE’s method of delivery was improper because it used WatchDox rather than FOIAXpress. Further, BuzzFeed asserted that there were egregious delays in the timing of OSSE’s response and that the delays were either a deliberate ruse or evidence that OSSE is improperly withholding unspecified responsive records.

In support of its claim that the format of OSSE’s production was improper. BuzzFeed cites D.C. Official Code § 2–532 (a-1), which states that “a public body shall provide the record in any form or format requested.” BuzzFeed also maintains that in several instances the PDFs contain cropped columns or shifted rows and columns, making it difficult to analyze and interpret information. Regarding the delivery method of the documents, BuzzFeed asserts that email, FOIAXpress, or physical devices could have been used as preferable alternatives instead of WatchDox, and notes that WatchDox allows users the ability to control files, track files, audit use of files, and wipe files on demand. Because the total size of the files was under 20MB, the files could have been transmitted via FOIAXpress, according to BuzzFeed. Lastly, BuzzFeed alleges that “[it] can be concluded . . . that there still remain voluminous responsive records that OSSE has failed to provide.”

OSSE responded to BuzzFeed’s FOIA appeal in a letter to this office dated June 23, 2015.² OSSE also provided a Vaughn index/privilege log³ specifying that the files were redacted to prevent disclosure of personally identifying information in accordance with D.C. Official Code

¹ See Katie Baker and John Templon, *D.C. Schools Released Private Student Data For A Second Time*, BUZZFEED (March 26, 2015) available at http://www.buzzfeed.com/katiejmbaker/dc-public-schools-released-private-student-data-for-a-second?utm_term=.rdnOn83qYg.

² The OSSE’s letter is attached hereto.

³ The OSSE’s Vaughn index/privilege log is attached hereto.

§§ 2-534(a)(2)⁴ and 2-534(a)(6)⁵ (“Exemption 2” and “Exemption 6,” respectively). Additionally, OSSE provided this office, via WatchDox, with the PDF files that were disclosed. In its response, OSSE addressed your claims regarding the format and delivery method of the files. OSSE also explained its search methodology and the delays in its disclosures.

Regarding formatting the files as PDFs, OSSE claims that it attempted to accommodate the requester’s preferences; however, it was unable to accommodate the request for an Excel format because doing so would result in violations of thousands of students’ privacy rights. OSSE states that the initial disclosures were made as Excel files, but due to the format the attempted redactions were ineffective, inadequate, and resulted in an inadvertent disclosure of information for approximately 100,000 students that should have been protected under the DC FOIA, FERPA, and IDEA. Therefore, OSSE revised its FOIA policy to better align with its obligations to protect sensitive student information. OSSE determined that delivery of documents in an Excel file does not provide the level of privacy and security necessary to protect personal student information.

OSSE contends that providing the documents in an electronic format is legally sufficient to satisfy the “form or format” requirement of D.C. Official Code § 2-532(a-1). OSSE states that the DC FOIA does not specify or differentiate certain types of electronic files; the statute distinguishes electronic formats from traditional means of printed paper production. Further, OSSE contends that the right to request a specific format does not override a valid interest in preventing disclosure of protected personal information, and, as demonstrated by its initial disclosure, OSSE cannot ensure the protection of personal information in Excel files. OSSE references FOIA Appeal 2014-38, in which an agency was ordered to disclose records in a searchable and manipulable format. OSSE contends that the files it produced were searchable, and the distinction here is that the disclosure requires protection of personal student information. Further, OSSE acknowledges that formatting the files into PDFs made the files difficult to read. As a result, on July 8, 2015, OSSE provided BuzzFeed and this office with reformatted PDF files for review. OSSE asserts that these PDF files accurately replicate the content of the original formats.

Regarding the delivery method of the responsive records, OSSE explains that FOIAXpress delivery is email-based and subject to the size limitations of OSSE’s email server. OSSE claims that several files were too large to be delivered via OSSE’s email server, and that it used WatchDox to expedite transmission of the files in a secure manner because WatchDox allows the administrator to set permissions and apply protection for documents even after they are delivered.

⁴ 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.”

⁵ 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; and the Individuals with Disabilities Act (“IDEA”) 20 U.S. Code § 1400 *et seq.*

In response to the allegation that it withheld responsive documents, OSSE described its search methodology and attached declarations from the individuals who supervised the search.⁶ OSSE asserts that all responsive files discovered by the search have been disclosed. Additionally, OSSE explains its disclosures were delayed due to the process of reviewing and redacting thousands of pages of documents for compliance with privacy protections under the DC FOIA, and due to its initial inadvertent disclosure of student information, which required OSSE to revise its FOIA process and transition employees working on its FOIA team.

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).

This determination shall address the format and delivery method of OSSE’s disclosures and the allegation that OSSE improperly withheld records. While we acknowledge BuzzFeed’s complaints regarding the delay of the disclosures, there is no remedy under the DC FOIA that we can provide.

Format of Files

BuzzFeed argues that D.C. Official Code § 2-532 (a-1) requires OSSE to “provide the record in any form or format requested.” The determination in FOIA Appeal 2014-38, in which an agency was ordered to disclose files in a searchable and manipulable format, ostensibly supports this argument. FOIA Appeal 2014-38 is distinguishable from this matter, however, because in that appeal the agency’s rationale for providing the files in a static format was to ensure “that data is not subject to manipulation by the requester or by any third parties.” FOIA Appeal 2014-38 did not involve the need to protect information from disclosure pursuant to valid exemptions to the DC FOIA. Here, OSSE has invoked Exemptions 2 and 6 to prevent disclosure of private and personally identifiable student information including names, personally identifying numbers, and other indirect identifiers. BuzzFeed does not challenge the use of these exemptions. Therefore, the issue is whether or not OSSE has the capacity to provide the files in the requested format while preventing the disclosure of information protected by Exemptions 2 and 6.

⁶ The declarations are attached hereto.

Courts have held that an agency is entitled to withhold records in their entirety if the agency lacks the technical capacity to properly redact protected information.⁷ The capacity for redaction is not a general standard, but rather focuses on “the agency’s current technological capacity.” *Milton*, 842 F. Supp. 2d at 260. When an agency asserts its lack of capacity with reasonable specificity and detail, the requestor must point either to “contradictory evidence in the record” or provide “evidence of agency bad faith” in order to refute the agency’s assertions. *Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (internal quotations omitted). Here, OSSE has described and demonstrated, through its initial disclosure, that it lacks the capacity to properly redact files in an Excel format. OSSE further asserts that it cannot sufficiently remove metadata from Excel files to protect student level information.

An agency is expected to provide requesters with the best copy available of a record. *See McDonnell v. United States*, 4 F.3d 1227, 1261 n. 21 (3d Cir. 1993) (“Of course, we anticipate that [the requester] will receive the best possible reproduction of the documents to which he is entitled.”). We agree with BuzzFeed that several portions of the files that OSSE initially disclosed were unintelligible due to cropped columns and shifted rows and columns from the conversion to PDF. After reviewing the reformatted PDF files OSSE provided on July 8, 2015, we find that the legibility of the files is significantly improved and the files no longer appear to contain cropped or shifted columns; however, neither BuzzFeed’s appeal nor OSSE’s response mentions that the original request also asked for records as “comma separated values (CSV) files, or SQL schema files” in addition to Excel files.

As addressed in FOIA Appeal 2014-38, an important aspect of the format of disclosed information is that it is not only searchable but also manipulable. The formats BuzzFeed specifically requested are searchable and manipulable, whereas the PDF files provided are not manipulable unless the data is copied and pasted into another format. Accordingly, OSSE shall consult with its data team to determine if the files can be disclosed in an alternate requested format that is manipulable but still protects private student information. If OSSE is unable to protect private student level information from disclosure in an alternate requested format, its disclosure of reformatted PDF files shall be considered compliant with the DC FOIA as the best copy available.

Delivery Method

The second issue BuzzFeed raises on appeal is that OSSE used a “questionable” method to deliver the files requested. Unlike the requirement to provide documents in a requested form or format, the DC FOIA does not allow a requestor to mandate a particular method of document

⁷ *See e.g., Milton v. DOJ*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (holding that telephone conversations were exempt from disclosure because an agency did not possess technological capacity to segregate non-exempt portions of requested records); *see also Mingo v. DOJ*, 793 F. Supp. 2d. 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because agency “lacks the technical capability” to segregate information that is digitally recorded); *Stevens v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 157086, 33 (N.D. Ill. Nov. 4, 2014) (finding that an agency lacked the capacity to redact video footage; therefore, disclosure was not required).

delivery. *See* D.C. Official Code § 2-532 (requiring only that an agency make records available for inspection and copying). BuzzFeed requested that the records be sent “via email or FTP upload.” Based on the definition of FTP,⁸ it appears that OSSE satisfied this request by transmitting the documents through WatchDox. OSSE states that it selected WatchDox because the files were too large to be sent via email or FOIAXpress, whose capability is limited by OSSE’s email server. Additionally, OSSE states that WatchDox has superior security because it allows an administrator to set permissions and protect documents even after they are delivered.

It is unclear why OSSE would need a secure file transfer protocol to deliver documents responsive to a request under the DC FOIA because all sensitive and exempt information should be redacted from the disclosures. Moreover, OSSE should not have reason to exercise the additional controls and protections available within WatchDox. Nevertheless, BuzzFeed has not expressed an inability to obtain and inspect the files disclosed via WatchDox. Similarly, our office was able to retrieve and review the documents transmitted via WatchDox. Therefore, the use of WatchDox is not an inappropriate method of delivery in this instance.

Alleged Improper Withholding

On appeal, BuzzFeed also contends that “that there still remain voluminous responsive records that OSSE has failed to provide.” The basis for this allegation is unclear, though, as BuzzFeed does not indicate a category of missing records or the failure to perform an adequate search.

The 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).

⁸ *See* Bradley Mitchell, *FTP - What Does FTP Stand For?*, AboutTech, (available at http://compnetworking.about.com/od/networkprotocols/g/bldef_ftp.htm).

Regarding the allegation that OSSE is deliberately withholding responsive records, the Supreme Court has explained that there is a presumption of legitimacy accorded to the official conduct of the government, and clear evidence is usually required to displace it. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Allegations of government misconduct are “easy to allege and hard to disprove,” so a meaningful evidentiary showing is necessary. *Id.* at 175 (citing *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

Here, OSSE responded to your appeal with specificity, describing the search it conducted and including declarations from two data supervisors involved in the search. OSSE, in its response and declarations, indicated: (1) the locations where responsive records in this matter would be stored; and (2) that it conducted searches of these locations. The declarations assert that “all responsive records were provided to the FOIA Officer.” The FOIA officer states that all responsive records discovered by the searches have been disclosed in response to the request. Due to the absence of clear evidence to the contrary, we find that OSSE conducted an adequate search and has not improperly withheld responsive records.

Conclusion

Based on the foregoing, we affirm in part and remand in part OSSE’s response to BuzzFeed’s request. Within 10 business days of the date of this decision, OSSE shall consult with its data team and determine if an alternate format, such as CSV files, can be used to disclose responsive records while protecting personally identifiable student information. The remaining aspects of OSSE’s responses are affirmed.

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

Melissa C. Tucker
Associate Director
Mayor’s Office of Legal Counsel

/s John A. Marsh*

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cc: Mona Patel, FOIA Officer, OSSE (via email)

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