

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR**



Mayor's Office of Legal Counsel

January 31, 2018

Mr. Stuart Chapman

RE: FOIA Appeal 2018-65

Dear Mr. Chapman:

This letter responds to the administrative appeal you submitted 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 Office of the State Superintendent of Education ("OSSE") failed to respond to a request you made under DC FOIA.

Background

On October 13, 2017, you submitted a request under the DC FOIA to OSSE seeking:

For each fall semester since August 2011 to present, for which private schools in the District of Columbia were paid tuition for children's attendance pursuant to the DC Pre-K Enhancement and Expansion Program, which is a result of the Pre-K Enhancement and Expansion Amendment Act of 2008 (D.C. Law 17-202; D.C. Official Code 38.271.01 et seq.), please identify the year and the child's birthday, the name of the school to which the tuition was paid, and a means chosen by you to confidentially identify such students such as by initials, number, or code.

Subsequently, you appealed to this Office asserting that your request had been constructively denied. Your appeal alleges that OSSE did not respond to your request – though your appeal references communications between you and OSSE's FOIA Officer. On appeal, you assert without citation or explanation that OSSE is "trying to hide a situation where they are sending out hundreds of thousands of dollars to area schools without proper compliance." You aver that you seek the requested records to "see if ANY exceptions have been made in the past" so that you can "move for relief for the more-than-\$20,000 that [you] are currently paying for" child care. Your appeal clarifies that you "are not asking for anything that will identify anybody."

OSSE responded to your appeal in a January 30, 2018 letter to this Office. OSSE's response explained that it was providing to you responsive information from its enrollment audit for the 2016-2017 and 2017-2018 school years. This responsive information is in the form of a list of birthdays; OSSE withheld the names of the community-based organizations ("CBOs") so as to

prevent cross-referencing that could reveal the personally identifiable information of children. OSSE explained that its enrollment audit recently moved to a new data system, from which OSSE retrieved the most recent information. OSSE further explained that it was only able to retrieve 2016-2017 data from its older data system, Quick Base. OSSE was not able to retrieve earlier data from Quick Base, which is the only database likely to contain responsive records.

You responded to OSSE's response, stating "we will be continuing our appeal" . . . "I continue to wonder why they are withholding, without justification or explanation, that data, which would be used for compliance with the law." You also stated that you planned to respond further and that you believed OSSE's "partial response does NOT dispose of [your] appeal." Nonetheless, the record before this Office is sufficient for us to render a decision.

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 . . ." D.C. Official Code § 2-532(a). The right created under the 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. Under the DC FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

There are four primary issues in this matter: (1) the constructive denial of your request; (2) the adequacy of OSSE's search; (3) the withholdings made pursuant to an exemption under DC FOIA; (4) and OSSE's lack of obligation to create records that suit your personal needs.

Constructive Denial

You submitted your request to OSSE on October 13, 2017. OSSE's response indicates that your request was submitted on December 15, 2017. In either event, OSSE failed to provide the requested records within the 15 days prescribed by D.C. Official Code § 2-532 (c)(1). It is unclear from the record before this Office if OSSE sought an extension to respond to your request by "written notice . . . setting forth the reasons for extension and expected date for determination," as contemplated by D.C. Official Code § 2-532 (d)(1). In either event, because OSSE did not provide you with a final response by the time you filed your appeal on January 16, 2018, this Office finds that OSSE constructively denied your request. D.C. Official Code § 2-532(e).

Upon receipt of your appeal, OSSE finished conducting a search and provided to you responsive records for some of the years that you requested. Because your appeal is based on a lack of initial response from OSSE, this Office would normally dismiss this matter as moot. However, because you appear to be challenging the adequacy of OSSE's search by asserting your belief that additional data exists, we will review OSSE's substantive response to your request.

Adequacy of Search

DC FOIA requires only that, under the circumstances, a search is 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).

In order 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).

To conduct a reasonable and adequate search, an agency must: (1) make a reasonable determination as to the locations of records requested; and (2) 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). This first step may include a determination of the likely electronic databases where such records are to be located, such as email accounts and word processing files, and the relevant paper-based files that the agency maintains. *Id.*

Here, OSSE identified new and old data systems used to store enrollment audit information as the record repositories likely to contain records responsive to your request. OSSE searched the new system and retrieved data for the 2017-2018 school year. Additionally, OSSE searched the old data system, Quick Base, and was only able to retrieve data from the 2016-2017 school year. In communications with this Office, OSSE represented that earlier data does not exist in either of the databases, which are the repositories most likely to contain responsive records. Notwithstanding your belief that earlier information exists, we find that OSSE has conducted an adequate search under DC FOIA.

Withholding For Privacy

Summarily, we agree with OSSE's implied assertion of D.C. Official Code § 2-534(a)(2) to withhold the names and personally identifiable information of persons identified in the documents, including the names of the CBOs. Because of the small sample size within each

organization, pairing names of CBOs to student birthdates could be used to reveal the students' personally identifiable information. As a result, we affirm OSSE's withholdings that were made pursuant to the exemption.

Creating New Records

An adequate search does not require FOIA officers to act as personal researchers on behalf of requesters. *See, e.g., Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters..."); *Lamb v. IRS*, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

To the extent that enrollment data for previous school years of data is not retrievable, as OSSE has represented, your request could be interpreted a request for OSSE to create a new record. OSSE has no obligation under FOIA to create a new record or to answer interrogatories. *See Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985) (stating an agency "has no duty either to answer questions unrelated to document requests or to create documents."). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). "FOIA creates only a right of access to records, not a right to personal services." *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009).

Conclusion

Based on the foregoing, we affirm OSSE's decision insofar as it has conducted an adequate search for the documents you requested.

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,

Mayor's Office of Legal Counsel

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