

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-011**

November 18, 2019

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2020-011

Dear Mr. Mulhauser:

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”), on the grounds that the District of Columbia Public Schools (“DCPS”) denied your September 23, 2019 request for public records “showing the names of the six District schools where substantiated claims of sexual abuse by an employee occurred between January 2018 and the present. (If there are many such records, release of one with the full list will be satisfactory.)”

Background

On October 11, 2019, DCPS responded to your FOIA request indicating that its search did not identify any records that were responsive to your request. On October 18, 2019, you appealed this matter to this Office. In your appeal, you challenge the thoroughness of the agency’s search for public records. On October 25, 2019, DCPS responded to your appeal.¹ In the response, DCPS indicated that a search was performed of the databases maintained by the agency’s Labor Management and Employee Relations (“LMER”) office that investigates allegations of employee misconduct, including alleged sexual misconduct. The agency indicates that the search of those records did not produce any responsive documents relating to any substantiated claim of “sexual abuse,” as defined by D.C. Official Code §§ 22-3002-3020.

In addition, DCPS addresses an August 8, 2019 letter authored by Deputy Mayor for Education Paul Kihn that is referenced in your request. In the letter, Mr. Kihn provides a summary of the disposition of sexual harassment complaints involving DCPS employees that were reported to the DC Council, noting that there were six substantiated instances of sexual harassment by DCPS employees. DCPS’s response to this appeal notes that it did not interpret your request for records relating to “sexual abuse” to be for records of “sexual harassment. DCPS further indicated that if the request sought the names of schools where sexual harassment took place, DCPS does not maintain a list of those school names. Moreover, according to DCPS, information regarding the substantiated instances of sexual harassment would be contained in records maintained by the LMER and any such record are personnel records of individual

¹ A copy of DCPS’ response to your appeal is attached.

employees that are exempt from release pursuant to D.C. Official Code § 2-534 (a)(2) (information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy). DCPS's response did not address its duty to produce reasonably segregated 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. 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 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 if they are "retained by a public body." D.C. Official Code § 2-502(18).

Adequacy of the Search

The first issue you raise in the instant appeal is whether DCPS conducted an adequate search for records. You state in your appeal that the search was unreasonable because the search failed to locate a single responsive document even though there were several dozen claims in the relevant time period and six were acknowledged to have been substantiated. You also assert that these allegations were covered in local media and the Deputy Mayor for Education discussed this issue in public materials. You assert that these records must exist given the need under District and federal law for allegations to be investigated.

In determining whether an agency conducted an adequate search in response to a records request, the test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *See Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. U.S. Dep't of Justice*, 578 F.2d 261 (9th Cir. 1978).

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 includes determining 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.* Second, the agency must affirm that the relevant locations were in fact searched. *Id.* Generalized and conclusory allegations cannot suffice to establish an adequate search. *See In Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007).

In this instance, DCPS made the determination that a record repository likely to contain responsive records was its LMER division. It is not clear whether DCPS conducted an email search. DCPS's search was limited to its interpretation of your request as being for instances of "sexual abuse." It does not appear that DCPS's search was inclusive of potential "sexual harassment" records. We accept DCPS's representations that a search for records relating to substantiated cases of "sexual abuse," as used as a term of art in the D.C. Code's criminal title, did not yield responsive documents. To this extent, DCPS's search was reasonable.

The threshold determination in establishing the parameters of an adequate search is the identification of the records sought by the request. Your request includes several references to an ongoing public conversation about "6 substantiated . . . sexual harassment complaints involving staff from January 2018 to present." DCPS's response to the appeal makes a careful distinction between "sexual harassment" and "sexual abuse." While it appears from a plain reading of the FOIA request that you seek public records touching on the six instances of sexual "improprieties" – our phrasing – referenced in Deputy Mayor Kihn's August 8, 2019 letter to ANC Commissioner Krepp, it appears that the most prudent path forward is for you to avail yourself of DCPS's offer to engage in further discussion to clarify the scope of the FOIA request. To the extent that there was ambiguity as to what you were requesting DCPS would have been well-advised to contact you to clarify the scope of your request. *See* 1 DCMR § 402.5. This Office has nothing before it that indicates this engagement took place.

Exemption 2

DCPS also asserts that to the extent the request seeks records naming the six schools with substantiated claims of sexual harassment, such disclosure would violate the privacy rights of its employees. DCPS asserts that potentially responsive records of substantiated claims of sexual harassment would be maintained by the LMER and such records are personnel records of individual employees that are exempt from release pursuant to D.C. Official Code § 2-534 (a)(2) (information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy).

DCPS's assertion of Exemption 2 is at this point hypothetical and we are unable to review its basis at this time as DCPS as neither stated that it has identified such records, nor has it provided such records, for our review in assessing the validity of this argument. However, we will note that D.C. Official Code § 2-534(b) requires the disclosure of "[a]ny reasonably segregable portion of a public record . . ." and DCPS's argument does not address this matter.

Conclusion

Based on the foregoing, we remand this matter to DCPS to: (1) communicate further with you about the scope of your request; and (2) conduct additional search for responsive records to the extent appropriate. 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.

Respectfully,

Mayor's Office of Legal Counsel

cc: Eboni Govan, Attorney Advisor
DCPS (via email)