GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-085

September 3, 2020

VIA ELECTRONIC MAIL

Mr. Fritz Mulhauser

RE: FOIA Appeal 2020-085

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. Code § 2-537 ("DC FOIA"), on the grounds that the District of Columbia Public Schools ("DCPS") improperly denied your September 23, 2019, request for public records identifying the six District schools where substantiated claims of sexual abuse/sexual harassment by an employee occurred between January 2018 and the present. Your DC FOIA request was also addressed in an earlier decision by this Office in FOIA Appeal 2020-011.

Background

In FOIA Appeal 2020-011, we remanded your DC FOIA request back to DCPS, instructing the agency to clarify the scope of your request and to conduct a further search based on that clarification. On January 24, 2020, you filed a second appeal with this office, in which you indicated that you met with DCPS officials on November 27, 2019. The appeal identified the points that were clarified by agency counsel: (1) your request is for the names of the six schools with the substantiated claims of sexual harassment referenced in an August 8, 2019, letter from Deputy Mayor for Education Paul Kihn, whether the incidents involved abuse or sexual harassment; (2) you only seek records with the names of the schools, no other information; (3) any statutory exemption was waived by the releases described by the Deputy Mayor in the August 8, 2019, letter; and (4) you do not want every document containing the names of the schools (individually or collectively). Instead, one document identifying all of the schools (if supported by verification that the information came from agency records) would be sufficient. You further stated that DCPS had neither responded nor expressed any objection to a summary of the items discussed in the November 27, meeting that you emailed the agency the following day. The record before this Office also includes a January 16, 2020, letter from DCPS to you.[1] In that letter, DCPS did not dispute that you met with agency counsel or that the requestor clarified that one document identifying the schools would be sufficient.

[1] A copy of the agency's January 16, 2020, supplemental response to your request is attached to this decision.

Since your first appeal to this Office, we believe that DCPS has provided new information regarding the claims central to your request. DCPS informed this Office that the six substantiated incidents involved sexual harassment and not sexual misconduct or sexual abuse. It is the agency's policy not to release information about sexual misconduct or sexual abuse, since those matters involve criminal misconduct. With regard to sexual harassment, DCPS does not release information where no crime is alleged to have been committed in order to protect the privacy of the parties. The agency treats such allegations as confidential, in compliance with Mayor's Order 2017-313. DCPS acknowledged that, in correspondence regarding this DC FOIA matter, the terms "sexual harassment" and "sexual abuse" were used interchangeably to describe the six incidents in question.

On February 5, 2020, DCPS responded to your second appeal (FOIA Appeal 2020-085).[2] In that response, DCPS distinguished between "sexual abuse," for which there is public disclosure, and "sexual harassment," where no information is released to the public. DCPS stated for the first time that, of the six substantiated sexual harassment matters, only one incident occurred at a school and that the other five incidents occurred at the DCPS central office. This information had never been disclosed in any prior communication in this DC FOIA matter. Later, the agency clarified, in a communication with this Office on February 25, 2020, that five (not one) of the incidents of sexual harassment occurred at a school. Still, the agency reaffirmed its position that it could withhold the names of those schools pursuant to D.C. Code § 2-534(a)(2). We note that the Agency has shared varying tallies of incident claims over the course of this DC FOIA matter. We rely on those numbers provided on February 25, 2020, for the purpose of issuing this 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. 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. 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. Code § 2-534. Under the DC FOIA, an agency is required to disclose materials if they are "retained by a public body." D.C. Code § 2-502(18).

Adequacy of the Search

The first issue you raised in FOIA Appeal 2020-011, and by implication in this new appeal, is whether DCPS conducted an adequate search for records. You stated in your initial appeal that the search was unreasonable because it failed to locate a single responsive document, even though there were several dozen claims in the relevant time period and six claims were acknowledged to have been substantiated. In addition, the allegations were covered in local media and the Deputy Mayor for Education generally discussed them in public materials. You

[2] A copy of the DCPS response to your appeal is attached to this decision.

assert that these records must exist, given the need under District and federal law for allegations to be investigated.

As stated in FOIA Appeal 2020-011, 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 FOIA Appeal 2020-011, DCPS indicated that its Labor Management and Employee Relations ("LMER") division likely maintained a repository of responsive records. DCPS also repeatedly stated that its search was limited to its interpretation of your request as being for instances of "sexual abuse." As a result, in FOIA Appeal 2020-011, we accepted DCPS's representation that a search for records relating to substantiated cases of "sexual abuse," did not yield responsive documents. And, we concluded that the agency's search, given its interpretation of your request, was reasonable.

As for the agency's most recent search, for six substantiated claims of "sexual harassment" (as opposed to the prior search for allegations of "sexual abuse"), it appears to have been adequate. DCPS did locate additional records and, based on those records, the agency disclosed that five of the six incidents of sexual harassment occurred at a school and the sixth incident occurred at the agency's central office. As a result, we conclude that DCPS has conducted an adequate search for responsive records.

Exemption 2 – Personal Privacy

D.C. Code § 2-534(a)(2) ("Exemption 2") protects from disclosure information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. In determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id*.

> The privacy interest in the FOIA balancing analysis "encompasses the individual's control of information concerning his or her person," including names, addresses, and other identifying information. *Padou*, *supra*, 29 A.3d at 982. Moreover, individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature. *U.S. Dep't of State v. Washington Post Co*., 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).

District of Columbia v. FOP, 75 A.3d 259, 265-66 (D.C. 2013).

As support for Exemption 2, DCPS relies on Mayor's Order 2017-313 which provides as follows:

> The Complaint file, including all information and documents contained in the file as well as information received during investigation of the complaint shall be confidential. The agency shall take all reasonable steps to ensure that no information contained in the complaint file is disseminated except in furtherance of the investigation; resolution of the allegations; execution of any consequences stemming from the investigation; when lawfully released; or when required by court order.
>
> The agency must take all reasonable efforts during the conduct of an investigation to protect the identities of the alleged harasser and the alleged victim, as well as witnesses from either party. However, the alleged harasser shall be promptly advised of the complaint and its substance and be given an opportunity to respond to the allegations.
>
> This confidentiality requirement does not preclude the agency from reporting a suspected illegal or improper act, or conduct related to the investigation, to an appropriate enforcement investigating and/or legal organization or from cooperating in any related investigation.

We find that there is a personal privacy interest in the names and addresses of employees, details of an alleged act of sexual harassment, including dates and specific locations of the incident(s) or even the supervisory reporting chain for the victims or harassers in the investigative file. However, we do not find that the Mayor's Order creates a personal privacy interest in the names of the five schools that DCPS now states had substantiated claims of sexual harassment. We believe this to be so for the actual file information, and even more so with regard to emails and other records identifying the schools with those substantiated sexual harassment claims.

Even if we did find a personal privacy interest in the disclosure of the school name for information in or taken from the investigative file, the second part of the Exemption 2 analysis would still require us to determine whether an individual privacy interest is outweighed by the public interest. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of "public interest" if it would shed light on an agency's conduct. *Beck v. Department of Justice, et al*., 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

> This statutory purpose is furthered by disclosure of official information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee,* 489 U.S. at 773; *see also Ray,* 112 S. Ct. at 549. Information that "reveals little or nothing about an agency's own conduct" does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee,* 489 U.S. at 773.

Id. at 1492-93.

We recognize that there is a public interest in the information contained in the records that you seek. *Cochran v. U.S*., 770 F.2d 949, 956 (11th Cir. 1985) ("[T]he balance struck under FOIA exemption [two] overwhelmingly favors the disclosure of information relating to a violation of the public trust by a government official . . ."). In this matter, the potential disclosure would not be the specifics of an incident or the identities of the parties involved in a sexual harassment matter. We recognize that, in such a situation, the public's right to know that there were substantiated claims of sexual harassment at a particular DCPS school might outweigh any personal privacy interest that may be deemed to exist in the name of a school where a claim of sexual harassment has been substantiated. However, under FOIA, an agency "has no duty either to answer questions unrelated to document requests or to create documents." *Zemansky v. United States Envtl. Prot. Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt records, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

The record before us is such that we cannot, at this point, decide whether Exemption 2 justifies the withholding of the names of the schools in question. Instead, we direct that DCPS provide this Office with a Vaughn Index listing the records upon which it based its statement regarding the five substantiated sexual harassment incidents at a DCPS school and a copy of the document(s) which support the agency's statement on the number of school based incidents that were substantiated. Upon our review of the Vaughn Index and the document(s), we will be able

to make a final determination on whether the records relied upon by DCPS are protected under Exemption 2.

Segregability

The last issue to be considered is whether DCPS can redact the withheld records to protect personal privacy interests. D.C. Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009). We conclude that segregability is not an issue in this FOIA request because you have asked that all of the information, other than the school name, be redacted from the responsive documents.

Conclusion

Based on the foregoing, we remand this matter to DCPS to provide this Office with a Vaughn Index describing the records reviewed that support the agency's statement that five of the six incidents of substantiated sexual harassment occurred at DCPS schools. The Index should also identify the statutory exemption for each document. In addition, DCPS is to provide this Office with a copy of the record(s) for our review.

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 D.C. Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc:
DCPS (via email)