

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-183**

September 2, 2020

VIA ELECTRONIC MAIL

Ms. Jamie Smith

RE: FOIA Appeal 2020-183

Dear Ms. Smith:

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 District of Columbia Public Schools (“DCPS”) improperly withheld documents under Exemptions 2 and 4 of the DC FOIA.

Background

You submitted a FOIA request to DCPS for “[a]ny and all emails to/from Carrie Broquard, John O. ‘Shawn’ Stover, or Jeffrey Holmes regarding Jamie Davis Smith regarding ADA/Handicapped Parking or any other topic,” with a date range from February 28, 2020 to March 31, 2020. Although DCPS initially determined that no responsive records existed, at your request it subsequently undertook a new search and located several responsive emails. On May 11, 2020, DCPS provided responsive emails to you, but withheld others on the grounds of attorney-client privilege, deliberative-process privilege, and personal privacy.

That same day, you filed the instant appeal, alleging that DCPS improperly withheld emails with respect to the attorney-client privilege and personal privacy. DCPS responded to your appeal by arguing that its decision to withhold emails based on those exemptions was justified and by providing this office with a *Vaughn* Index and a copy of the withheld documents.¹ As DCPS notes, it withheld additional emails by invoking the deliberative-process privilege, but your appeal does not challenge the decision to withhold those emails.

Discussion

It is the public policy of the District of Columbia government 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, the DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body.” *Id.* at § 2-532(a).

¹ DCPS’s response to your appeal is attached.

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

Exemption 2 – Personal Privacy

Under Exemption 2, 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 Dep't 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. 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).

The emails that DCPS withheld under Exemption 2 consist of emails between the principal of Lafayette Elementary School and at least one Lafayette parent addressing their concerns about a situation at the school involving you. DCPS argues that “parents were clearly bringing their concerns to the Principal in confidence” and that “the individuals involved had a privacy interest in their communications with the Principal that is outweighed by any public interest in the disclosure of the communications.” In DCPS’s view, “[p]arents should be able to communicate with school administration about their concerns without fear of those communications being disclosed to the other parents or the general public. This should be the case even when the communications are about other parents.” By contrast, you argue that these emails should not be withheld on privacy grounds because much of the information in them has already been widely shared with the Lafayette community, including on the school’s website and other email communications.

We conclude that DCPS can invoke the personal privacy exemption in this context, but only as to the personal and identifying information in the withheld emails, not to the emails in their entirety. In particular, it is generally accepted that the identities (and identifying information) of private citizens who send complaints to government agencies can properly be withheld under FOIA’s personal privacy exemption. *See, e.g., Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122 (7th Cir. 2003). At the same time, DCPS has provided no authority—and we have found none—for the proposition that there is a cognizable privacy interest in the contents of a complaint to a

government official that is devoid of personally identifiable information. The upshot is that at least a portion of the emails withheld on the basis of personal privacy can likely be disclosed without invading the privacy of any parents involved.

Furthermore, under D.C. Code § 2-534(b), even when an agency establishes that an exemption is applicable, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). As a result, with respect to the emails that DCPS withheld on the basis of Exemption 2 (Bates Nos. 00001-00010), DCPS should redact the emails for any personally identifying information. That would include the parents' names and email addresses, as well as references to particular students or names of other individuals that would have the effect of disclosing the identity of the parents or their children. DCPS should then provide you with redacted copies of the emails contained at Bates Numbers 00001-00010.

Exemption 4 – Attorney-Client Privilege

DCPS also indicated that it withheld certain other records under D.C. Official Code § 2-534(a)(4). Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” This exemption has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), which includes the attorney-client privilege.

Invoking attorney-client privilege, DCPS withheld documents with Bates Numbers 00042 to 00125, which it describes as “communications between the General Counsel of DCPS, a DCPS Instructional Superintendent with oversight of Lafayette ES and the Lafayette Principal.” DCPS argues that these “communications reflect legal advice being sought and provided regarding an incident involving [you] which resulted in a Warning Letter being issued to [you] by the Instructional Superintendent.” You counter that “[m]any emails responsive to my request were exchanged between non-DCPS employees and DCPS administrators without the involvement of an attorney and without the intent of seeking legal counsel,” and thus the attorney-client privilege should not apply. However, DCPS does not claim that the attorney-client privilege shields *all* responsive emails. DCPS instead invokes the privilege simply to shield communications with its general counsel directed toward receiving or providing legal advice with respect to incidents involving you at the school.

Based on our review of the documents DCPS provided to our office, we conclude that the vast majority of those for which it invoked the attorney-client privilege were properly withheld on that basis. Disclosing the emails and attachments exchanged between DCPS administrators and attorneys would reveal the nature or substance of the legal advice sought or provided and are thus subject to the privilege. Because these documents are privileged, they are exempt from disclosure under DC FOIA Exemption 4. The only exceptions are the documents with Bates Numbers 00057-00059, 00065-00066, and 00071-00072, which are copies of letters that you sent to DCPS administrators on March 10 and March 12, 2020, and which you already have in your possession.

We therefore conclude that DCPS need not produce any of the documents it withheld under Exemption 4. However, DCPS should redact for personally identifiable information the documents that it withheld under Exemption 2 and provide you with the redacted copies of those documents. We thus affirm in part and remand in part.

This is the final decision on your appeal. 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 DC Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Eboni J. Govan, FOIA Officer
DCPS (via email)