

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-092**

January 18, 2023

VIA ELECTRONIC MAIL ONLY

Ms. Kathleen M Coughlin

RE: FOIA Appeal 2022-092

Dear Ms. Coughlin:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* ("DC FOIA"). In your appeal, you have challenged the response of the Department of Health ("DOH") to your DC FOIA request.

Background

On January 22, 2022, you submitted a DC FOIA request to DOH, identified as 2022-FOIA-02812, which sought the following:

I am seeking public records that fulfill the data reporting requirements pursuant to Sec.105(a)(1) of the Protecting Our Children Emergency Amendment Act B24-0403 which was enacted on October 26, 2021...The section reads as follows:

Sec. 105. COVID-19 infection and mitigation reporting requirements

(a)(1) On or before November 1, 2021, the Department of Health shall make available and update the following information on a weekly basis for the previous week on the District's coronavirus website (coronavirus.dc.gov), broken out by week:

- (A) The number of students who tested positive for COVID-19, broken out by LEA, school, and grade level;
- (B) The number of school personnel who tested positive for COVID-19, broken out by LEA and school;
- (C) The total number of students tested, broken out by LEA, school, and grade level;
- (D) The total number of school personnel tested, broken out by LEA and school;
- (E) The number of students in quarantine, broken out by LEA, school, and grade level; and
- (F) The number of school personnel in quarantine broken out by LEA and school.

Therefore, under the District of Columbia Freedom of Information Act § 2-531 *et seq.*, I hereby request the opportunity to inspect all data from the date the legislation was

enacted (October 26, 2021) to the present related to the total number of students who tested positive for COVID-19, personnel who tested positive, students tested, personnel tested, students in quarantine, and personnel in quarantine broken down by week as well as LEA, school, and grade-level as applicable under the above legislation.

On February 14, 2022, DOH responded to your request explaining, “[m]ost of the data requested can only be collected by the Office of the State Superintendent (OSSE) and D.C. Public Schools (DCPS). [DOH] has been collaborating with OSSE and DCPS to receive a weekly data feed so DC Health can then submit updates to the Executive Office of the Mayor for the District government’s dashboard as written in the legislation.” In addition, DOH provided links to available data that was responsive to subsections (E) and (F), and stated that data for some of the subsections would be available by the first week of February, with the remaining subsections being available by mid-February.

In your February 25, 2022 appeal filed with this Office, you assert DOH’s failure to provide the documents you requested “constitutes an unlawful denial.” Specifically,

I see two possible conclusions; either A) D.C. Health has been collecting the data required under The Protecting Our Children Emergency Amendment Act and are failing to produce requested records without cause, or B) D.C. Health has not been gathering the mandated information and still does not have the documents to actually fulfill my request. In case A, DC Health does not have grounds to refuse my FOIA request without reason or a specific exemption being invoked. DC Health could not invoke an exemption because none of them reasonably apply to my request. The only one that might be argued is § 2–534(a)(2) of the District of Columbia Freedom of Information Act which protects individuals’ privacy and the unwarranted disclosure of personal information; however, Sec.105(a)(2) of the Protecting Our Children Emergency Amendment Act allows the Department of Health to report n<10 in situations with small sample sizes that might compromise individuals’ privacy and the District of Columbia Freedom of Information Act § 2–534(b) requires agencies to release all reasonably segregable nonexempt portions of documents with the exempted portions excluded. In case B, I should have been explicitly refused with the explanation that the records do not exist rather than be given a timeline that was already inaccurate by the time I received it.

On March 8, 2022, we notified DOH of your appeal and requested a response. DOH responded on March 15, 2022 stating that it “provided all requested documents available to [it] when its final response to [your] email was sent...” DOH also explained,

...all information related to COVID-19 flows through the Joint Information Center (JIC) established as part of the Incident Command Structure for the Emergency Operations Center overseeing the District of Columbia’s COVID-19 response.... The JIC controls what is posted on coronavirus.dc.gov.

Finally, DOH noted JIC had updated coronavirus.dc.gov to show the data requested.

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).

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). Accordingly, 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).

Under DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Code § 2-502(18). An agency is only required to disclose records that are under its control at the time of the request. *DOJ v. Tax Analysts*, 492 U.S. 136, 145 (1989). Additionally, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Env’tl. Prot. Agency*, 767 F.2d 569, 574 (9th Cir. 1985). 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).

If an agency cannot locate a requested record, the agency must notify the requester. 1 DCMR § 407.3. Given DOH’s explanation provided in response to your appeal—which detailed the contemporary and future availability of records that would be responsive to your request—it has appropriately responded.

Conclusion

Based on the foregoing, this appeal is denied as moot. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in Superior Court.

Sincerely,

The Mayor’s Office of Legal Counsel

cc: Phillip Husband, DOH FOIA Officer (via email only)