

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



May 1, 2019

VIA ELECTRONIC MAIL

Mr. [REDACTED] Mulhauser

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RE: #0004_11.15.18_FOIA AO

Dear Mr. Mulhauser:

This correspondence is in response to your November 15, 2018, request for a Freedom of Information Act (FOIA) advisory opinion from the Office Open Government (OOG) on the following issues:

- The application of FOIA to Local Education Agencies and District of Columbia Public Charter Schools (PCS); and
- Whether PCS are private contractors that perform a public function, whose records through FOIA, are accessible pursuant to D.C. Official Code § 2-532(a-3).

The foregoing non-binding legal advisory opinion is issued by the OOG pursuant to section 205c(d) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective October 30, 2018 (D.C. Law 19-124; D.C. Official Code § 1-1162.05c(d)), which authorizes the issuance of advisory opinions by the OOG on the implementation of Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*), the Freedom of Information Act of 1976.

Based on the analysis below, my findings are as follows: (1) by statute, PCS are not a part of the District of Columbia government (D.C. Official Code § 38-1800.02(10)(B)); (2) in instances of charter non-renewals and revocations PCS are a part of the D.C. Public Schools (D.C. Official Code §§ 38-1800.02(29)(B); 38-1802.12(d)(5) and 38-1802(c)(5)); (3) it is unclear that when PCS are part of the D.C. Public Schools due to charter non-renewals and revocations, whether the former PCS is subject to FOIA; (4) under District law PCS are non-profit entities (D.C. Official

Code § 38-1802.04(c)(16); (5) PCS are not District government “agencies” or “public bodies” and are therefore not subject to FOIA (D.C. Official Code §§ 2-502(3); 2-502(18A)); (6) the District of Columbia Public Charter School Board (PCSB) is expressly subject to FOIA (D.C. Official Code § 38–1802.14(i)), however, there is no statute which expressly subjects PCS to FOIA; (7) it is unclear whether D.C. Official Code § 38-1802.11(a)(2) is a mandate for the PCSB to request records from PCS to comply with FOIA; (8) the legislative history of FOIA leaves no question that PCS are not private contractors performing a public function, therefore PCS records are not subject to FOIA pursuant to D.C. Official Code § 2-532(a-3); (9) The National Alliance for Public Charter Schools publication, *A Model Law for Supporting the Growth of High-Quality Charter Schools*,¹ cannot take precedent over existing District of Columbia statutes and does not support the contention that PCS are private contractors subject to FOIA pursuant to D.C. Official Code § 2-532(a-3); and (10) legislation is necessary to subject PCS to FOIA because of the aforementioned ambiguities in the law.

I. BACKGROUND

In the District of Columbia, Public Charter Schools are independent, tuition-free schools under agreements approved by the District of Columbia Public Charter School Board. However, a public charter school is not a matter-of-right school to students in a given neighborhood, like traditional public schools. Entries into public charter schools require admission via an application and lottery.

A Local education agency (LEA) is an entity that operates public elementary and secondary schools. Each charter network has its own LEA. D.C. Official Code § 38-2601.02(3) defines “Local education agency” or “LEA” as an “educational institution at the local level that exists primarily to operate a publicly funded school or schools in the District of Columbia, including the District of Columbia Public Schools and a District of Columbia public charter school.” Pursuant to D.C. Official Code § 38-1802.10, “[F]or any fiscal year, a public charter school shall be considered a local education agency for purposes of part A of title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311 *et seq.*) . . .” Hereinafter, LEA and Public Charter Schools shall be collectively referred to as PCS.

II. DISCUSSION

The issue this query raises, whether individual District of Columbia Public Charter Schools are subject to FOIA, is a complex issue. While the DCPCSB is clearly a public body subject to FOIA, the entities that it charters do not appear to be subject to FOIA. This Advisory Opinion will provide guidance on this issue and the discussion that follows sets forth why the particular legal theories offered in the query do not support the view that PCS are subject to FOIA. The document concludes by offering a solution to the issue.

¹ Nat. Alliance for Public Charter Schools, *A Model Law for Supporting the Growth of High-Quality Charter Schools*, 2d ed. (2016), p. 14. Available at: <https://bit.ly/2B5g1N7>.

A. The Application of FOIA to the PCSB.

The PCSB must comply with all provisions of FOIA, as set forth in D.C. Official Code § 38–1802.14(i).² However, it is unclear whether D.C. Official Code § 38–1802.14(i) requires the PCSB to request records from PCS to comply with a FOIA request the PCSB receives. In its Annual FOIA Report for FY2018, the PCSB lists seventy-four (74) FOIA requests it was responsible for processing from October 1, 2017 through September 30, 2018. The PCSB also maintains a “Transparency Hub” at <https://www.dcpcsb.org/blog/freedom-information-action>. The Hub includes information on school budgets, audits, at-risk funding usage, school calendars, and charter goals. The FOIA-related information provided by PCSB demonstrates that it collects some data from individual PCS. Under FOIA law, if not subject to an exemption, PCSB would be required to produce that information.

However, the OOG’s research on the PCSB and FOIA did not yield results by way of judicial case law advising that PSCB has an obligation to request information from a PCS to fulfill a FOIA request. A Mayor’s FOIA Appeal provides some guidance, although not conclusory on the issue. In FOIA Appeal 2015-67, the FOIA request to the PCSB was for the following: (1) the expulsion and suspension records of students for each PCS for 2011-12, 2012-13, and 2013-14 school years; and (2) records that indicate whether a student who was disciplined was receiving special education or had an individualized education program (IEP).³ In commenting on the PCSB’s response to the FOIA request, the Mayor’s Office of Local Counsel (MOLC) noted:

Here, the PCSB’s response to your appeal is general and conclusory, stating only that PCSB has conducted an adequate search for suspension and expulsion data subcategorized by special education status for the 2011-12 school year, *but has not located this information in its possession.* (Emphasis added) (page 3)

Additionally, the MOLC directed the PSCB “to describe the search it conducted for the records, stating: (1) where the responsive records would be stored; and (2) whether it conducted searches of these locations. D.C. Official Code § 38–1802.14(i) and FOIA Appeal 2015-67 do not indicate with any level of certainty that the statute requires the PCSB to obtain records from PCS to comply with FOIA. The guidance appears to suggest that the PCSB should disclose if information sought through a FOIA request is held by an individual PSC and state whether or not it is able to search for those records.

B. The PCSB has Authority to Request Records from PCS.

The PCSB has authority to request from a PCS “any book, record, paper, or document” if the PCSB determines such production is required for the Board to carry out its functions.⁴ The PCSB’s authority under D.C. Official Code § 38-1802.11(a)(2) raises two issues. First, once the DCPCSB obtains “books, records, papers or documents” from a PCS pursuant to D.C. Official

² D.C. Official Code § 38–1802.14(i) states: “(i) Freedom of Information Act- The Board shall comply with all provisions of subchapter II of Chapter 5 of Title 2 [2-531 *et seq.*].”

³ See June 15, 2015 Opinion of the Mayor’s Office of Legal Counsel (FOIA Appeal 2015-67).

⁴ D.C. Official Code § 38-1802.11(a)(2).

Code § 38-1802.11(a)(2), whether those records are subject to FOIA. Second, whether FOIA requires PCSB to request records from PCS to comply with its obligation to produce records.

A FOIA requester may obtain PCS records if the PCSB maintains those records. D.C. Official Code § 38–1802.14, supports the position that a requester could obtain PCS records through a FOIA request to the PCSB. This is also the position which the PCSB maintains. It states the following on its website:

Any record in our possession is subject to FOIA, including any documents submitted to us by schools. We are not able to provide documents that are held exclusively by the schools themselves.⁵

PCSB is clearly required to produce the PCS records that it maintains when those records are requested under FOIA. However, whether D.C. Official Code § 38-1802.11(a)(2) serves as a mandate for the PCSB to request records of individual PCS to comply with the FOIA requirements of D.C. Official Code § 38–1802.14(i) is not explicitly stated in the law. Based on the OOG’s research, there is no definitive authority on this issue. Although not expressly subject to FOIA, a requester may be able to obtain the records of PCS through submission of a FOIA request to the PCSB. However, the PCSB is not obligated under FOIA law to search or request records of PCS that it does not maintain, even though PCSB may request records from a PCS for other purposes.

C. PCS are not District Government Agencies or Public Bodies but are Non-profit Entities which are not a part of the District Government; however, in Cases of Charter Non-renewals and Revocations, PCS are a part of the District of Columbia Public School System.

District of Columbia law requires that PCS be organized as nonprofit entities. D.C. Official Code § 38-1802.04(c)(16) states: “A public charter school shall be organized under [Chapter 4 of Title 29](#) and its sole purpose shall be the operation of the public charter school.” Additionally, D.C. Official Code § 38-1800.02(10)(B) makes clear that PCS are not a part of the “District of Columbia government.” However, there is some ambiguity here. In cases of a charter’s non-renewals or revocations affected PCS become a part of the District of Columbia Public Schools (D.C. Official Code §§ 38-1800.02(10)(B); 38-1802.12(d)(5); 38-1802.13(c)(5)). Under this scenario it is unclear if the former PCS also becomes subject to FOIA.

District law limits the reach of FOIA to records of a public body (D.C. Official Code § 2-532(a)); or “records produced or collected pursuant to a contract with a private contractor that performs a public function” (D.C. Official Code § 2-532(a-3)). Relevant to this discussion are whether PCS fall within the definitions of “public body,” “agency” or private contractor performing a public function. We first determine if PCS meet the statutory definition of “public body” or “agency.”

⁵ See <https://www.dcpsb.org/blog/freedom-information-action>.

D.C. Official Code § 2-502 (18A)⁶ defines “public body” to mean “the Mayor, an agency,⁷ or the Council of the District of Columbia.” D.C. Official Code § 2-502(3)-(5) provides the following definition of “agency:”

(3) The term “agency” includes both subordinate agency and independent agency.

(4) The term “subordinate agency” means any officer, employee, office, department, division, board, commission, or other agency of the government of the District, other than an independent agency or the Mayor or the Council, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law.

(5) The term “independent agency” means any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this subchapter, to establish administrative procedures, but does not include the several courts of the District and the Tax Division of the Superior Court.

A thorough review of the statutory definitions of “public body” and “agency” reveals that each expressly excludes PCS. Further, an April 2007 Opinion by the Office of the Attorney General (OAG) on the “Applicability of the District’s Open Meetings Act, the Freedom of Information Act and ANC notice provisions to the Public Charter School Board” opines that PCS are not subject to FOIA because they are non-profit entities and not part of the District government. The opinion states: “[h]owever, because the charter schools themselves are not part of the District government, but instead are non-profit entities (D.C. Official Code § 38-1802.04(16) (2006) (Supp.), I do not believe that they would be subject to FOIA requirements.”⁸

We have established that PCS are not District government public bodies or agencies subject to FOIA in those capacities. Therefore, for FOIA to be applicable to PCS these entities must qualify under the statute as private contractors that perform public functions. A review of the FOIA’s legislative history, discussed below, reveals that PCS are not private contractors performing a public function whose records are accessible pursuant to D.C. Official Code § 2-532 (a)(3).

When amending FOIA in 2001,⁹ the Council of the District of Columbia included a provision to extend FOIA’s reach to the records of private contractors that perform a public function. This provision codified at D.C. Official Code § 2-532 (a)(3) reads:

(a-3) A public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function, and the public body with

⁶ D.C. Official Code § 2-539(a), provides: “(a) For the purposes of this subchapter, the following terms shall have the same meanings as provided in § 2-502. D.C. Law 13-283, the Freedom of Information Amendment Act of 2000” added a new paragraph 18(A) to provide the definition of “public body.”

⁷D.C. Official Code § 2-502(3)-(5) provides the definition of agency which also expressly excludes a PCS.

⁸ The OAG legal opinion may be accessed here: <https://oag.dc.gov/about-oag/laws-and-legal-opinions/legal-advice-ancs?page=0>

⁹ D.C. Law 13-283, which became effective April 27, 2001.

programmatic responsibility for the contractor shall be responsible for making such records available to the same extent as if the record were maintained by the public body.

Your January 27, 2019, email to the OOG, offers for discussion the position that contractual obligations exist between the PCSB and PCS that result in PCS being private contractors performing public functions. Therefore, PCS records are subject to FOIA pursuant to D.C. Official Code § 2-532 (a)(3). In support of this position you reference, A Model Law for Supporting the Growth of High-Quality Charter Schools, and you provided the following:

The PCSB approves petitions to set up a charter school, and may include conditions and requirements, D.C. Code § 38.1802.03 (h). An approved petition seems likely to be a contract with the PCSB or the District. That's the typical legal status of charters generally; the national charter organization's model state law defines at p. 18 a charter school as one "established, operated, and accountable under the terms of a charter contract between the school's board and its authorizer." See Nat. Alliance for Public Charter Schools, A Model Law for Supporting the Growth of High-Quality Charter Schools, 2d ed. (2016), p. 14. Available at: <https://bit.ly/2B5glN7>. In D.C. records of contractors are subject to D.C. FOIA. D.C. Code § 2-532 (a)(3).

Contrarily, an excerpt from FOIA's legislative history evidences that PCS are not private contractors performing public functions. Therefore, D.C. Official Code § 2-532(a-3) does not support the application of FOIA to PCS as private contractors performing a public function. The excerpt states the following:

This provision has been modified and narrowed since the legislation was introduced in response to several concerns raised by private firms that provide service to the government. The new provision is designed to clarify that the government is responsible for compliance with the law, and for the costs associated with responding to requests for information.

Additionally, the new version does not apply to every company that provides service to the District, but only those contractors that provide goods or services that were previously provided by the government but have been contracted out to private entities. The Community Partnership for the Prevention of Homelessness is the type of contractor that the new provision is intended to cover. (Report on the Committee on Government Operations and the Environment on Bill 13-829, the Freedom of Information Act Amendment Act of 2000, at page 5 (Council of the District of Columbia October 31, 2000) (Emphasis added).

A Model Law for Supporting the Growth of High-Quality Charter Schools merely provides recommendations for states enacting public charter school laws. We must also be mindful that the publication does not take precedence over statutory authority and was written in 2016. This is well after FOIA’s private contractor provision became effective in 2001. Additionally, the passage you cite from this publication provides no support for the position that there exists a contract which makes a PCS a private contractor performing a public function under D.C. Official Code § 2-532(a-3). It states:

One of the essential characteristics of the charter school concept is a fixed-term, renewable contract between a school and its authorizer. Such a contract defines the roles, powers, responsibilities, and performance expectations for the school and its authorizer.

While some state charter school laws explicitly require an authorizer to enter into a contract with a charter school, several state laws omit such a requirement. To make clear that schools and authorizers must enter into such contracts, the model law provides the following definition of a “charter contract”:

“A ‘charter contract’ means a fixed-term, renewable contract between a charter public school and an authorizer that outlines the roles, powers, responsibilities, and performance expectations for each party to the contract.” (Ibid) (Emphasis added).

District of Columbia law does not explicitly require the PCSB to enter into “a fixed-term renewable contract with PCS.” The definition of “charter contract” the model law publication states is necessary to make clear that “schools and authorizers must enter into such contracts” is not within District of Columbia public charter school law. The public charter schools serve as an alternative to traditional District of Columbia public schools. In addition to clear expression of intent in the contractor’s provision, PCS are not contractors that provide a service previously provided by the District since the District government currently provides public education for its students.

CONCLUSION

In summary, PCS under District law: (1) are not District government agencies; (2) are not District government public bodies; (3) are not a part of the District government; (4) are a part of the District of Columbia Public Schools in cases of charter no-renewals or revocations; and (5) are nonprofit entities. In cases of a charter’s non-renewals or revocations it is unclear if the former PCS are subject to FOIA. It is also unclear whether D.C. Official Code § 38–1802.14(i) when read in concert with D.C. Official Code § 38-1802.11(a)(2) is a mandate for the PCSB to request records of individual PCS to comply with the FOIA.

There is also ambiguity as to whether D.C. Official Code § 38–1802.14(i) requires the PCSB to obtain records from PCS to “comply with all provisions of FOIA.” It is unclear from a

Mayor's FOIA Appeal whether a FOIA request submitted to the PCSB requires the entity to obtain the records of PCS to comply with FOIA.

FOIA's legislative history makes clear that PCS are not private contractors that perform public function by educating District students. Because the current law is unsettled as noted herein and PCS are not private contractors subject to FOIA pursuant to D.C. Official Code § 2-532 (a)(3), I opine that legislation is necessary to make clear any remaining ambiguity and to make PCS subject to FOIA.¹⁰

Sincerely,

//s//

NIQUELLE M. ALLEN, ESQ.
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Board of Ethics and Government Accountability

¹⁰On March 19, 2019, Councilmembers, Allen, Cheh, Bonds, Nadeu and Silverman co-introduced Bill 23-0199, the "Public School Transparency Amendment Act of 2019" (Bill 23-0199). Bill 23-0199, inter alia, expressly makes PCS and their Board of Trustees subject to FOIA.