

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



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**VIA ELECTRONIC MAIL**

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**VIA ELECTRONIC MAIL**

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**RE: OOG-0005\_6.12.17\_FOIA AO**

Dear Mr. Mulhauser:

The Office of Open Government (OOG) is in receipt of your June 12, 2017, request for a Freedom of Information Act (FOIA) advisory opinion on the legality of a determination by the Office of the Inspector General (OIG) withholding certain content from an OIG Report of Investigation (ROI) concerning preferential treatment given to District of Columbia Public School (DCPS) lottery applicants whose parents are mayoral cabinet members.

The foregoing non-binding advisory opinion is issued by the OOG pursuant to section 503(c) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593(c)), which empowers the OOG to issue advisory opinions 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.

This advisory opinion resolves the issue of whether the OIG may rely on FOIA's statutory exemptions to withhold content from an OIG ROI when a permanent and complete copy of the report has been released into the public domain. It is well established in case law that the government may not rely on FOIA's statutory exemptions and must release the record in these instances. Courts have ordered release of the record because: (1) a permanent and complete copy of the record has been released in the public domain<sup>1</sup>; (2) the party asserting a claim of prior

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<sup>1</sup>The court in *Niagara Mohawk Power Corp. v. United States DOE*, 169 F.3d 16, 19; 335 U.S. App D.C. 100, explains the logic and necessity of requiring the government to release a record pursuant to a FOIA request that is in

disclosure identifies the specific information in the public domain that appears to duplicate that being withheld; and (3) the government's failure to demonstrate that the specific records identified have since been removed from the public domain.

## **BACKGROUND**

On April 12, 2017, the OIG transmitted to the Secretary to the Council of the District of Columbia a "Significant Activity Report-Substantiated Investigation (Substantiated Investigation),<sup>2</sup> which states in relevant part the following:

This letter is to inform you that the D.C. Office of the Inspector General (OIG) has completed an administrative investigation into misconduct by the former Chancellor, D.C. Public Schools.

The OIG investigation revealed that Kaya Henderson, then-Chancellor of DCPS, from April 2015 to August 2015, failed to act impartially and gave preferential treatment to certain District government officials and members of the public when granting discretionary out-of boundary school transfers, outside the My School DC Lottery requirements, to wit: 5E DCMR § 2106.6, in violation of DPM § 1800.3(h).

Between May 10, 2017, and May 28, 2017, the Washington Post published at least six news articles on favoritism shown to public officials in the D.C. Public School lottery. These articles also were published in an electronic format online.<sup>3</sup> The Washington Post's May 17, 2017, article is entitled, "Secret Report Shows 'Special' Treatment for Public Officials in D.C. School Lottery." This May 17, 2017, article is unique from the other articles on the DCPS lottery matter because initially, it was the only article published online with a link granting the public access to the OIG's un-redacted "Investigations Unit Report of Investigation (ROI) (2016-1751 Amended)." It is the content from the un-redacted ROI that is being withheld from release to the

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the public domain. In providing the rationale mandating the public release, the court stated: [N]iagara's position here is a little odd: if the information is publicly available, one wonders, why is it burning up counsel fees to obtain it under FOIA? But the logic of FOIA compels the result: if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes."

<sup>2</sup> This correspondence may be viewed in its entirety at

<http://app.oig.dc.gov/news/view2.asp?url=release10%2FSAR++Substantiated+Administrative+Investigation++2016-1571%2Epdf&mode=release&archived=0&month=00000&agency=0>.

<sup>3</sup> The additional news articles are: (1) "Second Mayoral Appointee Identified in School-Lottery Scandal"; [https://www.washingtonpost.com/local/dc-politics/second-mayoral-appointee-implicated-in-school-lottery-scandal/2017/05/10/17e72092-35b2-11e7-b373-418f6849a004\\_story.html?tid=ss\\_mail&utm\\_term=.fal32d7473c](https://www.washingtonpost.com/local/dc-politics/second-mayoral-appointee-implicated-in-school-lottery-scandal/2017/05/10/17e72092-35b2-11e7-b373-418f6849a004_story.html?tid=ss_mail&utm_term=.fal32d7473c); (2) "D.C.'s Mayor Played Down a School-Lottery Scandal. Now Parents Are Furious"; [https://www.washingtonpost.com/local/dc-politics/dcs-mayor-played-down-a-school-lottery-scandal-now-parents-are-livid/2017/05/12/0c0f8f50-367c-11e7-b373-418f6849a004\\_story.html?tid=ss\\_mail&utm\\_term=.fb677e6913b4](https://www.washingtonpost.com/local/dc-politics/dcs-mayor-played-down-a-school-lottery-scandal-now-parents-are-livid/2017/05/12/0c0f8f50-367c-11e7-b373-418f6849a004_story.html?tid=ss_mail&utm_term=.fb677e6913b4); (3) "This is How the D.C. School Lottery is Supposed to Work"; [https://www.washingtonpost.com/local/education/this-is-how-the-dc-school-lottery-is-supposed-to-work/2017/05/17/631c5a98-3b1e-11e7-a058-ddbb23c75d82\\_story.html?tid=ss\\_mail&utm\\_term=.a17fb592f633](https://www.washingtonpost.com/local/education/this-is-how-the-dc-school-lottery-is-supposed-to-work/2017/05/17/631c5a98-3b1e-11e7-a058-ddbb23c75d82_story.html?tid=ss_mail&utm_term=.a17fb592f633); (4) "After the Favoritism Revealed in School Lottery, D.C. Parents Wait on Apology"; and, (5) "Behind the D.C. school Lottery Scandal": 'A crisis in confidence'; [https://www.washingtonpost.com/local/education/behind-the-dc-school-lottery-scandal-a-crisis-in-confidence/2017/05/28/d8c3f010-409d-11e7-9869-bac8b446820a\\_story.html?tid=ss\\_mail&utm\\_term=.523946c88560](https://www.washingtonpost.com/local/education/behind-the-dc-school-lottery-scandal-a-crisis-in-confidence/2017/05/28/d8c3f010-409d-11e7-9869-bac8b446820a_story.html?tid=ss_mail&utm_term=.523946c88560).

public subject to the cited FOIA exemptions referenced below by OIG.<sup>4</sup> On or about May 15, 2017, WAMU reporter Martin Austermuhle submitted to the OIG a FOIA request for the ROI. The OIG's June 5, 2017, electronic response to this FOIA request reads in relevant part:

You will note that certain portions of the enclosed report have been redacted in accordance with D.C. Code {sic} § 2-534(a)(3)(C) (2001), which exempts from disclosure information of a personal nature where public disclosure would constitute an unwarranted invasion of personal privacy. Accordingly, we have redacted the names of adult and minor individuals, as well as information that reasonably identify those individuals. We have made these redactions where the substantial privacy interest related to this information outweighs any public gain from disclosure.

We have also withheld information obtained from an individual's official personnel records in accordance with D.C. Code {sic} § 1-631.03 and 6 DCMR § B3113. *See* D.C. Code {sic} 2-534(a)(6)(B) (2001) (allowing the withholding of information specifically exempted by another statute) and D.C. Code {sic} § 2-534(a)(3)(C) (exempting personal information where public disclosure would constitute an unwarranted invasion of personal privacy). We have noted this redaction with an asterisk (\*) at the appropriate location.

The OIG was initially established pursuant to Mayor's Order 79-7 (Mayor's Order).<sup>5</sup> The Council of the District of Columbia abolished the OIG and statutorily created the office in section 208(a) of the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 1-301.115(a)) (PPA). Section 208(a)(2) of the PPA transferred from the Mayor's Order "[A]ll existing positions, funding, powers, duties functions, and other resources that were assigned by the Mayor's Order to the new office created by statute. The OIG's statutory duties include: (1) conducting independent fiscal and management audits of District government operations (D.C. Official Code § 1-301.115a.(a)(3)(A)); (2) independently conducting audits, inspections, assignments, and investigations on request by the Mayor, or any other audits inspections and investigations that are necessary or desirable in the Inspector General's judgment (D.C. Official Code § 1-301.115a.(a)(3)(D)); and, (3) independently conducting and supervising audits, inspections and investigations relating to the programs and operations of District government departments and agencies, including independent agencies (D.C. Official Code § 1-301.115a.(a-1)(1)). An April 17, 1995, Congressional amendment to the PPA requires public disclosure of OIG reports.<sup>6</sup> This amendatory language codified at D.C. Official Code § 1-301.115a.(d)(4) provides: "[T]he Inspector General shall make each report submitted under this subsection available to the public,

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<sup>4</sup> The OOG was able to access this article on July 12, 2017, and August 15, 2017 at [http://wapo.st/2rgw2h7?tid=ss\\_mail&utm\\_term=.10ebfc870d4a](http://wapo.st/2rgw2h7?tid=ss_mail&utm_term=.10ebfc870d4a). Subsequent to publication of this May 17, 2017, article, the following three Washington Post Articles also provide a link to the May 17, 2017, article and direct access to the un-redacted ROI: (1) "This is How the D.C. School Lottery is Supposed to Work" (May 17, 2017); (2) "After the Favoritism Revealed in School Lottery, D.C. Parents Wait on Apology" (May 21, 2017); and (3) "Behind the D.C. School Lottery Scandal: 'A Crisis in Confidence'" (May 28, 2017).

<sup>5</sup> Mayor's Order 79-7, took effect on January 2, 1979 and abolished its predecessor, the Office of Municipal Audit and Inspections, established by Organization Order No. 33, dated July 4, 1972.

<sup>6</sup> Section 303 of the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (FRMAA) (109 Stat. 148-151).

except to the extent that the report contains information determined by the Inspector General to be privileged.”

## **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). Unless the record may be validly withheld pursuant to a statutory exemption, “a public body, upon request reasonably describing any public record, shall within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.” (D.C. Official Code § 2-532(c)(1)).

***A permanent and complete copy of the ROI was released into, and remains in, the public domain. Therefore, the OIG may not rely on a statutory exemption under FOIA to withhold release.***

Since May 17, 2017, an un-redacted copy of the ROI has been available to the public through a link in an electronic version of the Washington Post’s article entitled, “Secret Report Shows ‘Special’ Treatment for Public Officials in D.C. School lottery.” Since then, the public has been able to access, read, and print in its entirety, the ROI.<sup>7</sup> Relevant to this determination is the legal impact on a FOIA request of the release of the un-redacted ROI into public domain. This is because the ROI which the OIG provided to the requester on June 5, 2017, contains redactions made by the OIG in accordance with the following: (1) FOIA’s personal privacy exemption (D.C. Official Code § 2-534(a)(3)(C))<sup>8</sup>; and (2) information specifically exempt by statute other than FOIA (D.C. Official Code § 1-631.03) and (6 DCMR § B3113).<sup>9</sup>

For the reasons which follow, courts construe the release into the public domain of the ROI as a waiver which precludes the OIG’s reliance on the statutory FOIA exemptions. The principle requiring release of records in such instances is judicially recognized as the “public domain doctrine.” There exists an abundance of FOIA case law which enumerates the prerequisites for applicability of the public domain doctrine to a FOIA request. The prerequisites are: (1) “a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to the specific information in the public domain that appears to duplicate that being withheld.” (*Afshar v. U.S. Dep’t of State*, 702 F.2d 1125, 1130, 226 U.S. App. D.C. 388 (D.C. Cir. 1983)); and (2) “[O]nce the FOIA requester has carried his burden of production, it is up to the government, if it so chooses, to rebut the plaintiff’s proof by demonstrating that the specific tapes or records identified have since been destroyed, placed under seal, or otherwise removed from the public

<sup>7</sup> The OOG was able to access this article as recently as August 15, 2017, at [http://wapo.st/2rgw2h7?tid=ss\\_mail&utm\\_term=.10ebfc870d4a](http://wapo.st/2rgw2h7?tid=ss_mail&utm_term=.10ebfc870d4a). The article was still printable at that time.

<sup>8</sup> The OIG’s June 5, 2017, correspondence to Mr. Austermuhle cites the unwarranted invasion of personal privacy exemption twice.

<sup>9</sup> D.C. Code § 2-534(a)(6) reads: “(6) Information specifically exempted from disclosure by *statute* [emphasis added] (other than this section), provided that such statute: (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]” This exemption does not apply to regulations.

domain.” *Cottone v. Reno*, 193 F.3d, 550, 556. These prerequisites exist in the case at bar, and therefore require the OIG to release the ROI.

First, since May 17, 2017, there has been unfettered and continual public access to read and print the ROI in its entirety. Hence, a permanent copy of the record exists in the public domain. Second, comparing the un-redacted and redacted ROIs reveal that the records are identical, save the OIG’s redactions. Finally, the un-redacted ROI has been in the public domain for three months with apparently no attempts at removal.<sup>10</sup> For these reasons the public domain doctrine is applicable to the un-redacted ROI.

The OIG cites FOIA exemptions to justify redacting content from the ROI. However, the OIG’s response is misplaced and its actions cannot be upheld by FOIA. This is because the release of the ROI into the public domain constitutes a waiver which bars the OIG from relying on FOIA’s exemptions. In support of this reasoning, courts have emphatically stated: “materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.” *Reno*, at 554. The “logic of FOIA postulates that an exemption can serve no purpose once information—including sensitive law enforcement intelligence—becomes public.” *Id.* at 555; and “[I]f identical information is truly public, then enforcement of an exemption cannot fulfill its purposes.” *Niagara Mohawk*, at 19.

## CONCLUSION

A complete and permanent un-redacted copy of the ROI currently remains in the public domain through an electronic link in an online Washington Post article. Since May 17, 2017, the public has been able to read and print a permanent copy of the entire record. Case law has found in such instances that the government waives the ability to assert FOIA’s statutory exemptions to withhold release of records from the public.

Sincerely,




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TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

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<sup>10</sup> The OOG is not aware of any attempts to remove the record from the public domain during this period. Given the relative ease of the public gaining access to, and printing the record, it does not seem plausible that the ROI may be removed from the public domain.