

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



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VIA ELECTRONIC MAIL

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**RE: DCPS' District of Columbia Freedom of Information Act Compliance
OOG-001.7.29.20_AO**

Dear Director Blaeuer:

This correspondence responds to your request for an advisory opinion from the Office of Open Government, Board of Ethics and Government Accountability (“OOG”) regarding the District of Columbia Public Schools’ (“DCPS”) compliance with the District of Columbia Freedom of Information Act’s (“D.C. FOIA”) proactive disclosure provisions. These provisions mandate that District of Columbia Government agencies make certain public information available on the Internet. Public information includes “[a]dministrative staff manuals and instructions to staff that affect a member of the public,” and “[t]hose statements of policy and interpretations of policy, acts, and rules which have been adopted by a public body.”¹ I will refer to these documents collectively as “Administrative and Policy Documents” in this advisory opinion. D.C. FOIA also requires that agencies provide Administrative and Policy Documents without a D.C. FOIA request.²

This advisory opinion discusses whether DCPS provides its Administrative and Policy Documents on the Internet, as required by D.C. FOIA. In response to this request for an advisory opinion, OOG thoroughly reviewed the following: (1) D.C. FOIA and its legislative history; (2) DCPS’ website³; (3) the federal Freedom of Information Act (“federal FOIA”)⁴; (4) D.C. Mayor’s FOIA Appeals; (5) case law interpreting D.C. FOIA and federal FOIA; and (6) the FOIA Request to DCPS at issue.

¹ D.C. Official Code §§ 2-536(a)(2); 2-536(a)(4); 2-536(b).

² D.C. Official Code § 2-536.

³ www.dcps.dc.gov

⁴ 5 U.S.C. § 552 *et seq.*

It is the public policy of the District of Columbia (the “District”) “that all persons are entitled to full and complete information regarding the affairs of the government and the official acts of those who represent them as public officials and employees.”⁵ To support the District’s public policy, I am authorized to issue advisory opinions on the implementation of the D.C. FOIA pursuant to section 205c(d) of the Board of Ethics and Government Accountability Establishment and Comprehensive Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C Official Code § 1-1162.02c(d)).

After reviewing the results of my office’s inquiry into this matter, I find that DCPS has not fully complied with the D.C. FOIA’s proactive disclosure provisions because DCPS has not made all of its Administrative and Policy Documents, created on or after November 1, 2001, publicly available on the Internet or on its website.⁶ The analysis below supports my findings.

I. BACKGROUND

Advocates for Justice and Education, Inc. (“AJE”), was created in 1996 to educate parents, and those working with parents, about the laws that govern special education and related services.⁷ The DCPS system is charged with educating the District’s students, including those with special needs.⁸

The D.C. FOIA became law on March 25, 1977.⁹ On April 21, 2001, amendments to the D.C. FOIA became effective which designated certain categories of information as “public information.”¹⁰ This includes: (1) “[a]dministrative staff manuals and instructions to staff that affect a member of the public;” and (2) “[t]hose statements of policy and interpretations of policy, acts, and rules which have been adopted by a public body.”¹¹ The D.C. FOIA also requires that District government public bodies must proactively disclose public information created on or after November 1, 2001, by making the records publicly available on the Internet, the agency’s website or by other electronic means (if it has no website). Anyone may obtain this “public information” without having to submit a D.C. FOIA request.

On July 24, 2020, AJE submitted a D.C. FOIA request to DCPS via the D.C. FOIA Public Access Portal¹², for DCPS’ records. AJE’s D.C. FOIA request sought the following:

All documents in DCPS’ possession that are administrative staff manuals, and instructions to staff that affect a member of the public.

⁵ D.C. Official Code § 2-531.

⁶ D.C. Official Code §§ 2-536(a)(2); 2-536(a)(4); 2-536(b).

⁷ Taken from AJE’s website here <https://www.aje-dc.org/who-we-are/>.

⁸ D.C. Public Charter Schools also educate District of Columbia students. These independent schools are not subject to the D.C. FOIA.

⁹ D.C. Law 1-96, the “Freedom of Information Act of 1976.”

¹⁰ D.C. Law 13-283, the “Freedom of Information Amendment Act of 2000.”

¹¹ See Report of the Committee on Government Operations, Bill 13-829, the Freedom of Information Amendment Act of 2000, at 2 and 5 (Council of the District of Columbia October 31, 2000).

¹² foia-dc.gov.

All handbooks and/or manuals related to how members of the Individualized Education Plan (IEP) are instructed to conduct IEP meetings and fulfill their job duties as related to students with disabilities.
DCPS School Psychologist handbook/staff manual.
DCPS Speech-Language Therapist and/or Pathologist handbook/staff manual.
DCPS Social Worker handbook/staff manuals.
Local Educational Agency (LEA) Representative (commonly called LEA rep) handbook/staff manuals.
Occupational therapist handbook/staff manuals.
Assistive Technology Evaluation handbook/staff manuals; and
All documents related to policy and interpretations of policy, acts, and rules which have been adopted by DCPS.

DCPS acknowledged the FOIA request on July 24, 2020 through the D.C. FOIA Public Access Portal and assigned it tracking number, 2020-FOIA-06794. During this period, D.C. FOIA law was impacted by the coronavirus pandemic and DCPS' response advised that requests submitted between March 11, 2020 and January 15, 2021, may be delayed or tolled completely due to COVID-19.¹³

On July 29, 2020, I received your request for an advisory opinion on DCPS' compliance with D.C. FOIA's proactive disclosure provisions. You contended in your request that DCPS failed to proactively disclose the records AJE requested; and, that under D.C. FOIA, DCPS should have made the records available on DCPS' website without the need for AJE's FOIA request.

DCPS responded to AJE's FOIA request on August 25, 2020. DCPS granted the D.C. FOIA request in 22 days, despite the tolling of all D.C. FOIA requests, and provided the records that AJE "identified as of particular interest."¹⁴ The records DCPS provided are as follows: (1) DCPS School Psychologist handbook/staff manual; (2) DCPS Speech Language Therapist and/or Pathologist handbook/staff manual; (3) DCPS Social Worker handbook/staff manual; (4) Occupational Therapist handbook/staff manual; (5) Assistive Technology Evaluation handbook/staff manual; and (6) Missed Services & Compensatory Educational manual.

DCPS also responded to the allegations in the request for an advisory opinion on August 27, 2020. DCPS provided OOG with an email that admitted the specific manuals AJE requested were not on DCPS' website. DCPS argued that the allegation that DCPS is not in compliance with D.C. FOIA is "unfair and unsubstantiated, and that it is in substantial compliance with the law" because DCPS provided the most recent versions of the requested guidebooks and is working to place them online.¹⁵

¹³ Under the Coronavirus the Coronavirus Support Congressional Review Emergency Amendment Act of 2020, deadlines for FOIA responses, during the time AJE submitted 2020-FOIA-06794, were tolled.

¹⁴ Director Maria Blaeuer's September 30, 2020, email correspondence to OOG stated, "DCPS has responded to our FOIA request, albeit incompletely, and we are in communication about providing the outstanding documents. DCPS did provide the documents we identified as of particular interest."

¹⁵ DCPS, August 27, 2020, email correspondence to OOG to address DCPS' compliance with D.C. Official Code § 2-536.

II. DISCUSSION

The information requested in AJE’s D.C. FOIA request to DCPS is “public information” under D.C. FOIA, so it should be available on DCPS’ website. My review of the matter led me to find the following: (1) DCPS’ Administrative and Policy Documents are public information subject to D.C. FOIA’s proactive disclosure provisions; (2) DCPS has not fully complied with D.C. FOIA’s proactive disclosure provisions; (3) a D.C. FOIA request is not needed to obtain these documents; and (4) DCPS has not made these documents publicly available as required by the D.C. FOIA. The analysis below discusses these findings and begins with a discussion of the D.C. FOIA’s proactive disclosure provisions.¹⁶

A. **Under D.C. FOIA, Administrative and Policy Documents are public information that must be publicly available without a written request for the information.**

DCPS agrees that the records at issue are Administrative Policy Documents and that DCPS must proactively disclose pursuant to the D.C. FOIA. Yet, the agency has not provided those records on the Internet and is out of compliance with the D.C. FOIA. I provide a brief summary below of why DCPS is required to make these records readily accessible to the public.

D.C. FOIA’s proactive disclosure provisions follow federal FOIA’s affirmative disclosure provisions.¹⁷ Federal case law provides a rational explanation justifying proactive disclosure requirements. The federal FOIA statute requires that federal agencies make “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and administrative staff manuals and instructions to staff that affect a member of the public” available “for public inspection in an electronic format.”¹⁸ D.C. FOIA requires the same proactive disclosure. This is significant because of the public interest served in ensuring the public’s access to government’s methodology and basis for decision-making. The public should also be privy to the government’s internal policies that impact the public. The District follows the federal case law that interprets the similar federal provision and requires the electronic publication of Administrative Policy and Documents.¹⁹

In *Animal Legal Def. Fund v. USDA*, the court discusses the plaintiffs’ alleged “procedural” and “informational” injuries, in that, the “reading room” provision requires government agencies to follow a particular procedure in making certain categories of information available in an electronic format without the need for a FOIA request. Plaintiffs contend they were harmed because the information needed was not in USDA’s reading room. Plaintiffs assert that because

¹⁶ D.C. Official Code §§ 2-536(a)(2); 2-536(a)(4); 2-536(b).

¹⁷ 5 U.S.C. §§ 552(a)(1); (a)(2)

¹⁸ 5 U.S.C. § 552 (a)(2)(B)-(C).

¹⁹ See *Animal Legal Def. Fund v. United States Dep’t of Agric.*, 935 F.3d 585 (9th Cir. 2019); see also *Lipton v. U.S. Envtl. Prot. Agency*, 316 F. Supp. 3d 245, 249 (D.D.C. 2018) (“Plaintiffs assert that EPA’s failure to make the Administrator’s detailed calendar available in its electronic reading room on an ongoing basis violates FOIA’s reading-room provision”).

the USDA failed to affirmatively disclose records, they were not able to get information to their members in a timely manner which impacted operations.²⁰ The court concluded that the plaintiffs' alleged injuries were "fairly traceable" to USDA's action, and the plaintiffs had standing to bring a lawsuit.²¹ Similarly, AJE is concerned about DCPS' failure to post all Administrative and Policy Documents on DCPS' website. DCPS' Administrative and Policy Documents are used as guidance to protect vulnerable students, provide valuable information for parents, and establishes policies and practices that promote student safety. DCPS' Administrative and Policy Documents are important not merely for academic purposes but also for informing families. The parents AJE serves are left to attend meetings without the tools they need to properly advocate for their children because they are unaware of what is permitted or not permitted by DCPS' policies. Not being able to locate important information on DCPS' website leaves families at a disadvantage. Parents, special education advocates and the general public, are denied the ability to actively support students with disabilities and make sure policies are being implemented properly by only releasing information if a D.C. FOIA request is submitted. Therefore, based on federal and the D.C. FOIA, DCPS must make Administrative Policy and Documents available on the Internet to comply with the D.C. FOIA.

The following discussion explains why DCPS' failure to proactively disclose Administrative and Policy Documents violates the D.C. FOIA.

B. DCPS' must disclose all of its Administrative and Policy Documents on the Internet to comply with D.C. FOIA.

DCPS admits it has not adhered to the D.C. FOIA by publishing all of its Administrative and Policy Documents, including those requested by AJE.²² DCPS' website, contains 28 of its Administrative and Policy Documents. However, the 28 policies listed do not include the documents DCPS released to AJE on August 25, 2020.

While DCPS granted AJE's FOIA request and provided it with several Administrative and Policy Documents, the documents were not publicly available on DCPS's website as mandated by law. Despite DCPS' suggestion that it is in substantial compliance, the Executive Office of the Mayor has held that the failure to make information publicly available under D.C. Official Code § 2-536(b) is an improper withholding of records in violation of the D.C. FOIA.²³ Because the information was not published on DCPS's website, AJE had to submit a FOIA request to obtain the Administrative and Policy documents from DCPS. Under the D.C. FOIA the request was unnecessary because Administrative and Policy Documents are "public information" and under the D.C. FOIA "you do not require a written request to obtain public information."²⁴ The OOG reviewed DCPS' website on April 2, 2021, and as of that date, DCPS had not published the required records.

Based on my review of the DCPS website and its concession, I find that: (1) Administrative and Policy Documents are public information subject to the D.C. FOIA's proactive disclosure

²⁰ *Animal Legal Def. Fund v. United States Dep't of Agric.* at 866-867.

²¹ *Id.* at 869.

²² D.C. Official Code §§ 2-536(a)(2); 2-536(a)(4).

²³ See FOIA Appeal 2016-26 (February 18, 2016) at page 2.

²⁴ D.C. Official Code § 2-536(a).

