

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



August 28, 2020

VIA ELECTRONIC MAIL

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**RE: OSSE's Compliance with District FOIA
#OOG-002_2.26.20_AO**

Dear Mr. Mulhauser:

On February 26, 2020, you contacted the Office of Open Government (“OOG”) to request an advisory opinion regarding the Office of the State Superintendent of Education’s (“OSSE”) compliance with the Freedom of Information Act (“D.C. FOIA”). The relevant D.C. FOIA provisions require that agencies make “[F]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases” (“Final Opinions”) publicly available on the internet.¹ This advisory opinion discusses whether OSSE’s Letters of Decision (“LODs”) are Final Opinions and must be published on its website as required by D.C. FOIA.

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.”² This includes access to certain records that must be made publicly available on the internet and without submission of a D.C. FOIA request. To support the District’s public policy, I am authorized to issue advisory opinions on the implementation of 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)).

¹ D.C. Official Code §§ 2-536(a)(3); 2-536(b).

² D.C. Official Code § 2-531.

I. BACKGROUND

On March 9, 2020, my staff provided OSSE with a copy of the advisory opinion request.

On May 11, 2020, I contacted OSSE via email regarding the agency's compliance with D.C. FOIA to determine the agency's justification for not making the adjudication of special education LODs publicly accessible online. OSSE emailed its response on May 11, 2020.³ On June 18, 2020, OSSE provided me, via email, with an update regarding its publication of LODs to its website. On July 9, 2020, OSSE's General Counsel, Sarah Jane Forman, discussed, with OOG staff and me, OSSE's position on disclosure of LODs via conference call. On July 22, 2020, OSSE confirmed via email that: (1) its proactive disclosure of LODs was live on its website; (2) the published LODs went back two fiscal years; and (3) OSSE would post LODs proactively going forward on a monthly basis.

In response to the advisory opinion request, I also undertook an exhaustive review of the following: (1) OSSE's website; (2) D.C. FOIA and its legislative history; (3) the federal Freedom of Information Act⁴ and its legislative history; (4) federal and D.C. FOIA case law; (5) Mayoral FOIA appeal decisions; (6) the District of Columbia Administrative Procedure Act ("DCAPA"); (7) the federal Administrative Procedure Act ("Federal APA"); and (8) OSSE's LODs⁵. I concluded my inquiry on July 22, 2020.

As supported by an analysis of the forgoing sources, I find that: (1) LODs are Final Opinions; (2) the State Complaint Office ("SCO") is the decision maker charged with issuing LODs; (3) the process of disposing of LODs by the SCO are adjudications as defined by statute and case law; (4) LODs are not advisory recommendations from the SCO to OSSE; and (5) LODs are not pre-decisional documents that would be exempt from disclosure. Therefore, for OSSE to be compliant with the mandatory disclosure provisions of D.C. Official Code §§ 2-536(a)(3); 2-536(b), the agency must make all LODs publicly available on its website that were created on or after November 1, 2001, and are not subject to a statutory D.C. FOIA exemption.⁶ A discussion regarding the reasoning for my findings follows.

II. DISCUSSION

D.C. FOIA's mandatory disclosure of Final Opinions provision became law in 1976. In 2001, D.C. FOIA was amended to require that all Final Opinions created on or after November 1, 2001, be made publicly available on the Internet or by other electronic means. Approximately nineteen years have elapsed since enactment of the latter provision.

³ OSSE's May 11, 2020, email response stated, "I agree that these documents are agency records and subject to the general requirements of FOIA. OSSE values transparency and we are happy to coordinate with your agency on FOIA compliance."

⁴ 5 U.S.C. § 552 *et seq.*

⁵ View LODs here <https://osse.dc.gov/node/1485201>.

⁶ D.C. FOIA exemptions may be applied to withhold from records subject to mandatory disclosure. *See* February 4, 2011 Opinion of the Mayor's Office of Legal Counsel (FOIA Appeal 2011-03). Therefore, OSSE may lawfully redact or withhold from mandatory disclosure Final Orders that meet a FOIA exemption.

The issues this query raises, whether LODs are adjudications that result in the issuance of Final Opinions that must be made publicly available without the need of a FOIA request, appear to be questions of first impression under D.C. FOIA.⁷ However, we are not without guidance. This is because D.C. FOIA is modeled on the federal Freedom of Information Act. Although not binding, the District of Columbia looks to decisions interpreting similar provisions in the federal Freedom of Information Act when interpreting the meaning of D.C. FOIA.⁸ Federal FOIA contains a proactive disclosure provision that is identical to the D.C. FOIA provision.⁹ Therefore, a review of statutes and case law that has construed Final Opinions under federal FOIA is necessary to answer these queries. The discussion that follows sets forth why the particular legal theories offered in response to the queries supports the view that LODs are Final Opinions that result from agency adjudications.

What immediately follows is an analysis of the body of law that has construed federal FOIA's "Final Opinion" provision.

A. *Final Opinions under federal FOIA.*

The United States Court of Appeals for the District of Columbia in *Bristol Myers CO. v. FTC*, 598 F.2d 18, 25 (1978), held "action taken by the responsible decisionmaker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA." The Court further explained that if this action includes "a written explanation of the decisionmaker's reasoning, that explanation constitutes a final opinion and must be disclosed."¹⁰ However, "the decision must be more than advisory."¹¹ Courts have also construed the meanings of "order" and "adjudication" in the Federal APA¹² to determine when a Final Opinion is issued by an agency. These terms are specifically defined in the Federal APA as follows:

- (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
- (7) "adjudication" means agency process for the formulation of an order.

Further, the U.S. Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158, 159 (1965), decided that the adjudication of a matter does not require litigation for an agency to issue a Final Opinion subject to proactive disclosure under 5 U.S.C. § 552 (a)(2)(A).¹³ The

⁷ The FOIA request in a December 19, 2014 Opinion of the Mayor's Legal Counsel (FOIA Appeal 2015-11) included FOIA decisions rendered in adjudication of driver's license suspensions requested pursuant to D.C. Official Code § 2-536(a)(3). However, there was no discussion as to what constituted Final Opinions under D.C. FOIA. The OAG stated that there were no responsive records and the Child Support Services Divisions "does not issue final opinions..."

⁸ See *District of Columbia v. Fraternal Order of Police Metro. Police Labor Comm.*, 33 A.3d 332, 342 n.8 (D.C. 2011).

⁹ See 5 U.S.C. § 552 (a)(2)(A).

¹⁰ *Bristol Myers CO. v. FTC*, 598 F.2d 18, 25 (1978).

¹¹ *Campaign for Accountability v. U.S. Dep't of Justice*, 278 F. Supp. 3d 303, 321 (D.D.C. 2017).

¹² 5 USC § 551(6); (7).

¹³ Courts have found an adjudication by an agency to have also occurred: (1) where there was a written decision denying inmates applications for parole that contain concise, general reasons for the denial (*National Prison Project*

Court stated, “[t]he decision (by General Counsel) to dismiss a charge is a decision in a ‘case’ and constitutes an ‘adjudication’; an ‘adjudication’ is defined under the Administrative Procedure Act . . . as an ‘agency process for the formulation of an order,’ 5 U.S.C. § 551(7).”¹⁴ The Court further explains that order is “the whole or a part of a Final disposition, whether affirmative (or) negative.”¹⁵ The Court concluded that “[s]ince an Advice or Appeals Memorandum explains the reasons for the final disposition it plainly qualifies as an opinion and falls within 5 U.S.C. § 552(a)(2)(A).”¹⁶ The Court also found the documents at issue in the case were not pre-decisional documents that were exempt as deliberative. The District should apply this framework to assess whether a record is a Final Opinion under D.C. FOIA.

What follows is the application of the federal court’s findings under federal FOIA to LODs. The analysis begins with how LODs are issued by the OSSE’s State Complaint Office (the “SCO”).

B. *The SCO is the office within OSSE responsible for resolving state complaints and the issuance of LODs.*

OSSE is the District of Columbia’s state education agency (“SEA”) and it performs the functions of a SEA for the District of Columbia under applicable federal law. Pursuant to regulations adopted to implement the Individuals with Disability Education Act (“IDEA”),¹⁷ each SEA must adopt procedures for resolving IDEA complaints, including complaints filed by organizations or individuals from another state.¹⁸ The SCO is the office within OSSE that investigates and issues LODs on these state complaints. LODs are issued after the SCO completes an investigation. The LOD explains whether the education agency complied with federal and District laws. If the SCO identifies noncompliance, the SCO orders the public education agency to complete corrective actions described by the LOD.

The LOD must consist of the following: (1) a written explanation of the deficiencies and specific instructions for corrective action; (2) findings of fact upon which the decision is based; (3) conclusions of law and relief ordered; (4) time frames to respond to the decision and initiate the corrective action; and (5) instructions on how to appeal the decision. The SCO is also responsible for enforcement of the corrective action recommendations and monitoring compliance. The analysis below applies the elements designating a federal agency decision as a Final Opinion to LODs.

of American Civil Liberties Union Foundation Inc. v. Sigler, 390 F. Supp. (1975)); and when an agency issues an engineer’s report on the valuation of timber (*Willamette Industries, Inc. v. United States*, 530 F. Supp. 904(1981)).

¹⁴ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158, 159 (1965).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 34 CFR § 300.151 *et seq.*

¹⁸ According to OSSE, LODs are only issued when the complainant is an organization or individual from another state. When the complaining party is a parent the matter is resolved through a Due Process Hearing and the issuance of a Hearing Officer’s Determination. OSSE does not dispute that Hearing Officer Determinations are Final Opinions under D.C. FOIA. OSSE has made publicly available on its website numerous legal opinions and other important documents. OSSE’s website lists Hearing Officer Determinations for Calendar years 2009-2020. I also must note the Hearing Officer Determinations do not date back to November 1, 2001. Therefore, OSSE should endeavor to reach full compliance by disclosing all Hearing Officer Determinations dating back to November 2001.

C. *Application of federal FOIA law to LODs.*

As previously discussed, an agency decision under federal FOIA is deemed a Final Opinion in adjudication of a matter when the following conditions are satisfied: (1) when the action taken by a responsible entity in an agency's decision-making process effectively disposes of a matter before the agency; (2) when such action is accompanied by a written explanation of the decision maker's reasoning; and (3) when the decision is more than advisory.¹⁹ Federal courts have also looked to Federal APA's definitions of "adjudication" and "order" in making this determination. LODs meet the criteria established by federal FOIA and are Final Decisions.

Notably, LODs are final decisions on complaints issued by the SCO and a responsible decisionmaker within OSSE is authorized to dispose of these matters. The SCO's disposition also includes a written explanation of the SCO's reasoning for its decision and are post-decisional rather than pre-decisional documents. The LODs are not advisory documents submitted by SCO to OSSE who may then accept or reject the SCO's findings, conclusions and order. These documents are final. In addition, the definitions of the terms "order" and "adjudication" in the DCAPA supports my conclusion that LODs are Final Opinions under D.C. FOIA. This is because the DCAPA's definitions of the terms "order" and "adjudication" are the same as the federal APA.²⁰ Federal FOIA uses these definitions when determining if an agency decision constitutes a Final Order.

(11) The term order means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of the Mayor or any agency in any matter other than rulemaking, but including licensing.

(19) The term "adjudication" means the agency process, other than rulemaking, for the formulation, issuance, and enforcement of an order.²¹

Using federal FOIA as instructive on the issues raised by this advisory opinion, I conclude that LODs are Final Opinions under D.C. FOIA.²²

E. *OSSE has made publicly available FY 2018 and FY 2019 LODs. However, these efforts fall short of the D.C. FOIA's statutory requirement.*

On July 22, 2020, OSSE confirmed via email that: (1) its proactive disclosure of LODs was live on its website; (2) the published LODs went back two fiscal years; and (3) OSSE would post LODs proactively going forward on a monthly basis.

I applaud OSSE for taking measured steps to make the FY 2018 and FY 2019 LODs

¹⁹ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158, 159 (1965).

²⁰ D.C. Official Code §§ 2-502 (11);(19).

²¹ *Id.*

²² D.C. FOIA's legislative history is definitive. "If a document falls within these specified areas, it should be disclosed without question." See Report of the Committee on Government Operations on Bill 1-119, the Freedom of Information Act of 1975, at 7 (Council of the District of Columbia July 23, 1975).

publicly available on July 22, 2020, and their plans for future monthly disclosures. However, in order to fully comply with D.C. FOIA, OSSE must make all of its LODs, from November 1, 2001 to present, publicly available on the internet.

III. CONCLUSION AND RECOMMENDATIONS

In summary, federal FOIA is instructive in determining whether LODs are Final Opinions under D.C. FOIA. Federal law provides that Final Opinions in the adjudication of matters occur when the agency's action includes the following: (1) when actions taken by a responsible decision maker in an agency's decision-making process has the practical effect of disposing of a matter before the agency; (2) when such action is accompanied by a written explanation of the decision maker's reasoning; and (3) when the decision is more than advisory. The issuance of LODs by the SCO meets these criteria. Therefore, since D.C. FOIA and the DCAPA mirror their federal counterparts, I find that LODs are Final Opinions in the adjudication of matters and must be proactively disclosed for the agency to fully and properly implement D.C. FOIA law.

OSSE's progress in the proactive publication of LODs is noted. I found no evidence to suggest that OSSE's current state of non-compliance with the statute is willful. While I understand from an operational standpoint, the task of obtaining and publishing LODs on the internet may be burdensome for the agency's staff and resources, the agency must implement these recommendations to be compliant with D.C. FOIA. I recommend that OSSE set a realistic deadline for reaching full compliance. My staff will continue to monitor OSSE's progress in this matter.

Sincerely,



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

cc: Hanseul Kang,
 State Superintendent, OSSE

Sarah Jane Forman
 General Counsel, OSSE