

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

WASHINGTON TEACHERS UNION
1239 Pennsylvania Avenue, S.E.
Washington, DC 20003

AMERICAN FEDERATION OF TEACHERS
555 New Jersey Avenue, N.W.
Washington, DC 20001

Plaintiffs,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS
1200 First Street, N.E.
Washington, DC 20002

Defendant.

Civil Action No.:

**COMPLAINT
For Injunctive and Declaratory Relief
Pursuant to D.C. Code § 2-537(a-1)**

Plaintiffs Washington Teachers Union, Local 6 (“WTU”) and American Federation of Teachers, AFL-CIO (“AFT”), file this complaint with the Court against the Defendant District of Columbia Public Schools (“DCPS”) pursuant to the D.C. Freedom of Information Act, to require the disclosure of public records related to DCPS and the teacher evaluation system known as IMPACT. IMPACT was implemented by DCPS in the 2009-10 school year with the promise of helping teachers become more effective in the classroom. Between 2010 and 2014, DCPS terminated 563 teachers and instructors (of approximately 4,000) because of their IMPACT scores. Despite terminating these allegedly “ineffective” teachers, the 2014 results of the DC-CAS test indicate that the percentage of students judged “proficient” or better in reading declined over the past five years for students who are identified as African-American, Hispanic, Low Income, English Language Learners, or Special Education. The public has a significant public

interest in knowing why the improvements promised by DCPS when it implemented IMPACT have failed public school students. Plaintiffs requested public records maintained by DCPS that would provide insight into IMPACT and support this public interest. Defendant, claiming a privacy exception, has refused to provide the specific documents requested. DCPS could provide the documents, with limited redactions to protect the privacy interests of the educators, but has failed to do so. Therefore, Plaintiffs respectfully request that the Court enjoin DCPS from withholding the record and to compel the production of the requested record.

Jurisdiction and Venue

1. This action is brought pursuant to the Freedom of Information Act, as amended, D.C. Code § 2-532, referred to as “FOIA,” to require public disclosure of certain non-exempt records and other documents, or parts of them, in the possession of DCPS files involving District of Columbia public school teachers.

2. This court has jurisdiction of this action pursuant to the District of Columbia FOIA regulations, as amended, D.C. Mun. Regs. tit. 1, § 412 and D.C. Code § 2-537(a-1).

Parties

3. Plaintiff Washington Teachers Union is a labor organization with its principal place of business at 1239 Pennsylvania Avenue, SE, Washington, D.C., 20003. WTU is the collective bargaining representative of DCPS education employees in the ET 15 Teachers’ Bargaining Unit, the ET 15/12 and ET 15/11 Teachers’ Bargaining Unit and the EG Teachers’ Bargaining Unit.

4. Plaintiff American Federation of Teachers is a labor organization with its principal place of business at 555 New Jersey Avenue, N.W., Washington, D.C., 20001.

5. Defendant District of Columbia Public Schools is an administrative agency of the

District of Columbia Government, with its principal offices located at 1200 First Street, NE, Washington, DC 20002, and its employees and agents constitute an “agency” within the meaning of the FOIA, D.C. Code § 2-502.

Violation of D.C. Freedom of Information Act

6. On or about August 8, 2014, Plaintiffs, by its attorney, and pursuant to the FOIA, D.C. Code § 2-531 *et seq.*, requested by letter that Defendant DCPS produce copies of certain records and other documents contained in its files related to DCPS and the IMPACT evaluation system, for inspection and copying by Plaintiffs. A copy of this request is attached as **Exhibit A**, and incorporated by reference.

7. By communication dated August 15, 2014, DCPS acknowledged receipt of the FOIA request, which it identified as 2014-FOIA-0287. At no point did DCPS request an extension of time to respond to Plaintiffs’ FOIA request as permitted by D.C. Code §2-532(d)(2).

8. On September 19, 2014, Plaintiffs’ attorney sent a communication to DCPS to determine whether the agency intended to respond to the FOIA request. DCPS responded that it intended to “fully comply with your request” and that Plaintiffs’ should not “deem the request denied.” A copy of this communication is attached as **Exhibit B**.

9. On November 26, 2014, Defendant DCPS, by its employee, Eboni J Govan, DCPS Assistant Attorney General, finally provided a formal response to the FOIA request. Defendant partially granted and partially denied Plaintiffs’ request for public records. Included with Defendant’s response were documents that were partially responsive to Plaintiffs’ FOIA request, while other documentation was incomplete and/or non-responsive. A copy of Defendant’s partial denial is attached as **Exhibit C**, and incorporated by reference.

10. Defendant’s November 26, 2014 response claimed that the public records sought

by Plaintiffs' in its FOIA request numbers 3, 5, 7, and 8 were "exempt from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Defendant denied FOIA Request Nos. 3 and 5 in their entirety and provided partially responsive documents to FOIA Request Nos. 7 and 8.

11. Plaintiffs' FOIA Request No. 3 seeks "documents listing teacher terminations, including each teacher's school, grade, IMPACT group, certification, subject and reason for the termination" for the school years 2009-10 through 2013-14.

12. Plaintiffs' FOIA Request No. 5 seeks "IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject" for the school years 2009-10 through 2013-14.

13. On February 20, 2015, Plaintiffs' filed a petition with the Mayor pursuant to the D.C. Code § 2-537, to require the disclosure of public records that had been denied by DCPS. Attached hereto as **Exhibit D**.

14. Included with the petition was a "Statement of Circumstances and Arguments Supporting Disclosure" that explained the Plaintiffs' position supporting disclosure of the documents. Attached hereto as **Exhibit E**. With respect to FOIA Request Nos. 3 and 5, Plaintiffs' argued that "DCPS can provide the information requested [by Request Nos. 3 and 5] without disclosing the identity of each teacher. Therefore, AFT requests that DCPS provide the information requested, after deletion of personally identifying information."

15. By letter dated March 18, 2015, the Mayor's Office of Legal Counsel issued a final decision regarding Plaintiffs' FOIA request to DCPS. Attached hereto as **Exhibit F**. With respect to the DCPS response to Plaintiffs' FOIA request, the Mayor's Decision upheld, in part,

and reversed and remanded, in part.

16. DCPS argued to the Mayor's Office that providing the information sought by Plaintiffs' FOIA Request Nos. 3, 5, 7 and 8 "in the manner that it was requested would *force* us to produce personally identifiable information that is exempt under 2-534(a)(2)." (Emphasis supplied). Mayor's Decision, p. 13.

17. The Mayor's Decision upheld DCPS' refusal to provide the information by FOIA Requests Nos. 3 and 5. The Mayor's Office concluded, "Appellant does not persuade us that DCPS withheld segregable, non-exempt information" and found that "it is reasonable to conclude that any portions of the compiled responsive documents that may be exempt from non-disclosure under FOIA are so inextricably intertwined with exempt material as to be non-segregable and that 'little more than a template' would remain." Mayor's Decision, p. 13.

18. Upon information and belief, the Mayor's Office did not review – and DCPS did not provide to the Mayor's Office – either clean or redacted copies of the public records sought by Plaintiffs to determine whether segregable, non-exempt information could be provided in the manner requested in FOIA Requests No. 3 and 5.

19. Attached hereto as **Exhibit G** is the "Final IMPACT Report" for a DCPS teacher (name redacted) for the 2013-14 school year. This is the exact document requested by Plaintiffs' FOIA Request No. 5. As is clear from this exhibit, simply redacting the employee's name protects the privacy of the employee while providing all of the non-exempt information ("IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject") that Plaintiffs' have requested. As is apparent, redacting the teacher's name does not render the record "unintelligible."

20. The Mayor's decision is erroneous and contrary to the D.C. FOIA statute because

the burden is on DCPS, not Plaintiffs, to demonstrate that the non-exempt information is non-segregable. DCPS did not meet this burden.

21. DCPS improperly denied Plaintiffs' FOIA Requests Nos. 3 and 5 and violated D.C. Code § 2-531 *et seq.* As demonstrated by **Exhibit G**, DCPS could have easily provided Plaintiffs with the segregable, non-exempt information that was requested, while protecting the privacy of DCPS employees by simply redacting the employee's name.

22. Disclosure of the withheld information will serve the public interest by informing the public about the very important issue of the DCPS teacher evaluation system, its effect on teacher quality, and its impact on student achievement.

WHEREFORE, for all of the foregoing reasons, Plaintiffs request that this Court:

1. Declare that the information sought by Plaintiffs' FOIA Request Nos. 3 and 5 are public records within the meaning of the Freedom of Information Act, as amended, D.C. Code § 2-531 *et seq.*, and order Defendants to make available for inspection and copying the information requested for each school year from 2009-10 through 2013-14;

2. Enjoin Defendants from withholding the requested public records from Plaintiffs;

3. Award Plaintiffs its costs and reasonable attorney fees in this action, pursuant to D.C. Code § 2-537(c);

4. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Date: April 14, 2015

Respectfully submitted,

JAMES & HOFFMAN, P.C.

By: _____ /s/
Lee W. Jackson
D.C. Bar # 436010
lwjackson@jamhoff.com

1130 Connecticut Avenue, N.W., Suite 950
Washington, DC 20036
Ph.: (202) 496-0500
FAX: (202) 496-0555

AMERICAN FEDERATION OF TEACHERS

By: 

Daniel J. McNeil
D.C. Bar # 455712
dmcneil@aft.org

555 New Jersey Avenue, N.W.
Washington, DC 20001
Ph.: (202) 393-7472
FAX: (202) 393-6385

Counsel for Plaintiffs



August 8, 2014

Donna Whitman Russell
 Director/Manager
 DCPS Office of General Counsel
 1200 First St., NE
 Washington, DC 20002

Re: FOIA REQUEST

Dear Director Russell:

The purpose of this letter is to request the opportunity to inspect and copy public records of the District of Columbia Public Schools pursuant to the D.C. Freedom of Information Act, D.C. Code § 2-531 (2001) *et seq.*

For purposes of this request, terms used have the following meaning:

a. “Teacher” means all full-time DCPS employees and regular part-time employees who work at least one half-time in the Pay Plan/Grade ET 15 or EG 09.

“IMPACT” means the DCPS Effectiveness Assessment System for School-Based Personnel.

b. “IMPACT group” refers to the subcategory by which teachers are classified for purposes of the criteria used to reach the individual’s IMPACT score.

c. “Documents” means all correspondence, memoranda, notes of meetings, facsimiles, electronic mail, reports, transcripts or notes of telephone conversations, minutes, notes, tests, reports, analyses, studies, testimony, speeches, charts, diagrams, computer printouts, and other writings or materials, and encompasses all physical and electronic recordings of information, whether on paper, audiotape, videotape, any form of computer memory or storage, or any other medium used to record information. Electronic documents should not be locked or password protected.

I am requesting that DCPS make available for inspection and copying the following records for **each school year from 2009-10 through 2013-14**:

1. Documents describing change in student enrollment from month-to-month, by school, by grade level and including the number of students:
 - a. Exiting the state from DCPS;
 - b. exiting DCPS to Public Charter Schools;
 - c. entering DCPS;
 - d. entering DCPS from Public Charter Schools; and
 - e. Transfers between DCPS schools.

American Federation
 of Teachers, AFL-CIO

AFT Teachers
 AFT PSRP
 AFT Higher Education
 AFT Public Employees
 AFT Nurses and Health
 Professionals

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 David J. Quolke
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 Denise Specht
 Tim Stoelb
 Richard Stutman
 Ann Twomey
 Adam Urbanski

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2. Documents listing teacher transfers by school, including both the school exited and the school receiving, as well as grade, certification, IMPACT group and subject.
3. Documents listing teacher terminations, including each teacher's school, grade, IMPACT group, certification, subject and reason for the termination.
4. Documents showing principal turnover, including terminations and transfer, by school.
5. IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject, including:
 - a. Individual Value Added score (Group 1);
 - b. Composite Teaching and Learning Framework score;
 - c. Commitment to the School Community score;
 - d. School Value Added score (if applicable); and
 - e. Core Professionalism score.
6. Documents showing the distribution of teachers by IMPACT rating category (i.e., highly effective, effective, minimally effective, and ineffective) by school and grade level.
7. Documents describing bonuses distributed by DCPS to teachers, including the amount, each teacher's school, grade, IMPACT Group, certification and subject.
8. Documents listing bonuses distributed by DCPS to principals, including the amount and identifying the school.
9. Documents showing all changes to IMPACT, including changes to rating categories, for each school year, and the reasons for such changes.
10. Documents describing how IMPACT accounts and adjusts for student poverty, including food stamp recipients, welfare recipients, homelessness, single parent households, parental unemployment.
11. Documents showing the number and percentage of students at each school who are considered to be in poverty for purposes of IMPACT Individual Value Added calculations.
12. Documents showing the number and percentage of students at each school who meet the criteria for identifying the school as eligible (or not) for Community Eligibility status for free school lunch.
13. Documents describing students who attended at least one day of D.C. Comprehensive Assessment System (D.C.-CAS) testing for either Math or ELA, but did not attend or complete all sections of the test. For each student provide their school and grade level.
14. Documents listing D.C.-CAS scores - both the scale score and proficiency level - sorted by student, school, grade, and teacher, including student subgroup characteristics.

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15. Documents describing any change in calculating D.C.-CAS scale scores or the cut scores for the proficiency levels.
16. The value added technical reports prepared by Mathematica for DCPS for school years 2009-10, 2010-11, and 2013-14 (links on DCPS website are broken).
17. Documents listing the number of days of standardized testing for each school by grade level and the name of the tests administered.
18. Documents regarding the erroneous calculation of the IMPACT scores for DCPS teachers for the 2012-2013 school year. Such documents should include, but are not limited to, the following:
 - a. a list of all teachers whose scores were changed;
 - b. each teacher's SY2012-13 final evaluation: the initial evaluation that was sent to teachers and any changes to those evaluations that were subsequently made and documents explaining the reasons for the change;
 - c. copies of all correspondence sent to teachers regarding the miscalculation of their scores;
 - d. the impact of the miscalculation on each teacher; and
 - e. a full description of the error, the cause of the error, how and when the error was brought to the attention of DCPS officials communications, including memoranda, correspondence, letters, emails, and faxes, between DCPS and Mathematica regarding the erroneous calculations.

For the requests above, each student and each teacher should have a unique identifier so that he/she can be tracked across years; however, be advised that we **are not** requesting the production of personally identifiable information and that the FOIA statute obligates DCPS to provide the public records "after deletion of those portions which may be withheld from disclosure" pursuant to D.C. Code § 2-534(a).

In accordance with D.C. Code § 2-532(c), DCPS should make these records available for inspection within fifteen (15) working days. Please contact us to establish a time that the requested records will be made available for our inspection. In lieu of inspection, please produce copies of the requested documents as they are kept in the usual course of business; electronically stored information must be produced in its native format (i.e., MS Word or MS Excel), without alterations of any kind. Electronic files should not be password protected or otherwise locked.

If your agency does not maintain the requested records, please certify in writing within three (3) days of receiving this request why these records are absent and what person has custody of the missing record(s). If you have the records but refuse to provide them for inspection, please state the legal basis for why the records are exempted from disclosure.

I agree to pay any reasonable duplication fees for the processing of this request in an amount not to exceed \$1,000.00. Please notify me prior to incurring any expenses in excess of that amount.

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If you have any questions regarding this request, please contact me at 202-393-6305 or dmcneil@aft.org. Thank you for your consideration of this request.

Sincerely,

A handwritten signature in blue ink that reads "Dan McNeil". The signature is written in a cursive style with a large initial "D" and "M".

Dan McNeil
Deputy Director, Legal Department

Daniel McNeil, Legal

From: Govan, Eboni (DCPS) <Eboni.Govan@dc.gov>
Sent: Friday, September 19, 2014 1:59 PM
To: Daniel McNeil, Legal
Cc: FOIA (DCPS); Russell, Donna (DCPS); Gillespie, Catrina (DCPS)
Subject: RE: FOIA Request # 2014-FOIA-00287

Thank you for the email. DCPS does intend to fully comply with your request and is still in the process of searching for the entire universe of responsive documents. Please do not deem the request to be denied. We apologize for not contacting you with a status. If you have further questions or concerns you may contact Donna Whitman Russell, DCPS FOIA Officer, at (202) 442-5170.

Best regards,

Eboni J. Govan
Assistant Attorney General, Office of the General Counsel

District of Columbia Public Schools
1200 First Street, NE- 10th Floor
Washington, DC 20002
T 202.535.2647
F 202.442.5098
E eboni.govan@dc.gov
W dcps.dc.gov

From: Daniel McNeil, Legal [<mailto:dmcneil@aft.org>]
Sent: Friday, September 19, 2014 1:04 PM
To: Govan, Eboni (DCPS)
Cc: FOIA (DCPS)
Subject: FOIA Request # 2014-FOIA-00287

By letter dated August 15, 2014, DCPS acknowledged receipt of my FOIA request on August 12, 2014 (a copy of your letter is attached). Since your initial acknowledgment of receipt, DCPS has not requested a 10 business day extension or identified/provided documents that comply with the request. Please indicate whether DCPS intends to comply with my FOIA request (original attached) or whether I should consider the request denied.

Regards,

Dan McNeil
Deputy Director | AFT Legal Department
T: 202 393-6305 | F: 202 393-6385 | E: dmcneil@aft.org

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November 26, 2014

Dan McNeil
American Federation of Teachers, AFT-CIO
555 New Jersey Avenue, NW
Washington, DC 20001

Email: dmcneil@aft.org

DCPS FOIA Request #: 2014-FOIA-00287 FINAL RESPONSE

Dear Mr. McNeil:

On August 12, 2014, District of Columbia Public Schools (DCPS) Office of General Counsel (OGC) received the Freedom of Information Act (FOIA) requesting that DCPS make available for inspection and copying the following records for each school year from 2009-10 through 2013-14:

REQUEST

1. Documents describing change in student enrollment from month-to-month by school, by grade level and including the number of students:
 - a. Exiting the state from DCPS;
 - b. exiting DCPS to Public Charter Schools;
 - c. entering DCPS;
 - d. entering DCPS from Public Charter Schools; and
 - e. Transfers between DCPS schools.

DCPS RESPONSE

DCPS does not maintain the requested information. FOIA requests for this information should be forwarded to Tracey A. Langley, Esq. (tracey.langley@dc.gov) in the Office of the State Superintendent for Education (OSSE).

REQUEST

2. Documents listing teacher transfers by school, including both the school exited and the school receiving, as well as grade, certification, IMPACT group and subject.

DCPS RESPONSE

In response to your request for information, DCPS does not possess any responsive documents.

REQUEST

3. Documents listing teacher terminations, including each teacher's school, grade, IMPACT group, certification, subject, and reason for the termination.

DCPS RESPONSE

DCPS denies this request. The requested information is exempt from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

REQUEST

4. Documents showing principal turnover, including terminations and transfer, by school.

DCPS RESPONSE

In response to your request for information, please see *Attachment A*.

REQUEST

5. IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject, including:
 - a. Individual Value Added score (Group 1);
 - b. Composite Teaching and Learning Framework score;
 - c. Commitment to the School Community score;
 - d. School Value Added score (if applicable); and
 - e. Core Professionalism score.

DCPS RESPONSE

DCPS denies this request. The requested information is exempt from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

REQUEST

6. Documents showing the distribution of teachers by IMPACT rating category (i.e., highly effective, effective, minimally effective, and ineffective) by school and grade level.

DCPS RESPONSE

In response to your request for information, please see *Attachment B*.

REQUEST

7. Documents describing bonuses distributed by DCPS to teachers, including the amount, each teacher's school, grade, IMPACT Group, certification and subject.

DCPS RESPONSE

In response to your request for information, please see *Attachment C*. Additional responsive information is publicly available at the following website address:

<http://dcps.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+%28Performance+Assessment%29/IMPACT+Guidebooks>. Additional responsive information has been withheld from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

REQUEST

8. Documents listing bonuses distributed by DCPS to principals, including the amount and identifying the school.

DCPS RESPONSE

In response to your request for information, please see *Attachment C*. Additional responsive information has been withheld from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

REQUEST

9. Documents showing all changes to IMPACT, including changes to rating categories, for each school year, and the reasons for such changes.

DCPS RESPONSE

Responsive information is publicly available at the following website address:

<http://dcps.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+%28Performance+Assessment%29/IMPACT+Guidebooks>.

REQUEST

10. Documents describing how IMPACT accounts and adjusts for student poverty, including food stamp recipients, welfare recipients, homelessness, single parent households, parental unemployment.

DCPS RESPONSE

Responsive information is publicly available at the following website address:

<http://dcps.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+%28Performance+Assessment%29/IMPACTplus>. Please Response to Request No. 16 for additional responsive information.

REQUEST

11. Documents showing the number and percentage of students at each school who are considered to be in poverty for purposes of IMPACT Individual Value Added calculations.

DCPS RESPONSE

Responsive information is publicly available at the following website address:

<http://dcps.dc.gov/DCPS/Files/downloads/In-the-Classroom/Ensuring-Teacher-Success/2014-1-17%20-%20IMPACTplus%20FARM%20for%20Online1.pdf>.

REQUEST

12. Documents showing the number and percentage of students at each school who meet the criteria for identifying the school as eligible (or not) for Community Eligibility status for free school lunch.

DCPS RESPONSE

Responsive information is publicly available at the following website address:

<http://dcps.dc.gov/DCPS/Beyond+the+Classroom/Food+Services/Application+for+Free+and+Reduced+Meals/Application+for+Free+and+Reduced+Meals>.

REQUEST

13. Documents describing students who attended at least one day of D.C. Comprehensive Assessment System (D.C.-CAS) testing for either Math or ELA, but did not attend or complete all sections of the test. For each student provide their school and grade level.

DCPS RESPONSE

In response to your request for information, DCPS does possess any responsive documents or data.

REQUEST

14. Documents listing D.C.-CAS scores - both the scale score and proficiency level sorted by student, school, grade, and teacher, including student subgroup characteristics.

DCPS RESPONSE

Responsive information regarding aggregate data is publicly available at the following website address: <http://dcps.dc.gov/DCPS/About+DCPS/DCPS+Data/DCPS+Data+Sets>. DCPS denies the request for individual level student data pursuant to D.C. Official Code §2-534 (a) (6) (B) and the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g.

REQUEST

15. Documents describing any change in calculating D.C.-CAS scale scores or the cut scores for the proficiency levels.

DCPS RESPONSE

DCPS does maintain the requested information. FOIA requests for this information should be forwarded to Tracey A. Langley, Esq. (tracey.langley@dc.gov) in the Office of the State Superintendent for Education (OSSE).

REQUEST

16. The value added technical reports prepared by Mathematica for DCPS for school years 2009-10, 2010-11, and 2013-14 (links on DCPS website are broken).

DCPS RESPONSE

Responsive information is publicly available at the following website address: dcps.dc.gov.

Once there, do as follows:

1. Click on the tab labeled *In the Classroom*
2. Click on the tab labeled *Ensuring Teacher Success*
3. Click on the tab labeled *Impact*
4. Click on the tab labeled *Individual Value-Added*.

REQUEST

17. Documents listing the number of days of standardized testing for each school by grade level and the name of the tests administered.

DCPS RESPONSE

In response to your request for information, Assessments calendars for school years 09-10, 10-11, 12-13, and 13-14 are available on the [DCPS website](#) at URL web address

<http://dcps.dc.gov/DCPS/About+DCPS/Calendars>. Please see *Attachment D* for the SY11-12 assessments calendar. Please note that the assessments calendars reflect windows in which schools *can* test students for each assessment, not actual testing days.

REQUEST

18. Documents regarding the erroneous calculation of the IMPACT scores for DCPS teachers for the 2012-2013 school year. Such documents should include, but are not limited to, the following:

- a. a list of all teachers whose scores were changed;
- b. each teacher's SY2012-13 final evaluation: the initial evaluation that was sent to teachers and any changes to those evaluations that were subsequently made and documents explaining the reasons for the change;
- c. copies of all correspondence sent to teachers regarding the miscalculation of their scores;
- d. the impact of the miscalculation on each teacher; and
- e. a full description of the error, the cause of the error, how and when the error was brought to the attention of DCPS officials communications, including memoranda, correspondence, letters, emails, and faxes, between DCPS and Mathematica regarding the erroneous calculations.

DCPS RESPONSE

In response to your request for information, please see *Attachment E*.

Please know that, under D.C. Official Code § 2-537 and 1 DCMR 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain “Freedom of Information Act Appeal” or “FOIA Appeal” in the subject line of the letter as well on the outside of the envelope.

The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to: The Mayor’s Correspondence Unit, FOIA Appeal, 1350 Pennsylvania Avenue, N.W., Suite 316, Washington, D.C. 20004.

Electronic versions of the same information can instead be e-mailed to The Mayor’s Correspondence Unit at foia.mayor@dc.gov. Further, a copy of all appeal materials must be forward to the Freedom of Information Officer of the involved agency, or to the agency head of

that agency if there is no designated Freedom of Information Officer there. Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

If you have any questions regarding this matter, please contact the Office of the General Counsel on (202) 442-5000.

Sincerely,

/s/ Eboni J. Govan

Eboni J. Govan

Attorney Advisor/FOIA Officer

District of Columbia Public Schools



February 20, 2015

Mayor's Correspondence Unit
FOIA Appeal
1350 Pennsylvania Ave, NW
Suite 316
Washington, D.C. 20004

Re: FOIA Appeal (DCPS)

To Whom It May Concern:

Petitioners Washington Teachers Union, Local 6 ("WTU") and the American Federation of Teachers, AFL-CIO ("AFT"), file this petition with the Mayor pursuant to the D.C. Freedom of Information Act, D.C. St. § 2-537, to require the disclosure of public records related to the District of Columbia Public Schools and the teacher evaluation system known as IMPACT by the District of Columbia Public Schools ("DCPS").

IMPACT was implemented by DCPS in the 2009-10 school year with the promise of helping teachers become more effective in the classroom. Between 2010 and 2014, DCPS terminated 563 teachers and instructors (of approximately 4,000) because of their IMPACT scores and total teacher turnover exceeds eighty percent (80%). The public has a significant interest in knowing how IMPACT works, whether evaluations are accurate and information about other factors that may be affecting the performance of DCPS students and teachers. AFT and WTU requested public records maintained by DCPS that would provide insight into IMPACT and support this public interest. DCPS, without justification, has refused to provide the documents requested.

On August 8, 2014, AFT, requested by letter that DCPS produce copies of certain records and other documents contained in DCPS's case files involving District of Columbia public school teachers, for inspection and copying pursuant to the FOIA, D.C. Code § 2-532. A copy of this request is attached as **Exhibit A**. By communication dated August 15, 2014, DCPS acknowledged receipt of the FOIA request, which it identified as 2014-FOIA-0287. When AFT contacted DCPS to inquire about the FOIA response, DCPS responded on September 19, 2014, by stating that the FOIA had not been denied and DCPS was still gathering the requested documents. Attached hereto as **Exhibit B**. DCPS provided a partial response on October 3, 2014, but stated that it was still processing responses to a majority of the FOIA requests.

DCPS finally responded in full to the FOIA request on November 26, 2014. Attached hereto as **Exhibit C**. DCPS provided non-responsive or incomplete documentation to a number of the requests, and did so without any sufficient explanation or legal justification; DCPS also claimed statutory exemptions to deny requests in total, rather

American Federation
of Teachers, AFL-CIO

AFT Teachers
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AFT Higher Education
AFT Public Employees
AFT Nurses and Health
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Richard Stutman
Ann Twomey
Adam Urbanski

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than providing redacted documents as required by law. A detailed statement of the deficiencies in the DCPS response is attached as **Exhibit D**.

The information sought by AFT and WTU is within the provisions of the FOIA, D.C. Code § 2-532, and is required to be disclosed by DCPS. DCPS's failure and refusal to furnish the requested information is arbitrary and capricious, and injures WTU, AFT and the public by depriving it of public information to which it is entitled access.

WTU and AFT respectfully request that Mayor Bowser, or her designee, issue a written determination requiring DCPS to comply with the FOIA statute and make available for inspection and copying the information requested by AFT in its FOIA request dated August 8, 2014. If DCPS does not maintain the requested records, it should certify in writing why these records are absent and what person has custody of the missing record(s).

Please do not hesitate to contact Dan McNeil (at 202-393-7472 or dmcneil@aft.org) if you have any questions or wish to discuss this matter.

Sincerely,



Dan McNeil
Deputy Director, AFT Legal Department

cc: Eboni Govan, FOIA Officer, DCPS
Lee Jackson, Counsel to WTU



A Union of Professionals

Statement of Circumstances and Arguments Supporting Disclosure

Request 1. Documents listing teacher transfers by school, including both the school exited and the school receiving, as well as grade, certification, IMPACT group and subject.

DCPS Response: In response to your request for information, DCPS does not possess any responsive documents.

Review: AFT is satisfied that DCPS does not possess any responsive documents.

Request No. 2: Documents listing teacher transfers by school, including both the school exited and the school receiving, as well as grade, certification, IMPACT group and subject.

DCPS Response: In response to your request for information, DCPS does not possess any responsive documents.

Review: AFT questions the assertion that DCPS does maintain records of teacher transfers from one DCPS school to another. To the extent that DCPS possesses documents that are responsive to Request No. 2, AFT requests that DCPS provide such additional documents or to explain why no such documents exist.

Request No. 3: Documents listing teacher terminations, including each teacher's school, grade, IMPACT group, certification, subject and reason for the termination.

DCPS Response: DCPS denies this request. The requested information is exempt from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

Review: AFT believes that DCPS can provide the information requested in AFT Request No. 3 without disclosing the identity of each teacher. As we stated in our FOIA request:

each teacher should have a unique identifier so that he/she can be tracked across years; however, be advised that we **are not** requesting the production of personally identifiable information and that the FOIA statute obligates DCPS to provide the public records "after deletion of those portions which may be withheld from disclosure" pursuant to D.C. Code § 2-534(a).

Therefore, AFT requests that DCPS provide the information requested, after deletion of personally identifying information.

Request No. 4: Documents showing principal turnover, including terminations and transfer, by school.

DCPS Response: In response to your request for information, please see *Attachment A*.

Review: DCPS was only partially responsive; Attachment A included a list of principals by school for each school year from 2009-10 through 2013-14. DCPS did not provide any documents describing principal turnover, listing the number or schools from which principals had been terminated, or identifying transfers of principals from one DCPS school to another.

AFT believes that there are additional documents within DCPS's possession that are responsive to Request No. 4 and requests that DCPS provide such additional documents or to explain why no such documents exist.

Request No. 5: IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject, including:

- a. Individual Value Added score (Group 1);
- b. Composite Teaching and Learning Framework score;
- c. Commitment to the School Community score;
- d. School Value Added score (if applicable); and
- e. Core Professionalism score.

DCPS Response: DCPS denies this request. The requested information is exempt from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

Review: DCPS was non-responsive; AFT believes that DCPS can provide the information requested in Request No. 5 without disclosing the identity of each teacher. Therefore, AFT requests that DCPS provide the information requested, after deletion of personally identifying information.

Request No. 6: Documents showing the distribution of teachers by IMPACT rating category (i.e., highly effective, effective, minimally effective, and ineffective) by school and grade level.

DCPS Response: In response to your request for information, please see *Attachment B*.

Review: DCPS was not responsive and did not provide a legal justification for failing to provide responsive documents. Attachment B provided only the district-wide percentages of teachers in each rating category, while the request asked for the distribution of IMPACT ratings by grade and school for 2009-10 through 2013-14. DCPS clearly has this data because it would be impossible to provide district-wide percentages without knowing the distribution by school and grade level. In fact, DCPS submitted the more specific information to the DC Council for the 2011-12 school year. Therefore, AFT requests that DCPS provide the documents that are responsive to the request.

Request No. 7: Documents describing bonuses distributed by DCPS to teachers, including the amount, each teacher's school, grade, IMPACT Group, certification and subject.

DCPS Response: In response to your request for information, please see *Attachment C*. Additional responsive information is publicly available at the following website address: <http://dcps.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+%28Performance+Assessment%29/IMPACT+Guidebooks>. Additional responsive information has been withheld from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

Review: DCPS was non-responsive; Attachment C contained only the bonus amounts awarded by year, but without identifying each teacher's school, grade, IMPACT Group, certification and subject. DCPS has this information and provided it to the DC Council in past years for oversight hearings (e.g., FY 2011-12 and FY 2012-13). Finally, DCPS can provide the information requested in Request No. 7 without disclosing the identity of each teacher. Therefore, AFT requests that DCPS provide the information requested, after deletion of personally identifying information.

Request No. 8: Documents listing bonuses distributed by DCPS to principals, including the amount and identifying the school.

DCPS Response: In response to your request for information, please see *Attachment C*. Additional responsive information has been withheld from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

Review: DCPS was non-responsive; Attachment C contained only the bonus amounts awarded by year, but without identifying each teacher's school, grade, IMPACT Group, certification and subject. DCPS has this information and provided it to the DC Council in past years for oversight hearings (e.g., FY 2011-12 and FY 2012-13). Finally, DCPS can provide the information requested in Request No. 8 without disclosing the identity of each teacher. Therefore, AFT requests that DCPS provide the information requested, after deletion of personally identifying information.

Request No. 9: Documents showing all changes to IMPACT, including changes to rating categories, for each school year, and the reasons for such changes.

DCPS Response: Responsive information is publicly available at the following website address: <http://dcps.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+%28Performance+Assessment%29/IMPACT+Guidebooks>.

Review: DCPS was only partially responsive; the IMPACT guidebooks contain some of the information requested, but does not describe why changes were made. For example, in 2012-2013, DCPS added the IMPACT rating category "developing" and AFT believes that DCPS possesses additional documents related to that significant change. DCPS response did not provide a legal justification for failing to provide such responsive documents. Therefore, AFT requests that DCPS provide such additional documents or to explain why no such documents exist.

Request No. 10: Documents describing how IMPACT accounts and adjusts for student poverty, including food stamp recipients, welfare recipients, homelessness, single parent households, parental unemployment.

DCPS Response: Responsive information is publicly available at the following website address: <http://dcps.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+%28Performance+Assessment%29/IMPACTplus>. Please Response to Request No. 16 for additional responsive information.

Review: AFT is satisfied with the DCPS response and that it does not possess any additional responsive documents.

Request No. 11: Documents showing the number and percentage of students at each school who are considered to be in poverty for purposes of IMPACT Individual Value Added calculations.

DCPS Response: Responsive information is publicly available at the following website address: <http://dcps.dc.gov/DCPS/Files/downloads/In-the-Classroom/Ensuring-Teacher-Success/2014-1-17%20-%20IMPACTplus%20FARM%20for%20Online1.pdf>.

Review: DCPS was non-responsive and did not provide a legal justification for failing to provide responsive documents. The document identified in DCPS's response only lists whether a school is high- or low- poverty and the stated purpose of that document is for "determining LIFT and IMPACT *plus* bonuses and service credits." Therefore, AFT requests that DCPS provide such additional documents or to explain why no such documents exist.

Request No. 12: Documents showing the number and percentage of students at each school who meet the criteria for identifying the school as eligible (or not) for Community Eligibility status for free school lunch.

DCPS Response: Responsive information is publicly available at the following website address:

<http://dcps.dc.gov/DCPS/Beyond+the+Classroom/Food+Services/Application+for+Free+and+Reduced+Meals/Application+for+Free+and+Reduced+Meals>.

Review: DCPS was not responsive and did not provide a legal justification for failing to provide responsive documents. The link only lists those schools that meet Community Eligibility status and not the number and percentage of students who meet the criteria. Therefore, AFT requests that DCPS provide the documents that are responsive to the request.

Request No. 13: Documents describing students who attended at least one day of D.C. Comprehensive Assessment System (D.C.-CAS) testing for either Math or ELA, but did not attend or complete all sections of the test. For each student provide their school and grade level.

DCPS Response: In response to your request for information, DCPS does possess any responsive documents or data.

Review: AFT is satisfied with the DCPS response and that it does not possess any additional responsive documents.

Request No. 14: Documents listing D.C.-CAS scores - both the scale score and proficiency level - sorted by student, school, grade, and teacher, including student subgroup characteristics.

DCPS Response: Responsive information regarding aggregate data is publicly available at the following website address: <http://dcps.dc.gov/DCPS/About+DCPS/DCPS+Data/DCPS+Data+Sets>. DCPS denies the request for individual level student data pursuant to D.C. Official Code §2-534 (a)(6)(B) and the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g.

Review: DCPS was only partially responsive and did not provide a legal justification for failing to provide the D.C.-CAS scale scores without personally identifiable information. However, on or about February 17, 2015, the DC Council posted the scale scores on its website.

Requests Nos. 15-18: AFT is satisfied with the DCPS response and that it does not possess any additional responsive documents.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel

March 18, 2015

VIA ELECTRONIC MAIL

Dan McNeil
Deputy Director, AFT Legal Department
555 New Jersey Avenue N.W. Washington, D.C.

Re: FOIA Appeal 2015-40

Dear Mr. MacNiel:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a) ("DC FOIA"), dated February 20th, 2015 (the "Appeal"). You ("Appellant") assert in the Appeal that the District of Columbia Public Schools ("DCPS") improperly withheld records in response to your request for information under DC FOIA dated August 8, 2014 (the "FOIA Request"). In your FOIA Request you seek documents from DCPS pertaining to the teacher evaluation system known as IMPACT. The Appeal states that DCPS's "failure and refusal to furnish the requested information is arbitrary and capricious" and "injures WTU and AFT."

Background

Appellant's FOIA Request sought the following records:

1. Documents describing change in student enrollment from month-to-month, by school, by grade level and including the number of students:
 - a. exiting the state from DCPS
 - b. exiting DCPS to Public Charter Schools;
 - c. entering DCPS;

- d. entering DCPS from Public Charter Schools; and
 - e. Transfers between DCPS schools.
2. Documents listing teacher transfers by school, including both the school exited and the school receiving, as well as grade, certification, IMPACT group and subject.
 3. Documents listing teacher terminations, including each teacher's school, grade, IMPACT group, certification, subject and reason for the termination.
 4. Documents showing principal turnover, including terminations and transfer, by school.
 5. IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject, including:
 - A. Individual Value Added score (Group 1);
 - b. Composite Teaching and Learning Framework score;
 - c. Commitment to the School Community score;
 - D. School Value Added score (if applicable); and
 - e. Core Professionalism score.
 6. Documents showing the distribution of teachers by IMPACT rating category (i.e., highly effective, effective, minimally effective, and ineffective) by school and grade level.
 7. Documents describing bonuses distributed by DCPS to teachers, including the amount, each teacher's school, grade, IMPACT Group, certification and subject.
 8. Documents listing bonuses distributed by DCPS to principals, including the amount and identifying the school.
 9. Documents showing all changes to IMPACT, including changes to rating categories, for each school year, and the reasons for such changes.
 10. Documents describing how IMPACT accounts and adjusts for student poverty, including food stamp recipients, welfare recipients, homelessness, single parent households, parental unemployment.

11. Documents showing the number and percentage of students at each school who are considered to be in poverty for purposes of IMPACT Individual Value Added calculations.
12. Documents showing the number and percentage of students at each school who meet the criteria for identifying the school as eligible (or not) for Community Eligibility status for free school lunch.
13. Documents describing students who attended at least one day of D.C. Comprehensive Assessment System (D.C.-CAS) testing for either Math or ELA, but did not attend or complete all sections of the test. For each student provide their school and grade level.
14. Documents describing any change in calculating D.C.-CAS scale scores or the cut scores for the proficiency levels.
15. Documents describing any change in calculating D.C.-CAS scale scores or the cut scores for the proficiency levels.
16. The value added technical reports prepared by Mathematica for DCPS for school years 2009-10, 2010-11, and 2013-14 (links on DCPS website are broken).
17. Documents listing the number of days of standardized testing for each school by grade level and the name of the tests administered.
18. Documents regarding the erroneous calculation of the IMPACT scores for DCPS teachers for the 2012-2013 school year.

DCPS fully responded to the FOIA Request on November 26, 2014. Documents were provided to Appellant as well as hyperlinks to websites where the responsive information could be located. In their response, DCPS indicated that some records were being withheld based upon the exemption from disclosure under D.C. Code § 2-534(a)(2) and § 2-534(a)(6).

On Appeal, Appellant challenges the DCPS response to the FOIA Request, as follows:

1. Appellant is satisfied with the DCPS response to request #10.

2. Appellant questions the assertion that DCPS does not possess any responsive documents. To the extent that DCPS possesses such documents, Appellant requests that these documents be produced or that DCPS explain why they do not exist.
3. Appellant claims that DCPS can provide the information requested without creating an unwarranted invasion of privacy.
4. Appellant contends DCPS only partially responded to this request. Attachment A included a list of principals by school each school year 2009-10 through 2013-14. DCPS did not provide any documents describing principal turnover, listing the number or schools from which principals had been terminated, or identifying transfers of principals from one DCPS school to another. Appellant believes that there are additional documents within DCPS's possession that are responsive to request #4 and requests that DCPS provide such additional documentation or explain why no such documents exist.
5. Appellant contends that the documents responsive to this request, which DCPS claims are exempt from disclosure under DC Code§ 2-534(a)(2) can be produced without disclosing the identity of each teacher "after deletion of those portions which may be withheld from disclosure" pursuant to D.C. Code§ 2-534(a).
6. Appellant asserts that the documents produced are not responsive and DCPS did not provide a legal justification for failing to provide responsive documents. Attachment B provided only the district-wide percentages of teachers in each rating category, while the request asked for the distribution of IMPACT ratings by grade and school for 2009-10 through 2013-14. Appellant believes that DCPS has this data because it would be impossible to provide district-wide percentages without knowing the distribution by school and grade level. In fact, DCPS submitted the more specific information to the DC Council for the 2011-12 school year.
7. Appellant asserts that the documents produced are only partially responsive, Attachment C contained only the bonus amount awarded by year, but without identifying each teacher's school, grade, IMPACT group, certification and subject. Appellant claims that DCPS has this information because they have provided it to the DC council in past years

- for oversight hearings. Appellant believes that these records can be produced subject to redaction.
8. Appellant contends DCPS was non-responsive. The documents provided contained the bonus amounts awarded by year, but without identifying each teacher's school, grade, IMPACT group, certification and subject. Appellant believes that DCPS has this information because it was provided to the DC Council in past years for oversight hearings.
 9. Appellant contends the DCPS response was only partially responsive because the IMPACT guidebooks contain some of the requested information, but does not describe why changes were made. For example, in 2012-13. DCPS added the IMPACT rating category of "developing" and AFT believes that DCPS possesses additional documents related to that significant change. DCPS did not include a legal justification for their limited response.
 10. Appellant is satisfied with the DCPS response to request #10.
 11. Appellant claims that the DCPS was non-responsive with regard to request #11 and that DCPS did not provide a legal justification for failing to provide responsive documents. The document identified in DCPS's response lists whether a school is high or low poverty and the stated purpose of that document is for "determining LIFT and IMPACT plus bonuses and service credits." For this reason, Appellant believes there are additional, undisclosed documents.
 12. Appellant contends that DCPS was non-responsive and did not provide a legal justification for failing to provide responsive documents. According to Appellant, the link provided only lists schools that meet Community Eligibility stats and not the number and percentages of students who meet the criteria.
 13. Appellant is satisfied with the DCPS response to request #13.
 14. Appellant contends that DCPS was only partially responsive and did not provide a legal justification for failing to provide the D.C.-CAS scale scores without personally identifiable information. Appellant notes that the DC Council posted the scaled scores on its website on February 17, 2015.

15.-18 Appellant is satisfied with the DCPS response to request #15-18.

DCPS was provided with a copy of the Appeal and given an opportunity to respond to the Mayor's Office of Legal Counsel. In reply, by email dated March 3, 2015, DCPS stated that it affirms all of its responses with the exception of Request #12. With regard Request #12, DCPS is willing to perform another search for responsive documents. With regard to the remaining specific numeric requests, DCPS responds to Appellant as follows:

1. Documents describing change in student enrollment from month-to-month by school, by grade level and including the number of students:
 - a. Exiting the state from DCPS;
 - b. exiting DCPS to Public Charter Schools;
 - c. entering DCPS;
 - d. entering DCPS from Public Charter Schools; and
 - e. Transfers between DCPS schools.

DCPS does not maintain the requested information.

2. Documents listing teacher transfers by school, including both the school exited and the school receiving, as well as grade, certification, IMPACT group and subject.

DCPS does not possess any responsive documents.

3. Documents listing teacher terminations, including each teacher's school, grade, IMPACT group, certification, subject, and reason for the termination.

DCPS denies this request. The requested information is exempt from release pursuant to D.C. Official Code §2-534 (a) (2) - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

4. Documents showing principal turnover, including terminations and transfer, by school.

In response to this request, DCPS provided appellant with spreadsheets for schools years 2009-10 -2013-14 ("Attachment A").

5. IMPACT scores for each teacher, including school, grade, IMPACT group, certification and subject, including:
 - a. Individual Value Added score (Group 1);

- b. Composite Teaching and Learning Framework score;
- c. Commitment to the School Community score;
- d. School Value Added score (if applicable); and
- e. Core Professionalism score.

DCPS denied this request, asserting an exemption from disclosure pursuant to D.C. Official Code §2-534 (a) (2). DCPS states that these records are exempt because they include information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

6. Documents showing the distribution of teachers by IMPACT rating category (i.e., highly effective, effective, minimally effective, and ineffective) by school and grade level.

In response to this request, DCPS provided appellant with spreadsheets for schools years 2009-10 - 2013-14 (“Attachment B”) that display district-wide percentages of teachers in each IMPACT rating category.

7. Documents describing bonuses distributed by DCPS to teachers, including the amount, each teacher's school, grade, IMPACT Group, certification and subject.

In response to this request, DCPS provided appellant with spreadsheets for schools years 2009-10 -2013-14 (“Attachment C”) that document bonuses paid to DCPS staff. DCPS also provided a hyperlink to additional responsive information. DCPS claimed an exemption pursuant to D.C. Official Code §2-534 (a) (2) with regard to some of the information responsive to this request.

8. Documents listing bonuses distributed by DCPS to principals, including the amount and identifying the school.

In response to this request, DCPS also referred the Appellant to Attachment C, which included spread sheets documents principal and school leader bonuses for school years 2012-13 and 2013-14. Additional responsive information has been withheld from release pursuant to D.C. Official Code §2-534 (a) (2).

9. Documents showing all changes to IMPACT, including changes to rating categories, for each school year, and the reasons for such changes.

DCPS directed Appellant to the IMPACT Guidebook in the DCPS website.

10. Documents describing how IMPACT accounts and adjusts for student poverty, including food stamp recipients, welfare recipients, homelessness, single parent households, parental unemployment.

DCPS directed Appellant to segment of the DCPS website where this information is located.

11. Documents showing the number and percentage of students at each school who are considered to be in poverty for purposes of IMPACT Individual Value Added calculations.

In response to this request, DCPS referred the Appellant to a document on the DCPS website entitled “IMPACTplus/LIFT Permanent FARM Status” which consists of a list of high- and low-poverty schools that “will be used for the purposes of determining LIFT and IMPACTplus bonuses and service credits.”

12. Documents showing the number and percentage of students at each school who meet the criteria for identifying the school as eligible (or not) for Community Eligibility status for free school lunch.

In response to request #12, DCPS agrees to perform another search for responsive documents.

13. Documents describing students who attended at least one day of D.C.

DCPS asserts that it does not does possess any data or documents responsive to this request.

14. Documents listing D.C. CAS scores - both the scale score and proficiency level sorted by student, school, grade, and teacher, including student subgroup characteristics.

DCPS provided a hyperlink to data sets located on their website where responsive information regarding aggregate DC CAS data (broken down by school and subgroup) is publicly available. DCPS denies any additional disclosure of individual level student data pursuant to D.C. Official Code §2-534 (a) (6) (B) and the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g. Moreover, DCPS informed us that DC CAS is administered and maintained by the Office of the State Superintendent of Education (“OSSE”), thus any request for this data should have been filed with OSSE.

Discussion

The 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), and 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).

DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978). Under the law, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985). DC FOIA provides a right to access of documents, not a right to challenge the correctness or reasoning of an agency decision, to interrogate an agency, to require an agency to conduct research, or otherwise to require answers to questions posed as FOIA requests. See Department of Justice Guide to the Freedom of Information Act (2009) at 51, n. 127 (collecting cases, reported and unreported). Moreover, an administrative appeal under DC FOIA is a summary process and we have not insisted on the same rigor in establishing the adequacy of a search as would be expected in a judicial proceeding.

We have summarized the arguments and counter-arguments of the parties above. As a general matter, Appellant makes repeated assertions that DCPS did not provide sufficient “legal justification” regarding why specific requests for documents were not satisfied. The law only requires the disclosure of nonexempt documents in the possession of the agency, not answers to questions. Therefore, as long as DCPS conducted a reasonable search, produced all non-exempt responsive documents, and explained why they withheld exempted information, they have met their obligations under FOIA.

With regard to requests #2 & 14 DCPS states that it does not possess the requested information. With regard to requests #4, 7, 8, & 9 DCPS declares that it has disclosed all of the non-exempt records in their possession that are responsive to these requests. As we have stated in prior decisions, see, e.g., Freedom of Information Act Appeal 2012-65, in order to make a reasonable and adequate search, an agency must make reasonable determinations as to the location of records requested and search for the records in those locations. Based on the

administrative record, we are satisfied that DCPS has met its statutory obligation with respect to these requests. We find DCPS conducted a reasonable search with regard to requests #2, 4, 7, 8, 9 & 14.

Moreover, DCPS is under no obligation to create responsive documents where none exist. Given the wording of your request and the documents provided by DCPS, it is probable that no records exist exactly matching requests #2, 4, 9 & 14. Although additional records may exist with regard to requests #7 & 14, we find that DCPS has properly claimed an exemption under DC Code 2-534 (a) (2) (“Exemption 2”) and DC Code 2-534 (a) (6) (“Exemption 6”) with regard to these requests. A more detailed analysis of the application of these exemptions to requests #7 & 14 follows later in this decision.

It has been held that an agency is not obligated under FOIA to produce records when the information is publically accessible. *Antonelli v. Fed. Bureau of Prisons*, 591 F. Supp. 2d 15, 25 (D.D.C. 2008). See also *Crews v. Commissioner*, 85 A.F.T.R.2d 2169, 2000 U.S. Dist. LEXIS 21077 (C.D. Cal. 2000) (production satisfied for documents that are publicly available either in the agency's reading room or on the Internet). “[A]gency record[s]” have not been “improperly withheld,” when they are “already are available from their primary sources” because they are “on the public record” cannot be deemed “improperly withheld.” *Tax Analysts v. Department of Justice*, 643 F. Supp. 740, 743-44 (D.D.C. 1986). In the case of records already publicly available, FOIA's primary purpose, to prevent “secret agency law,” is not at risk. *Id.*

Here, Appellant contends that DCPS must possess records that are fully responsive to requests #7, 8 & 14 because DCPS submitted this kind of information to the DC Council in years past during oversight hearings. Because the DC Council has extensive authority to oversee DCPS, the Council, in exercising this authority, is within its right to compel DCPS to create records. Appellant does not enjoy the same authority under FOIA. Thus, simply because DCPS can create records of a certain kind, does not mean they regularly do so or that they can be compelled to do so under FOIA. Moreover, the DC Council is the primary source of this information, since it was created by DCPS specifically for the Council's education committee. Appellant has acknowledged that these records can be found online at the DC Council website. DCPS is not obligated to create any records akin to those provided to the DC Council under this FOIA request. Furthermore, we find that DCPS is not required to produce documents responsive to requests #7, 8 & 14 which are publicly available on the Council website.

Therefore, we find that there was no denial of FOIA with regard to requests ##2, 4, 7, 8, 9 & 14 of Appellant's Request. With regard to these requests, the decision of DCPS is upheld.

DCPS has claimed Exemption 2 applies to withheld documents responsive to requests #3, 5, 7 & 8. These requests pertain to teacher termination information, teacher evaluations, and teacher and principal bonuses, respectively.

District of Columbia Official Code § 2-534(a)(2) ("Exemption (2)") provides for an exemption from disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." All information that "applies to a particular individual" qualifies for consideration under this exemption. *Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982); see also *New York Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc). A privacy analysis under FOIA turns on the existence of a sufficient privacy interest and a balancing of such individual privacy interest against the public interest in disclosure. See *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989). The first part of the analysis is to determine whether there is a sufficient privacy interest present.

[A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. See *Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976); *Simpson v. Vance*, 208 U.S. App. D.C. 270, 648 F.2d 10, 14 (D.C. Cir. 1980); *Sims v. CIA*, 206 U.S. App. D.C. 157, 642 F.2d 562, 575 (D.C. Cir. 1980). That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. See *Simpson*, 648 F.2d at 14. But it also reflects the employee's more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has obtained and kept in the employee's personnel file.

Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984).

Moreover, "numerous courts have held that disclosure of both favorable and unfavorable information regarding an employee's job performance, such as the receipt of a financial bonus, or a particular rating after an evaluation, constitutes more than a de minimis invasion of privacy because the information contains personal information about job performance. "Long v. Office of Pers. Mgmt.,

2007 U.S. Dist. LEXIS 72887, 64 (N.D.N.Y. Sept. 30, 2007) (citing *Warren v. SSA*, No. 98-CV-0116E (SC), 2000 U.S. Dist. LEXIS 12385, 2000 WL 1209383, (W.D.N.Y. Aug. 22, 2000)).

Although it has been recognized that “the privacy interests of public officials are ‘somewhat reduced’ when compared to those of private citizens, ‘individuals do not waive all privacy interests . . . simply by taking an oath of public office.’ [citation omitted.]” *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008). A disclosure that the employment of a person has been terminated due to poor performance may be, at the least, embarrassing and may result in further contact and questioning by third parties. Thus, there is a cognizable and sufficient privacy interest in information about teacher terminations, performance evaluations and financial bonuses.

As stated above, the second part of a privacy analysis must examine whether the public interest in disclosure is outweighed by the individual privacy interest. The Supreme Court has stated that this must be done with respect to the purpose of FOIA, which is “‘to open agency action to the light of public scrutiny.’” *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). “This basic policy of ‘full agency disclosure unless information is exempted under clearly delineated statutory language,’ indeed focuses on the citizens’ right to be informed about ‘what their government is up to.’” *Department of Air Force v. Rose*, 425 U.S., at 360-361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct. *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-773 (1989).

Appellant claims that redaction can safeguard the privacy of the withheld information. D.C. Official Code § 2-534(b) provides, in pertinent part, that “any reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section.” Thus, there is a question as to whether DCPS should have disclosed the additional information about terminations, evaluations and bonuses with redactions. A determination of whether non-exempt information in a record is reasonably segregable turns on the intelligibility of the record after the removal of the exempt information and the burden that removing the exempt material would impose on the agency. *Kalwasinski*, 2010 U.S. Dist. LEXIS 62659, 2010 WL 2541363, (citing *Mokhiber*

v. U.S. Dep't of Treasury, 335 F. Supp. 2d 65, 71 (D.D.C. 2004). To the extent that the removal of exempt information would leave “little more than templates,” so that “the purpose served by releasing the records in full is no longer served,” disclosure of redacted records is not required. See *id.*, (citing *Warren v. Soc. Sec. Admin.*, 2000 U.S. Dist. LEXIS 12385, 2000 WL 1209383, (W.D.N.Y. Aug. 22, 2000). Generally, “[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshal's Serv.*, 494 F. 3d 1106, 1117, 377 U.S. App. D.C. 460 (D.C. Cir. 2007). However, “[i]f the requester successfully rebuts this presumption, the burden lies with the government to demonstrate that no segregable, non-exempt portions were withheld.” *Id.*

DPS states with regard to requests #3, 5, 7 & 8, “providing the information in the manner that it was requested would force us to produce personally identifiable personnel information that is exempt under 2-534 (a) (2). We provided information in a manner that would not invoke that exemption.” Due to the nature of the requested information, it is reasonable to conclude that any portions of the compiled responsive documents that may be exempt from non-disclosure under FOIA are so inextricably intertwined with exempt material as to be non-segregable and that “little more than a template” would remain.

Appellant does not persuade us that DCPS withheld segregable, non-exempt information. Thus, given the privacy concerns at issue, we find that disclosure of detailed information related to teacher terminations, teacher evaluations and teacher and principal bonuses are exempt under Exemption (2) because the public interest in disclosure does not outweigh the individual privacy interest. The portions of data that were delivered in response to requests #3, 5, 7 & 8 represent DCPS’s best documents available in response to your FOIA request. Therefore, we find that there was no denial of FOIA regarding request #3, 5, 7 & 8. The decision of DCPS is upheld.

Regarding requests #14 DCPS asserts that the some of the responsive records are exempt under D.C. Official Code § 2-534(a)(6) as “[i]nformation specifically exempted from disclosure by statute.” In response to Appellant’s FOIA request #14, DCPS did direct Appellant to publicly available aggregated data sets containing CAS proficiency levels in reading and math, broken down by school and subgroup.

D.C. Official Code § 2-534(a)(6) (“Exemption 6”) provides an exemption for information specifically exempt from disclosure by statute if the statute requires that the matters be withheld from the public in such a manner as to leave

no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. With regard to request #14, DCPS cites § 2-534(a)(6)(B) which covers information “specifically exempted from disclosure by statute (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.”

The relevant statute in this case is the Family Educational Rights and Privacy Act (“FERPA”), which “requires schools and educational agencies receiving federal financial assistance to comply with certain conditions. One condition specified in the Act is that [student records] may not be released without [the student's] consent.” *Owasso Independent School District v. Falvo*, 534 U.S. 426, 428-29 (2002). Data about individual students that are maintained by a school district, including individual state wide assessment testing scores are student records protected by FERPA. 20 U.S.C. § 1232g(a)(4)(A). Their privacy is not impacted by FOIA. *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002). DC FOIA does not grant anyone the right to view a student’s private educational records, which are protected by a federal statute. Therefore, we find that there was no denial of FOIA regarding request #14. The decision of DCPS is upheld.

With regard to request #6 DCPS’s response provided the district-wide percentages of teachers in each rating category, while the request asked for the distribution of IMPACT ratings by grade and school for 2009-10 through 2013-14. We agree with Appellant that it is possible that DCPS has additional data because it would be impossible to provide district-wide percentages without knowing the distribution by school and grade level. We order DCPS to conduct an additional search to determine if such records are in their possession and to produce any such records that are non-exempt.

With regard to request #11 DCPS responded with a document that lists whether a school is high or low poverty for the purpose of “determining LIFT and IMPACT plus bonuses and service credits” rather than for purposes of IMPACT Individual Value Added calculations, as requested. It is unclear from the DCPS response if they possess any documents that more closely align with the specific inquiry of request #11. We order DCPS to conduct an additional search to determine if such records are in their possession and to produce any such records that are non-exempt.

With regard to request #12, DCPS agrees to perform another search for responsive documents.

We order DCPS to respond to items #6, 11, & 12 in Appellant's FOIA Request within five business days of the date of this order.

Conclusion

Therefore, we UPHOLD, in part, the decision of DCPS and REVERSE and REMAND, in part. DCPS is ordered to provide to Appellant any additional documentation in their possession regarding 1) IMPACT ratings by grade and school, and 2) wealth disparities among students for purposes of IMPACT Individual Value Added calculations that exist, are non-exempt, and in the possession of DCPS.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under DC FOIA to commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia.

Sincerely,

/s/ Sarah J Forman

Sarah Jane Forman
Associate Director
Mayor's Office of Legal Counsel (MOLC)

2013-2014 IMPACT

Final IMPACT Report
(available August 2014)
Notice of Separation

Payne ES
Group 1 - General Education Teachers with Individual Value-Added Data
LIFT Stage: Established
5th and Gen Ed All Subjects

Prior Year Assessments

- [12-13 Assessments](#)
- [11-12 Assessments](#)
- [10-11 Assessments](#)
- [09-10 Assessments](#)

Other

- [Appeal to the Chancellor](#)
- [IMPACT Guidebook](#)
- [Contact Us](#)
- [Logout](#)

Final Score: 237
Final Rating: Minimally Effective



*A score of exactly 200 would be classified as Minimally Effective. †A score of exactly 300 would be classified as Effective.
**A score of exactly 250 would be classified as Developing. ‡A score of exactly 350 would be classified as Highly Effective.

Component	Scoring Cycle	Score	Component Score	Weight	Weighted Score
	Administrator Cycle 1	1.88*			
	Administrator Cycle 2	Informal			
TLF	Master Educator Cycle 1	3.33	2.88	40%	115
	Administrator Cycle 3	3.11			
	Master Educator Cycle 2	2.22			
IVA	Year-End	1.25	1.25	35%	43
TAS	Year-End	3.00	3.00	15%	45
CSC	Administrator Cycle 1	2.60	3.30	10%	33
	Administrator Cycle 3	4.00			
CP	Administrator Cycle 1	No Change	No Change	N/A	No Change
	Administrator Cycle 3	No Change			
Final Score					237

* Dropped Score: This assessment score is not included in your overall TLF average or final score calculation.

Note: Some scores have been rounded or truncated for presentation purposes. As a result, some calculations may appear slightly different than their actual values. Your IMPACT Score is calculated using your exact scores and then rounded to the nearest whole number.