STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

Lola Duffort,
Plaintiff

v.

Rutland Unit
Docket No. 380-7-16 Rdcv

Vermont Agency of Education and
Vermont State Board of Education,
Defendants

MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF LAW

Plaintiff Lola Duffort moves for a partial judgment on the pleadings pursuant to Rule 12(c) of the Vermont Rules of Civil Procedure. In this case, Defendants Vermont Agency of Education and Vermont State Board of Education have unlawfully withheld public records that they are required to disclose under Vermont's Access to Public Records Act, 1 V.S.A. §§ 315-320. The basis for this motion is further explained in the following memorandum of law.

MEMORANDUM OF LAW

Introduction

In this action, Plaintiff Lola Duffort, a journalist, seeks a court order requiring Defendants to produce for inspection or provide copies of data records of hazing, harassment, and bullying ("HHB") incidents in each of Vermont's public schools. Ms. Duffort's Complaint also seeks to have the requested information produced as a compilation, the most efficient and cost-effective method of production. She sought these records because the public has a vital interest in knowing how well the Vermont

Agency of Education ("AOE"), the Vermont State Board of Education ("SBE"), and the schools they oversee meet the safety and educational needs of Vermont's children.

Annually, the AOE acquires electronic records containing data regarding HHB complaints and responses to those complaints from each public school, school district, and supervisory union in Vermont. These electronic records are imported into the AOE's electronic databases, producing AOE records containing school-level information. Annually, the SBE is required to report, "on a school by school basis," the number of complaints of bullying, hazing, and harassment, and responses thereto, in Vermont's public schools. 16 V.S.A. § 164(17).

When a "public agency" acquires or produces written or recorded information, regardless of its physical form or characteristics, in the course of agency business, those records are publicly accessible, 1 V.S.A. § 317(b), unless they are specifically exempt by law. The pleadings establish that the Defendants have unlawfully refused to produce records responsive to Ms. Duffort's requests, even though the records are subject to disclosure under Vermont's Access to Public Records Act ("PRA"). Therefore, Ms. Duffort asks the Court to enter judgment in her favor on Counts I, II, and III of her Complaint, and order the Defendants to produce these records.

I. Facts[1]

[1] As discussed *infra* Part II, the Defendants' Answer does not comply with Vt. R. Civ. P. 8(b). The facts recited here are based solely on allegations in the Complaint that the Defendants admitted or those that they "denied insofar as [the specified exhibits] speak for themselves" where there can be no good-faith basis for neither admitting nor denying the averment or for denying the facts spelled out in the corresponding paragraph of the Complaint. For the Court's convenience, averments and responses relied on in this recitation of facts that fall into these "speak for themselves" categories are marked with an asterisk (*e.g.*, Compl. & Ans. ¶ 118*). All ¶ references refer to the Complaint and Answer. The Defendants have not questioned the accuracy or authenticity of any of the exhibits. Instead, their denials are qualified only with respect to how the Complaint characterized the content of those exhibits. Therefore, Ms. Duffort will, where appropriate, directly quote from those exhibits to eliminate any question as to whether she has accurately characterized their content in her Complaint.

As exhaustively detailed in the Complaint, Plaintiff Lola Duffort has, over the course of the six months preceding the initiation of this lawsuit, assiduously sought the disclosure of certain public records held by the AOE and SBE. The Defendants have just as assiduously refused to produce those records, albeit without citing any exemptions to justify that refusal. Instead, the Defendants have erected a variety of legally insufficient excuses that the PRA does not countenance—notwithstanding the fact that Vermont law requires the SBE to produce and make publicly available an annual report consisting of the exact information Ms. Duffort requested.

Defendants AOE and SBE are public agencies within the meaning of the PRA, 1 V.S.A. §§ 315-320. (¶¶ 7, 13). The AOE is directed by the Secretary of Education, who is also a member of the SBE (¶¶ 8, 10). The AOE annually collects data regarding HHB complaints that occur in Vermont's public schools from each school, school district, or supervisory union (¶ 15), including the reported number of such complaints (¶ 24) and the responses to those complaints (¶ 16). The AOE provides schools with an electronic data collection tool called the Combined Incident Reporting Software ("CIRS") that enables schools to electronically record, collect, and report these data to the AOE. (¶¶ 20-23). The AOE operates and manages CIRS, which enables it to collect and record the schools' data. (¶¶ 21, 22). The CIRS is also capable of searching, organizing, and producing a report from the data contained in the AOE's databases. (¶ 26). The AOE's Model Procedures on the Prevention of Harassment, Hazing and Bullying of Students[2] require public school districts to "provide the Vermont Agency of Education with data requested by the Secretary of Education," and the Combined Incident Reporting

[2] Vermont law requires each school board to adopt "harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the Secretary." 16 V.S.A. § 570(b). Any school board that fails to do so is presumed to have adopted the model policies. *Id.*

Software (CIRS) School Year 2015-2016 Reporting Instructions ("CIRS Reporting Instructions") provide that "[a]ll hazing, harassment and bullying complaints" are among the "[t]ypes of incidents which must be reported." (¶ 17*; Compl. Ex. A at VIII.A, Ex. B at 3). In addition, the AOE (formerly the Vermont Department of Education) Bullying Incidents Data Gathering document provides that "[s]chool districts are required to collect data on the number of reported incidents of bullying and the number of incidents that have been verified and to make such data available to the Commissioner of the Vermont Department of Education [now the Secretary of the AOE] and to the public." (¶ 19*; Compl. Ex. C).

Vermont law requires the SBE to annually report "on a school by school basis . . . [the] number and types of complaints of harassment, hazing, or bullying . . . and responses to the complaints." 16 V.S.A. § 164(17). This report must "be organized and presented in a way that is easily understandable to the general public" and shall be used by the Secretary of Education "to determine whether students in each school are provided educational opportunities substantially equal to those provided in other schools." *Id.*

Several times over a six-month period, Ms. Duffort made formal and informal public records requests for records containing these data, and each time, the Defendants denied these requests. In January 2016, Ms. Duffort requested that the AOE provide the number of complaints and verified complaints of bullying and asked whether the AOE had these data on a school or district level. (¶¶ 42* & 46*). The AOE denied this request, stating that only state-level data could be produced because "much of the data would be suppressed" on the school or district level. (¶ 48*). In February 2016, Ms. Duffort requested data collected by the AOE from school districts each year "regarding the

number of reported bullying incidents and the number of verified bullying incidents." (¶ 56*). The AOE denied this request. (¶ 57* (AOE "unable to provide any responsive documents")). Ms. Duffort appealed this denial (¶ 65), and her appeal was denied (¶ 67) because "[w]e do collect raw state level data (for bullying incidents) but we do not subsequently create a district by district report" (¶ 68*). In March 2016, Ms. Duffort requested that the AOE produce each data file sent each year "by reporting school district or supervisory union regarding that district or supervisory union's bullying incident data for the 2012-2013, 2013-2014, 2014-2015 school years" (¶ 71), which the AOE denied because it did "not maintain any school district or supervisory union level reports due to small cell sizes" (¶¶ 72* & 73*). Ms. Duffort's appeal of this denial (¶ 77) was denied (¶ 81). In subsequent communication between the AOE and Ms. Duffort's counsel, the AOE stated that the information Ms. Duffort requested was stored "across multiple data tables" and it would require writing "a new database query to group the data together." (¶¶ 99*-100*; Compl. Ex. N). Also in March 2016, Ms. Duffort requested that the SBE produce the school-by-school reports required by 16 V.S.A. § 164(17) for the 2012-13, 2013-14, and 2014-15 school years (¶ 111*). This request, too, was denied (¶¶ 32* & 113* (denial of request because the SBE did not complete the reports)), as was Ms. Duffort's subsequent appeal (¶¶ 115 (appeal of denial of March request to SBE, requesting the reports be produced, with redactions where appropriate), 117* (denial of appeal because SBE "does not maintain these records")). Finally, in June 2016, Ms. Duffort, through counsel, sent a final request to the AOE (¶ 135), requesting "copies of records, including but not limited to records in the CIRS database, showing the number of bullying, hazing, and harassment complaints/incidents in each of Vermont's public schools that occurred during the school years of 2012-2013, 2013-2014, 2014-2015" and

copies of such records showing the number of such complaints that were verified (¶ 136*). Ms. Duffort further requested that the requested data be extracted and compiled if that was the least costly method of disclosure. (¶ 137*). In response, the AOE stated that the "records request would require the creation of new records that do not currently exist" and "[w]e decline to create these records." (¶ 140*). Ms. Duffort's appeal of this denial (¶ 143) was also denied (¶ 146).

The AOE has admitted that it has the ability to "recreate" the data at the district level (¶ 61*), but refused to do so because the data would be suppressed due to confidentiality concerns (¶ 62*). The AOE also admitted that it possessed "data reported from the 2015 school year at the district level" (¶ 97*), but that all prior years' data had been "purged" from electronic storage (¶ 96*). The AOE refused to produce the school-by-school or district-level data from 2015 because "it would constitute the creation of new records to pull [the electronic CIRS files from each school] together via a new query/report to respond to [Ms. Duffort's] request." (¶ 100*). The AOE subsequently admitted that the software it provides to each school or district provides a mechanism by which school personnel can create a school-level report of bullying data (¶ 129*) and that "the granular incident data persist in the state-level database" (¶ 130*). The SBE has admitted that it does not maintain the annual school-by-school report mandated by 16 V.S.A. § 164(17). (¶¶ 32*, 113*).

II. The Judgment on the Pleadings and Rule 8 Standards

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Vt. R. Civ. P. 12(c). A motion for judgment on the pleadings "has utility when all material allegations of fact are admitted

or not controverted in the pleadings and only questions of law remain to be decided." Charles Alan Wright, et al., 5C Federal Practice and Procedure § 1367 (3d ed. 2004). When adjudicating such a motion, a court "take[s] as true all well-pleaded factual allegations in the nonmovant's pleadings, including all reasonable inferences to be drawn from them." *Goodby v. Vetpharm, Inc.*, 2009 VT 52, ¶ 3 (internal quotation marks omitted). "Any contravening assertions in the movant's pleadings are considered false." *Id.* (internal quotation marks omitted).

In their answer, the Defendants have not satisfied their obligation under Vt. R. Civ. P. 8(b) to respond to each averment in the complaint with a denial, admission, or statement that they lack sufficient knowledge or information to form a belief as to the truth of that averment. Their repeated denial "insofar as [the relevant exhibit] speaks for itself" is not a proper answer,[3] even when paired with the introductory paragraph's general qualified denial regarding Ms. Duffort's characterization of those exhibits.

Vt. R. Civ. P. 8 provides, in relevant part, that:

> (b) Defenses; Forms of Denials. A party shall . . . admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.
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> . . . .
>
> (d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.[4]

[3] More than half of the Defendants' answers—85 in total—are in this form.

[4] Save for some language updates and differences in the order of its terms, Vt. R. Civ. P. 8(b) & (d) mirror in all relevant respects Fed. R. Civ. P. 8(b).

Thus, the permissible responses to a complaint's averments are but three: (1) admit; (2) deny; (3) state that the party is without knowledge or information sufficient to form a belief as to the truth of an averment – neither a "speaks for itself" nor "states a legal conclusion to which no responsive pleading is required" non-response is permissible.[5] *See, e.g.*, *Lane v. Page*, 272 F.R.D. 581, 602 (D.N.M. 2011) ("Rule 8(b) therefore permits only three possible responses to a complaint: (1) admission; (2) denial; or (3) a disclaimer statement in compliance with Rule 8(b)'s provision for lack of knowledge or information, which is deemed a denial."); *Kortum v. Raffles Holdings, Ltd.*, No. 01 C 9236, 2002 WL 31455994, at *4 (N.D. Ill. Oct. 30, 2002) ("Rule 8(b) of the Federal Rules of Civil Procedure gives parties three pleading options in the answer: to admit the allegation, to deny the allegation, or to state that the party lacks knowledge or information sufficient to form a belief as to the truth of the allegation. Responding that the documents 'speak for themselves' accomplish[es] none of the above. . . ."). The Northern District of Illinois, in a frequently repeated lament, poetically explains the impermissibility of the Defendants' "speak for themselves" non-response:

> [E]ach of Answer ¶¶ 3 through 7 purport to respond to corresponding allegations in the Complaint that allege the terms of provisions in documents—but instead of providing forthright responses to the specific allegations, [defendant] asserts that the documents 'speak for themselves.' This Court has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice[6])—but until some such writing does break its silence, this Court will continue to require pleaders to employ one of the only three alternatives that *are* permitted by Rule 8(b) in response to all allegations, including those regarding the contents of documents. No reason appears why [defendant] should not

[5] The impermissibility of the "legal conclusion" non-response is especially stark with respect to averments that are not, in fact, legal conclusions. The Complaint, for example, states a fact about how the AOE uses the data it collects. (¶ 28; *see also* ¶ 12). This is not a conclusion of law.

[6] A WestLaw search for the phrase "forlorn hope that one will indeed give voice" returns 65 hits, many of which are opinions by the authoring judge but many others are from state and federal courts around the country.

> respond by admitting any allegation that accurately describes the content of whatever part of a document is referred to.

Chi. Dist. Council of Carpenters Pension Fund v. Balmoral Racing Club, Inc., No. 00 C 2375, 2000 WL 876921, at *1 (N.D. Ill. June 26, 2000). Any response besides the three permitted, such as that exhibits speak for themselves or that the paragraph sets forth a legal conclusion, is insufficient to constitute a denial. *See, e.g.*, *Lane*, 272 F.R.D. at 602 ("Responses that documents speak for themselves and that allegations are legal conclusions do not comply with rule 8(b)'s requirements."); Federal Practice and Procedure § 1264 ("The third sentence of Federal Rule 8(b) requires that denials fairly meet the substance of the averments they purport to deny. . . . [P]leadings that allege that averments in an earlier pleading are immaterial and do not require an answer are insufficient to constitute a denial. It also is insufficient to . . . claim that 'the documents speak for themselves.'"). A "speak for themselves" response undermines the very purpose of the responsive pleading: "to expose the pertinent issues in the litigation at the earliest possible stage, so the parties can focus on the actual substance of the dispute as soon as practically possible." *Kortum*, 2002 WL 31455994, at *4.

Courts presented with insufficient "speaks for themselves" answers have either deemed the accompanying averments admitted or uncontested, *e.g.*, *In re marchFirst, Inc.*, 431 B.R. 436, 438 n.1 (Bankr. N.D. Ill. 2010) ("Some facts are uncontested because [defendant] has expressly admitted them in its answer. Others are uncontested because [defendant] has admitted them by responding to allegations about documents that the document 'speaks for itself.' That response is not one of the three alternatives Rule 8(b) permits. Allegations to which [defendant] has given this non-answer are deemed admitted." (citations omitted)); *Khepera-Bey v. Santander Consumer USA, Inc.*, No.

WDQ-11-1269, 2012 WL 1965444, at *5 (D. Md. May 20, 2012) ("That the terms of documents attached to the amended complaint 'speak for themselves,' is an acceptable response—it means that [defendant] admits that the attachments contain the information that they appear to contain." (citation omitted)); *United States v. Cunningham*, No. 3:08cv709, 2009 WL 3350028, at *5 (E.D. Va. Oct. 15, 2009) ("Defendants failed to admit or deny this allegation, answering instead that '[t]he [cited] records speak for themselves.' According to the law of pleading, what is not denied is conceded. Therefore, for purposes of the parties' cross-motions for summary judgment, Defendants are deemed to have admitted [the averment]." (citations omitted)), or stricken the responses and required defendant to file an amended answer that satisfies Rule 8, *e.g.*, *Balmoral*, 2000 WL 876921, at*1-2 (sua sponte striking defendant's "speaks for themselves" answers, requiring defendant to file amended answer, and, because of these and other deficiencies in the answer, prohibiting defendant's counsel for charging any fees associated with preparing the amended answer because "[t]here is no reason for any client to pay twice for such unacceptable work by its counsel").

Here, the Defendants' indiscriminate use of this improper answer—regardless of whether they can, in good faith, deny the accuracy of any particular characterization—warrants the Court deeming those paragraphs admitted. As noted *supra* n.1, for the purposes of this motion only, Ms. Duffort relies only on averments the Defendants admitted or those, among all those they improperly responded to with "speaks for themselves" non-responses, where either there can be no good-faith basis for not admitting or denying the averment or the Defendants cannot in good faith deny that the averment accurately characterizes the exhibits attached to the Complaint. Should the Court not deem any of these paragraphs admitted and deny this Motion on that basis,

Ms. Duffort requests that the Court order the Defendants to file an amended answer that satisfies the dictates of Rule 8(b) and afford her the opportunity to move for judgment on the amended pleadings.

III. Argument

This is a straightforward public records case that the Defendants have made appear confusing by unnecessarily injecting mountains of technical terminology.[7] Courts have routinely rejected attempts by public agencies to refuse to produce records stored electronically where those same records unambiguously would have been subject to the public records act had they been stored in paper format. As more and more records are being stored electronically, it is critical that courts resist any effort by agencies to treat their obligations under the PRA any differently based on the method and manner in which the agencies has chosen to produce, obtain, store, and/or maintain their records.

The pleadings establish that (1) the DOE annually collects data regarding bullying, hazing, and harassment ("BHH") complaints that occur in Vermont's public schools from each school, school district, or supervisory union (¶ 16) and the responses

[7] Ms. Duffort's efforts to obtain the requested records have also been hindered by the Defendants' shifting and inconsistent responses to her requests. For example, on March 18, 2016, the AOE stated that, due to the annual purging of the raw text files from the FTP directories, the Defendants "only [have] data reported from the 2015 school year at the district level." Compl. Ex. N. But several days later, it stated that the "FTP process was put in place last year as an effort to help reporting entities send this information in a secure electronic format versus having to burn these extracted data onto CDs and pay to physically mail them to the AOE." Compl. Ex. P, at 1. Thus, it would appear that records submitted by schools prior to 2015 were not submitted via the FTP process and were therefore not purged annually, yet the Defendants inexplicably failed to produce the records submitted in prior years, either. Likewise, the Defendants profess that federal student privacy law requires them to suppress any records where a cell size (representing the number of incidents for a particular district) is under 11 (Compl. Exs. G, BB), yet they suggest that Ms. Duffort review the federally collected HHB data at the U.S. Department of Education Office for Civil Rights website (Compl. Ex. Y), which shows cell sizes as low as two (per the federal agency's rounding rules, counts between 1 and 3 are reported as 2, counts between 4 and 6 are reported as 5, etc.) [as an example, starting at http://ocrdata.ed.gov/flex/Reports.aspx?type=school#/action=addSearchParams&ddlSearchState=VT&btnSearchParams, enter "Burlington" as the city and "Vermont" as the state, then click through the various HHB reports in the right-hand menu].

to those complaints (¶ 17*); (2) the DOE annually collects the reported number of BHH complaints from each of Vermont's public schools, school districts, or supervisory unions (¶ 24); and (3) Vermont law requires the SBE to "[r]eport annually on the . . . number and types of complaints of harassment, hazing, or bullying made pursuant to chapter 9, subchapter 5 of this title and responses to the complaints" (¶ 29[8] (quoting 16 V.S.A. § 164(17)). There is no question that these records are public records within the meaning of Vermont's Public Records Act. *See* 1 V.S.A. § 317(b) ("As used in this subchapter, 'public record' or 'public document' means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business."). The pleadings also establish that, without citing a single exemption to the PRA, the Defendants have refused to produce these records in response to Ms. Duffort's repeated requests, notwithstanding the AOE's conceded ability to "recreate the data at the district level" (¶ 61* (citing Compl. Ex. G)) and the SBE's statutory mandate to publicly report this information annually (¶ 29[9] (quoting 16 V.S.A. § 164(17)). The Defendants' purported justifications for refusing to disclose these records are legally insufficient and rely on incorrect interpretations of the PRA.

1. General Public Records Act Principles

The Vermont Access to Public Records Act (PRA) was enacted "to provide for free and open examination of records" consistent with the Vermont Constitution. 1 V.S.A. § 315(a). The PRA provides any person the right to inspect or copy any public record of a

[8] The Defendants' response to this averment was that it sets forth a legal conclusion to which no responsive pleading was required.
[9] *See supra* n.8.

public agency. *Id.* § 316(a). A "public record" is defined as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." *Id.* § 317(b). Public agencies must "promptly produce the record" at issue for viewing or copying, *id.* § 318(a), and are permitted to extend their response time where "the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records" present an unusual delay. *Id.* § 318(a)(5)(B).

While the PRA includes many exemptions and exceptions, they are construed "strictly against the custodians of the records and any doubts should be resolved in favor of disclosure." *Finberg v. Murnane*, 159 Vt. 431, 434 (1992) (internal quotations omitted). Furthermore, the PRA is construed liberally and agencies resisting disclosure of public records have the burden of proof in sustaining their actions. 1 V.S.A. § 315(a).

2. Querying the Database Is Not the Creation of a New Record.

The Defendants have refused to query the CIRS database to produce the data submitted by the schools, contending that such a query constitutes the creation of a new record—something that the PRA allows, but does not require, agencies to do. *See* 1 V.S.A. § 316(i) ("An agency may, but is not required to, . . . create a public record . . . ."); *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) ("It is well settled that an agency is not required by [the federal] FOIA to create a document that does not exist in order to satisfy a request." (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975))). However, the Defendants are incorrect: querying a database to retrieve public records stored therein is not the creation of a new record; it is simply the method by which those records are retrieved.

Although the Defendants' responses to Ms. Duffort's requests relied on a welter of technological terminology to attempt to muddy the waters, it is most helpful to think about these records by analogy to their paper counterparts. Simply put: imagine that schools annually submit their HHB data to the AOE as paper records (or, as was apparently the case before 2015, CDs, *see supra* n.7). The AOE uses those records to come up with an aggregate total. Ms. Duffort requests the paper records submitted by the schools. Producing copies or permitting inspection of those records is not the creation of a new record.

The outcome is no different if an agency chooses to collect and maintain those records electronically: querying the database to access information therein is functionally no different from opening a file cabinet and manually removing the responsive records. Agencies cannot evade their PRA obligations by the simple expedient of altering the format their records are stored in and then claiming that performing the query or search that format requires is tantamount to creating a new record. That argument would be absurd in the world of paper records. Raising it in the world of electronic records is no less absurd and violates both the letter and the spirit of the PRA; accepting it would create perverse incentives for agencies to convert all of their records to an electronic format with the explicit purpose of shielding their activities from public view.

The PRA expressly contemplates that records may be stored in a variety of formats and requires that, regardless of format, they be treated the same. *See* 1 V.S.A. § 317(b) ("As used in this subchapter, 'public record' or 'public document' means any written or recorded information, *regardless of physical form or characteristics*, which is produced or acquired in the course of public agency business." (emphasis added)).

Courts interpreting the same or similar language in other public records statutes have easily rejected the argument that the rules change when records are electronic; a database query or search for electronic records is no different than a manual search for paper records.

In *Yeager*, the court quoted from the Senate Report on the 1974 amendments to FOIA—"'With respect to agency records maintained in computerized form, the term 'search' would include services functionally analogous to searches for records maintained in conventional form.'" 678 F.2d at 321 (quoting S. Rep. No. 854, 93d Cong. 2d Sess. 12 (1974))—as support for the proposition that:

> Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA.

Id. Thus, although querying a database is a "different process" than rummaging through a file cabinet, both are simply searches that agencies are required to perform. *See Nat'l Security Counselors v. C.I.A. ("National Security II)*, 960 F. Supp. 2d 101, 159 (D.D.C. 2013) ("[T]he FOIA imposes no duty on the agency to create records. In this regard, [e]lectronic database searches are . . . not regarded as involving the creation of new records." (citations and internal quotation marks omitted)). "Because an electronic search of computer databases does not amount to a creation of records, it follows that the programming necessary to instruct the computer to conduct the search does not involve the creation of a record." *Schladetsch v. U.S. Dep't of Hous. & Urban Dev.*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) (citation omitted).

Similarly, in *ACLU of Arizona v. Arizona Department of Child Safety*, 377 P.3d 339 (Ariz. Ct. App. 2016), the court relied on the "regardless of physical form or

characteristics" language to hold that an agency's entire database was a public record, *id.* at 344, and that it followed that when "a state agency maintains public records in an electronic database, Arizona's public records law requires the agency to take appropriate steps to query and search its database to identify, retrieve, and produce responsive records for inspection," *id.* at 341-42. The court rejected the defendant's argument, raised too by Defendants here, that querying a database to retrieve the underlying records constituted the creation of a new record—even where the agency had to write a new software program to retrieve those records. *Id.* at 344-45. The court noted that an employee creating a query to retrieve records was functionally indistinguishable from an employee filling out a form to retrieve public records from storage—in both instances, the employee has "created" something where nothing previously existed, but the thing created was not the requested record but rather the tool for obtaining that record. *Id.* at 345.

The *ACLU of Arizona* court further noted that to hold that an agency was not required to create a query to retrieve public records would "functionally place most records maintained in public agency databases outside of the public records law," *id.* (internal quotation marks omitted)—an outcome wholly incompatible with the purpose and policy of public records laws. "[A] public record that would otherwise be subject to Arizona's public records law does not become immune from production simply by virtue of the method the City employs to catalogue the document. . . . [I]f the City has selected [the database] as its database of choice for collecting and storing records, then it must also assume the responsibility of producing such records in response to record requests that comply with the public records law." *Id.* (citation and internal quotation marks omitted). So too here: the Defendants' decision to collect and store HHB data

electronically carries with it the responsibility of retrieving those data in response to public records requests.

The outcome is different where the request requires the creation of information *about* the information in a database. So, in *ACLU of Arizona*, the court held that the agency was required to search its database to retrieve information stored therein, but it was not required to tally and compile information about that information, which would have been the creation of a new document. *Id.* at 345-47. Thus, an agency could be required to write a computer program to extract the responsive data from the database, but not to take the further step of performing various manipulations, calculations, and categorizations of the extracted data. *Id.* at 347. One of the requests the court held the agency did not have to fulfill, for example, was for "[t]he average number of placements experienced by children in out-of-home care as of the last day of SFY [State Fiscal Year] 2011, 2012 and 2013, or of each of the Semi-Annual Reporting Periods within those SFYs, by total time in care according to the following (or any similar available) distribution: (a) 1 year or less; (b) 1–2 years; (c) 2–5 years; and (d) more than 5 years." *Id.* at 342. To fulfill this request, the agency would have had to first extract and compile raw data reflecting all children in out-of-home care, and then "determine how many children were in out-of-home care during the requested time frames, and analyze that information by length of time in care. Then, for each distribution, it would have had to determine how many placements those children had experienced during the specified time periods, and based on the total number of children in each distribution category, determine the average number of placements for children in those categories." *Id.* at 347. Although the agency was responsible for extracting and compiling the raw data, it could not be required to perform the subsequent analyses the ACLU's request would

have necessitated. *Id.*

Here, Ms. Duffort's request did not require the AOE to perform any calculations on, categorization of, or other manipulation of the data once extracted; that is, she did not request information *about* the information in the database. Instead, she requested a simple extraction of the information in the database.

Similarly, in *National Security Counselors v. C.I.A. ("National Security I)*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012), the court held that using some form of programming or codes to retrieve information or sorting a database by data field to make the information intelligible was not creating a new record or performing research; it was, in fact, "just another form of searching that is within the scope of an agency's duties in responding to FOIA requests." Conversely, a request for information about the information retrieved—for example, a record that indexed, listed, or aggregated information in a way the agency did not already index, list, or aggregate it—would involve creating a new record. *Id.* at 271-72 (agency not required to produce a list of the first 100 FOIA requests filled in a given year). In a helpful illustration of the distinction, the court analogized to a request for paper records: a FOIA request for "an inventory of all non-electronic records created in 1962 regarding the Cuban Missile Crisis" need not be honored if such an inventory did not already exist, but a request for the underlying records themselves would have to be honored (to the extent they were not exempt). *Id.* at 271; *see also Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 451-52 (D.D.C. 2014), *aff'd.*, No. 14-5278, 2015 WL 4072055 (D.C. Cir. June 29, 2015) (holding that disclosure of indexes in the form in which they were maintained by the agency was sufficient; agency did not need to create more specific and detailed records to comply with records request).

Here, Ms. Duffort has requested the equivalent of the underlying documents about the Cuban Missile Crisis: the reports submitted by the schools, districts, and supervisory unions. She has not requested a separate record inventorying the reports submitted, nor has she requested that the Defendants perform calculations on, categorize, or otherwise manipulate the extracted data. Her request was unambiguously one for public records that the Defendants possess, and no amount of technological jargon can change the fact that to require the Defendants to query the database to retrieve the underlying records is not to require them to create new records—it is to require "just another form of searching that is within the scope of an agency's duties in responding to FOIA requests." *National Security I*, 898 F. Supp. 2d at 270. For these reasons, Ms. Duffort requests that the Court enter judgment in her favor as to Counts I and II of her Complaint.

3. Extracting and Compiling Data from the Database is Not the Creation of a New Record.

Ms. Duffort requested that the AOE extract and compile the information she requested from available AOE records, if that was the most effective way of obtaining the requested information. The AOE refused to produce such a compilation, claiming that to pull data from separate text files and compile them into one record would require the AOE to create a query, which would constitute "creat[ing] a new record." However, "extracting and compiling [] data does not amount to the creation of a new record." *Schladetsch*, 2000 WL 33372125, at *3. And even if the AOE does not have the ability to run a program or query to automatically produce this compilation, it still must manually extract and compile responsive information from its various electronic records.

In *Schladetsch*, an agency conceded that its database contained the discrete pieces of information requested, and the court held that the agency could not deny the request on the grounds that it did not possess the information in the isolated compilation sought by the requestor. *Id.* at *2. "[E]xtracting and compiling that data does not amount to the creation of a new record. . . . The programming necessary to conduct the search is a search tool and not the creation of a new record." *Id.* "The fact that the agency may have to search numerous records to comply with the request and that the net result of complying with the request will be a document the agency did not previously possess is not unusual in FOIA cases, nor does this preclude the applicability of the Act." *Id.* at *3 (citing *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456 (D.D.C. 1977), *aff'd*, 574 F.2d 636 (D.C. Cir. 1978)).

Again, an analogy to the non-electronic world is helpful. If responsive paper records are strewn about in multiple filing cabinets, the agency would be required to open each filing cabinet and pull the responsive documents. It would be impermissible to deny the request on the grounds that searching for and removing documents from multiple filing cabinets and placing those documents into one pile would be the creation of a new record.[10] Nor should such a denial be countenanced in the electronic world. Indeed, as a practical matter, it is likely more efficient to extract and compile these data than to produce each individual record, redacting any exempt information.

The Illinois Court of Appeals has drawn exactly this analogy in rejecting an agency's claim that it need not compile information stored in a database to respond to a records request where there was no specific document that contained the information

[10] The PRA contemplates that agencies will sometimes have to search across multiple and voluminous records. *See* 1 V.S.A. § 318(a)(5)(B).

requested. *Hites v. Waubonsee Cmty. Coll.*, 56 N.E.3d 1049, 1064 (Ill. App. Ct. 2016), as modified on denial of rehearing July 13, 2016. The court, relying on the "regardless of physical form or characteristics language" in the Illinois public records law, first held that both the database itself as well as the individual data points therein were public records. *Id.* at 1063-64. The court noted that "the distinction between a database and its individual data points for purposes of what constitutes a public record is a red herring [because a] database is an aggregation of data, not a discrete document." *Id.* at 1064. "[T]he database is akin to a file cabinet, and the data that populates the database is like the files. FOIA permits a proper request for a single file, some of the files, or all of the files." *Id.* at 1064.

Turning to the search-versus-create question, the court first noted the general rule that "a request to search and produce data stored in a database is not a request to generate a new record." *Id.* at 1065. The court held that creating a query or program to search across different fields containing raw data (e.g., zip code, what courses students took and when they took them) to respond to a request for all students living in particular zip codes who took particular courses at particular times did not involve creating a new record. *Id.* 1066-67. This request for "a specific type of compiled data—zip codes—for certain persons" was proper. *Id.* at 1067. Conversely, requests for the total number of students who fit specified criteria would require creation of new records—compilations of information *about* the information in the database. *Id.* at 1066.

In this case, the AOE has conceded that the requested data—including the number of HHB complaints from each school, school district, and/or supervisory union—are in its electronic databases. Nevertheless, as did the defendants in *Schladetsch* and *Hites*, the AOE has refused to compile the requested data because it

believes this would require the creation of a new record. This Court should reject the Defendants' efforts to undermine the PRA's policies of disclosure and transparency and require a compilation of information from internal records to be produced for the same reasons as in *Schladetsch* and *Hites*: regardless of the format in which data are maintained, and regardless of how many separate file cabinets (electronic or otherwise) the data are in, to extract and compile raw data from various internally accessible records does not amount to the creation of a new record. Ms. Duffort thus requests that the Court grant judgment in her favor as to Count III of her Complaint.

4. Agencies Cannot Refuse to Release a Record Simply Because Some Parts of It May Be Exempt.

As an additional basis for denying Ms. Duffort's request, the AOE stated that it could only produce state-level data because "much of the data would be suppressed" on the school or district level. This response suggests that it is unwilling to disclose non-exempt information from the requested records because much of the information would require redaction. The PRA does not permit withholding records in their entity because some of their content is exempt, and the courts have suggested that the amount of redaction required is of no consequence when some portion of the record is disclosable – disclosable information must be disclosed. The AOE may not withhold entirely the requested records simply because some portion of the records may be exempt.

All recorded or acquired information in possession of a public agency must be disclosed to a requester unless a specific exception to the PRA applies. *See Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 107 (1993); 1 V.S.A. § 317(b) (defining "public record" as "any written or recorded information, regardless of physical

form or characteristics, which is produced or acquired in the course of public agency business"). "A public agency shall not withhold any record in its entirety on the basis that it contains some exempt content if the record is otherwise subject to disclosure; instead, the public agency shall redact the information it considers to be exempt and produce the record accompanied by an explanation of the basis for denial of the redacted information." 1 V.S.A. § 318(e).

Section 318(e) was added to the PRA in 2011, 2011 Vt. Laws No. 59 (H. 73), but even before that, in the absence of an explicit statutory basis, the Vermont Supreme Court had preserved the PRA's policy of providing for maximal "free and open examination of records" by ensuring that exempt portions of a particular record do not prevent the disclosure of the entire record. *See Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 359 (2002) (rejecting defendants' argument that they should be able to withhold records because redacting them would be burdensome, noting that "[t]he Access to Public Records Act does not allow an agency to withhold public records simply because complying with the request is difficult or time consuming"); *Norman v. Vt. Office of Court Adm'r*, 2004 VT 13 (trial court's failure to "consider redaction as an alternative to nondisclosure" required remand).

There is no basis for the AOE to deny Ms. Duffort's request because "much of" the data would have to be redacted. Thus, for this additional reason, Ms. Duffort requests that the Court enter judgment in her favor on Count I (and, to the extent the SBE also relies on this argument, Count II).

IV. Conclusion

For the reasons that have been set forth above, this Court should grant Ms. Duffort's Motion and enter judgment in her favor as to Counts I, II, and III of her complaint.

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