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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 16-IB22

October 24, 2016

VIA U.S. MAIL

Mr. Peter Kostyshyn
SBI # [REDACTED]
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Re: FOIA Petition Concerning the State Election Commissioner

Dear Mr. Kostyshyn:

We write in response to your correspondence, which we received on March 7, 2016, alleging that the Delaware Office of the State Election Commissioner ("SEC") violated the public records provisions of Delaware's Freedom of Information Act ("FOIA"), 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition ("**Petition**") for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur.

Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the SEC to submit a written response to your Petition. We received the SEC's response ("Response Letter") on March 21, 2016. We have reviewed your Petition and the Response Letter. For the reasons set forth below, we conclude that the SEC did not violate FOIA as alleged in the Petition.

FACTS

On December 31, 2015, you submitted multiple FOIA requests to the SEC (the “Requests”).¹ Specifically, in separate submissions, you requested campaign finance reporting records for the following individuals on a standard FOIA request form: Charles Potter, Jack Markell, Matt Denn, Catherine Damavandi, John Cartier, Dennis P. Williams, Samuel Prado, and Tom Gordon.²

In response to your Requests, the SEC informed you that all of the information that you wished to review was available online at <https://cfrs.elections.delaware.gov/>.³ The SEC sent its response to the Howard R. Young Correctional Center, where you have previously resided.⁴

POSITIONS OF THE PARTIES

The Petition alleges that the SEC violated FOIA by failing to provide you hard copies of the requested records because, as an inmate, you have no access to a computer.⁵

In its Response Letter, the SEC argues that the records you request are available on its website and, as a result, the SEC provided you “reasonable access” to records as required by FOIA by directing you to the appropriate webpage.⁶ The SEC states that it was not aware at the time of its response that you did not have computer access.⁷ The SEC notes, however, that “[your] sister, who claims to be [your] attorney in fact, is not incarcerated and so has the same access to a computer as any other member of the public.”⁸ In the alternative, the SEC states that it will provide the requested records, which total 2,682 double-sided pages of documents, at a cost of \$504.40 to

¹ See Response Letter at Ex. A.

² *Id.*

³ Petition at Ex. 1.

⁴ *Id.*

⁵ See Petition at 1. You also appear to allege that the SEC violated FOIA by sending its response to your requests to the wrong address. See Petition at 1. The SEC has explained that it did, inadvertently, send its response to your previous prison address. Response Letter at 2. This was, at most, a technical violation. No remediation would be required in any event because it is clear that you received the SEC’s response.

⁶ Response Letter at 1.

⁷ *Id.* at 2.

⁸ *Id.*

be paid in advance.⁹ The SEC indicates that this cost reflects 20 free pages and a cost of \$.20 for the remaining 2,522 double-sided pages.

RELEVANT STATUTES

Delaware's FOIA provides that "[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body" and "[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen."¹⁰

When paper records are provided to the requesting party, "[t]he first 20 pages of standard-sized, black and white copies [sic] material shall be provided free of charge" and "[t]he charge for copying standard sized, black and white public records for copies over and above 20 shall be \$0.10 per sheet (\$0.20 for a double-sided sheet)."¹¹ Moreover, "[t]he public body may require all or any portion of the fees due . . . to be paid prior to any service being performed."¹²

LEGAL DISCUSSION

As an initial matter, we note that that the SEC has not denied your right to view the requested records. Rather, the SEC directed you to a specific public webpage containing all records responsive to your request.¹³ Under the circumstances, we cannot find that doing so violated FOIA.

You state that you do not have access to a computer, and you therefore deem the SEC's identification of its public website to be a denial of your request for records. We do not agree with this characterization of the facts. We accept for purposes of this Petition that you have no access to a computer, but we also accept the SEC's counsel's representation that the SEC was not aware of this fact at the time it responded to your Requests.¹⁴ Given its state of knowledge, the SEC's actions satisfied FOIA.

⁹ *Id.* (citing 29 Del. C. §10003(m)).

¹⁰ 29 Del. C. § 10003(a).

¹¹ 29 Del. C. § 10003(m)(1).

¹² 29 Del. C. § 10003(m)(5).

¹³ Petition at Ex. 1.

¹⁴ See Response Letter at 2. To our knowledge, inmates do not automatically lose access to computers upon incarceration, so it seems reasonable that the SEC would not have assumed that you had no access to a computer.

Having been made aware that you do not have access to a computer, however, the SEC has agreed to provide the records in hard copy. The SEC intends to charge photocopying fees, as permitted by FOIA, and the fees proposed appear to satisfy the statute.¹⁵ Likewise, the request for advance payment is expressly permitted by the statute.¹⁶ Thus, we believe that the SEC is providing you “reasonable access” to the requested records in accordance with FOIA.¹⁷

CONCLUSION

For the reasons stated, we determine that the SEC did not violate FOIA by directing you to a public webpage containing all of the information that you have requested. Moreover, based on the facts in the record,¹⁸ the SEC’s offer to provide a hard copy of the requested documents, at the estimated cost, to be paid in advance, satisfies FOIA. This resolves the issues raised in your Petition, and we consider the matter closed.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Danielle Gibbs', is written over a horizontal line.

Danielle Gibbs
Chief Deputy Attorney General

cc: Ann Woolfolk, Counsel to SEC (via email)

¹⁵ *See Id.* We have reviewed the SEC’s calculations and find that the cost estimate reflects a correct application of 29 Del. C. § 10003(m)(1).

¹⁶ *See 29 Del. C. § 10003(m)(5).*

¹⁷ Of course, if you wish to modify your request, you may do so. We consider this Petition to be resolved, and all future correspondence concerning the Requests should be directed to the SEC.

¹⁸ We note that the SEC included “facts” in its Response regarding your financial condition and your ability to receive assistance from a family member. We did not consider the purported facts because they are not relevant to the arguments presented in the Petition. Neither did we find them sufficiently reliable as presented.