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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB25**

**July 17, 2017**

**VIA EMAIL**

Randall Chase  
rchase@ap.org

**RE: March 3, March 15, and May 10, 2017 FOIA Petitions Regarding the Delaware Department of Correction**

Dear Mr. Chase:

I write in response to your correspondence, received on March 3, 2017, March 15, 2017, and May 10, 2017, alleging that the Delaware Department of Correction (the "DOC") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA"). I treat each correspondence as a petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur.

On March 3, 2017, you alleged that DOC's statement to you that it would need an additional 45 days to respond to a FOIA request was itself a violation of the FOIA statute.

On March 15, 2017, you alleged that DOC's statement to you that it would need an additional 60 days to respond to a FOIA request was itself a violation of the FOIA statute. That FOIA request, originally made on February 23, 2017, was for:

all 'exceptional incident' reports filed by staff at James T. Vaughn Correctional Center since Jan. 1, 2014. All use-of-force incident reports filed at JTVCC since Jan. 1, 2014. All grievances filed by inmates at JTVCC since Jan. 1, 2014, including those deemed by DOC to be 'non-grievable.' All grievances and complaints filed against correctional officer Steven R. Floyd since Jan. 1, 2007. Records of all disciplinary actions, of any kind, taken against JTVCC staff members since Jan. 1, 2012. Records of all Rule 210 reports and proceedings at JTVCC since Jan. 1, 2014. Records of

the types and amounts of all contraband seized at JTVCC since Jan. 1, 2014.

Finally, on May 10, 2017, you alleged that DOC violated FOIA by declining to provide the records sought in your February 23, 2017 FOIA request on the grounds that they were exempted from the statutory definition of “public records.”

### **March 3, 2017 and March 15, 2017 Petitions**

FOIA requires that a public body “respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.”<sup>1</sup> Moreover, “[i]f access cannot be provided within 15 business days, the public body shall cite 1 of the reasons . . . why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”<sup>2</sup>

DOC satisfied these statutory mandates in response to your March 3, 2017 and March 15, 2017 petitions. I see no evidence of bad faith in connection with the respective estimates regarding how much additional time was required to fulfill your requests or in the amount of time that the DOC indicated that it required. In both instances, DOC indicated that it needed to seek legal advice, the timing of which is not entirely within its control and the extent of which it could be difficult for a layperson to assess. In addition, DOC made reference to the volume of materials requested in your second FOIA request in making its time estimate, even if it did not use the precise language of the statute. Therefore, I find that DOC did not violate FOIA in estimating the time that would be required to respond to your FOIA requests.

### **May 10, 2017 Petition**

With one exception, I am able to conclude based on the record that DOC did not violate the Freedom of Information Act in declining to provide the records requested in your February 23, 2017 FOIA request. With the exception of your request for “[r]ecords of the types and amounts of all contraband seized at JTVCC since Jan. 1, 2014,” all of the records that you requested would be exempt from the definition of “public record,” either because they would constitute “a personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy....”<sup>3</sup>, “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files”<sup>4</sup>, “records specifically exempted from public disclosure by

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<sup>1</sup> 29 Del. C. § 10003(h)(1).

<sup>2</sup> *Id.*

<sup>3</sup> 29 Del. C. § 10002(l)(1).

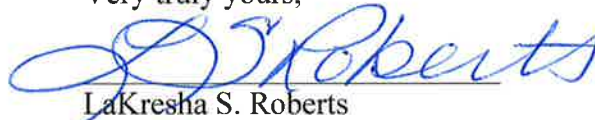
<sup>4</sup> 29 Del. C. § 10002(l)(3).

statute or common law”<sup>5</sup>, to include 11 *Del. C.* § 4322(a), or “records pertaining to pending or potential litigation which are not records of any court.”<sup>6</sup>

Some “[r]ecords of the types and amounts of all contraband seized at JTVCC since Jan. 1, 2014” may also constitute non-public records under the previously cited FOIA exemptions. However, if DOC has previously generated summary documents containing this cumulative information, those documents might not be subject to said exemptions.

In light of the foregoing, and given that DOC bears the burden of proof to justify a denial of access to records,<sup>7</sup> I recommend that DOC respond more precisely to your February 23, 2017 request for “[r]ecords of the types and amounts of all contraband seized at JTVCC since Jan. 1, 2014” in the next 20 business days. That response may include an argument that some or all of the requested records are not public records due to one or more statutory exemptions. However, to the extent the DOC’s position is that the records are part of the investigative material that is being reviewed as part of the investigations arising from the February 1-2 incident, the argument should be based upon a fact-specific inquiry with the entity or entities conducting the investigation(s). Of course, you reserve the right to submit a new petition upon receipt of the DOC’s response.

Very truly yours,



LaKresha S. Roberts  
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)  
Gregory Smith, Deputy Attorney General (via email)

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<sup>5</sup> 29 *Del.C.* §10002(l)(6).

<sup>6</sup> 29 *Del.C.* §10002(l)(9).

<sup>7</sup> 29 *Del. C.* § 10005(c).