



DEPARTMENT OF JUSTICE

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MATTHEW P. DENN  
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB22

July 12, 2017

**VIA U.S. Mail**

Richard Roth [REDACTED]  
JTVCC Bldg. T-Z  
1181 Paddock Road  
Smyrna, DE 19977

Re: **February 18, 2017 FOIA Petition Concerning the Delaware Department of Justice**

Dear Mr. Roth:

I write in response to your correspondence, dated February 18, 2017 ("Petition"). In your Petition, you allege that the Delaware Department of Justice ("DDOJ") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA") in responding to your request for records dated January 11, 2017. Pursuant to our routine procedures in responding to petitions, a representative of the DDOJ responded to the Petition. The DDOJ provided a written response ("DDOJ Response") addressing the Petition on March 16, 2017. I have reviewed the Petition and the DDOJ Response. For the reasons set forth below, it is my determination that the DDOJ did not violate FOIA in responding to your records request.

**FACTS**

On January 11, 2017,<sup>1</sup> you sent a letter addressed to the Attorney General requesting documents under FOIA. Your request stated:

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<sup>1</sup> The letter is dated January 11, 2017; however, the DDOJ states that its records do not reflect receipt of the letter until January 17. DDOJ Response, fn. 1.

I am requesting copy or information pertaining to the “Attorney General’s Submission/Memorandum Regarding Application of the New Habitual Statute-SS1 for SB 163 effective July 19, 2016.”

I was directed by the Office of the Legislative Council to obtain this document from your office. This request is made under the FOIA and please direct it to the appropriate staff person for prompt handling.<sup>2</sup>

On January 18, 2017, Kim Siegel, the DDOJ FOIA Coordinator, contacted State Prosecutor Sean Lugg via email inquiring into the existence of the requested “Attorney General’s Submission/Memorandum Regarding Application of the New Habitual Statute.”<sup>3</sup> Ms. Siegel asked Mr. Lugg if there was “anything – a guidance memo or summary of the new law – that would resemble that.”<sup>4</sup> That same afternoon, Ms. Siegel spoke to Mr. Lugg who informed her that he was not aware of such a record.<sup>5</sup> On January 27, 2017, Ms. Siegel followed up her conversation with Mr. Lugg with an email to confirm that no documents or other record could be located, to which Mr. Lugg responded that same day that no such records were found and that “[o]nly internal outlines” were located.<sup>6</sup>

On February 2, 2017, Ms. Siegel sent you a letter acknowledging receipt of your request for a copy of the “Attorney General’s Submission/Memorandum Regarding Application of the new Habitual Offender Statute- SS1 for SB 163 effective July 19, 2016.”<sup>7</sup> In the letter, Ms. Siegel stated that “[t]he only records found are internal documents that are exempt from the definition of ‘public record’ pursuant to 29 *Del.C.* §10002(1)(6),” which exempts records by statute or common law including attorney work product.<sup>8</sup>

Subsequently, in your February 18, 2017 Petition addressed to the Attorney General, you requested review of the DDOJ’s decision. In that Petition, you characterized your FOIA request as a request for “all documents submitted to the Delaware Legislature concerning the revisions to the Habitual Offender statute, 11 *Del. C.* 4214 [sic], including those concerning the 2015 and 2016 legislative years and the ultimate passage of SB163 (effective July 19, 2016).”<sup>9</sup>

In DDOJ’s Response to your Petition, dated March 16, 2017, the DDOJ stated that it did not violate FOIA in response to your original request wherein you sought a specific document – the “Attorney General’s Submission/Memorandum Regarding Application of the New Habitual

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<sup>2</sup> DDOJ Response Exhibit A.

<sup>3</sup> DDOJ Response Exhibit B.

<sup>4</sup> *Id.*

<sup>5</sup> DDOJ Response at 2.

<sup>6</sup> DDOJ Response Exhibit B.

<sup>7</sup> *Id.*

<sup>8</sup> DDOJ Response Exhibit C.

<sup>9</sup> Petition.

Statute.”<sup>10</sup> The DDOJ also stated in its response that the originally requested document was not in its records and, thus, it could not provide you with this document.<sup>11</sup> The DDOJ further asserted that despite the fact that the specific document you requested did not exist, it nonetheless conducted a search for any document that may resemble what you requested.<sup>12</sup> This search revealed the existence of only internal legal outlines, which are exempted from FOIA disclosure because they are not “public records” under 29 *Del. C.* §10002(1)(6) (exempting from the definition of “public records” “any records specifically exempted from public disclosure by statute or common law”).<sup>13</sup> Thus, the DDOJ asserts that it did not violate FOIA because the requested document does not exist and the internal outlines are exempt from FOIA.<sup>14</sup>

### POSITIONS OF THE PARTIES

You allege that the DDOJ violated FOIA in denying your request. In your Petition, you claim that you requested “all documents submitted to the Delaware Legislature concerning the revisions to the Habitual Offender statute, 11 *Del. C.* 4214 [sic], including those concerning the 2015 and 2016 legislative years and the ultimate passage of SB163 (effective July 19, 2016).”<sup>15</sup> You allege that the DDOJ submitted the information you requested to the Legislature “pursuant to 29 Del.C. Chap. 25 [sic]” and that these documents are public and not protected from disclosure.<sup>16</sup>

In its Response, the DDOJ asserts that your request was denied because the document you requested was one specific document, namely, the “Attorney General’s Submission/Memorandum Regarding Application of the New Habitual Statute” and that the DDOJ could locate no such document.<sup>17</sup> The DDOJ states that it and its FOIA Coordinator are obligated under 29 *Del. C.* §10003(d)(1) and 29 *Del. C.* §10003(g)(2) to make a reasonable effort to provide the public assistance in obtaining public records, and that the DDOJ fully complied with this mandate when Ms. Siegel investigated the existence of the requested document, or any similar document, through communications with Mr. Lugg.<sup>18</sup>

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<sup>10</sup> DDOJ Response at 2-3.

<sup>11</sup> DDOJ Response at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Petition.

<sup>16</sup> *Id.*

<sup>17</sup> DDOJ Response at 3.

<sup>18</sup> *Id.*

## RELEVANT STATUTES

Delaware's FOIA statute defines "public record" as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes . . . ." <sup>19</sup> FOIA is intended to provide easy access to public records to citizens requesting such access. <sup>20</sup> In its efforts to accomplish this goal, "[a]ll state agencies and public bodies are to provide reasonable assistance to the public in identifying and locating public records to which they are entitled access, and all records held by the agency are 'public records' to which the public should have access unless they fall within the scope of enumerated exceptions in §10002 of this title." <sup>21</sup> Among the information that FOIA exempts from the definition of "public records" are "[a]ny records specifically exempted from public disclosure by statute or common law." <sup>22</sup>

## DISCUSSION

FOIA requires that a public body respond to requests for "public records." <sup>23</sup> It is my determination that the DDOJ fully complied with this mandate when it responded to your January 11, 2017 letter. In that letter, you requested a particular document: the "Attorney General's Submission/Memorandum Regarding Application of the New Habitual Statute." <sup>24</sup> By searching for the requested document, and similar documents not specifically requested, Ms. Siegel fulfilled her obligation to assist you with identifying and locating any records to which you were entitled access.

When Ms. Siegel was unable to locate the requested document, she informed you in a letter dated February 2, 2017 that the document you had requested did not exist. <sup>25</sup> Ms. Siegel, as required by FOIA, conducted a reasonable search to determine whether *other documents* might be within the *intended* scope of your records request. Her search revealed documents that were protected by the attorney work product doctrine and, thus, exempt from the FOIA definition of "public record." <sup>26</sup> To be clear, DDOJ was not claiming an exemption for the document you requested (which did not exist). In conducting its search occasioned by your request, it located records that are arguably within the scope of your request but also outside the definition of "public records" set forth in FOIA. Therefore, I have determined that the DDOJ did not violate FOIA with its response to your January 11, 2017 request. Because the scope of your FOIA request as set forth

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<sup>19</sup> 29 Del. C. §10002(l).

<sup>20</sup> See 29 Del. C. §10001; *ACLU of Del. v. Danberg*, 2007 WL 901592, at \*3 (Del. Super. March 15, 2007).

<sup>21</sup> 29 Del. C. §100003(d)(1).

<sup>22</sup> 29 Del.C. §10002(l)(6).

<sup>23</sup> 29 Del.C. §10003(h).

<sup>24</sup> DDOJ Response Exhibit A.

<sup>25</sup> DDOJ Response Exhibit C.

<sup>26</sup> *Id.*

in your February 18, 2017 Petition is broader than the scope set forth in your initial petition, we will treat your February 18, 2017 correspondence as a new FOIA request to DDOJ received by DDOJ as of the date of this opinion.

**CONCLUSION**

For the reasons set forth above, I conclude that the DDOJ's response to your January 11, 2017 request did not violate FOIA. I will, however, direct the DDOJ to treat your February 18, 2017 Petition as a new FOIA request.

Very truly yours,

A handwritten signature in cursive script that reads "Lakresha S. Roberts". The signature is written in black ink and is positioned above the printed name and title.

Lakresha S. Roberts  
Chief Deputy Attorney General

cc: Kim Siegel, DDOJ FOIA Coordinator (via email)  
Michelle Whalen, Deputy Attorney General (via email)