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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB40

August 23, 2017

VIA EMAIL

Randall Chase
rchase@ap.org

RE: August 10, 2017 FOIA Petition Regarding the Delaware Department of Correction

Dear Mr. Chase:

I write in response to your correspondence, received on August 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 your 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 ("Petition"). Based upon the record, it is my determination that DOC violated FOIA by failing to provide you with summary documents containing cumulative information regarding contraband seizures. However, as DOC has since provided the information, your petition is now moot and no further remediation is warranted.

On February 23, 2017, you requested the following information from the DOC:

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.

The DOC denied your request on the grounds that they were exempted from the statutory definition of “public records.”

On May 10, 2017, you submitted a petition with this Office pursuant to 29 *Del. C.* § 10005 challenging the DOC’s denial of your request. In *Del. Op. Att’y Gen.* 17-IB25,¹ I concluded:

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....”, “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files”, “records specifically exempted from public disclosure by statute or common law”, to include 11 *Del. C.* § 4322(a), or “records pertaining to pending or potential litigation which are not records of any court.”

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.²

I recommended that DOC respond more precisely to your request for records relating to contraband seizures within 20 business days of my determination and noted that you reserved the right to submit a new petition upon receipt of the DOC’s response. On August 4, 2017, the DOC’s FOIA Coordinator informed you that “[t]he DOC has not generated summary documents that cumulate the contraband seized at the JTVCC since January 1, 2014.”³

In your Petition, you stated:

[I]f the DOC maintains that it does not generate summary documents regarding the seizure of contraband, I would ask that the DOC explain the following excerpt from the June 2, 2016 edition of the Delaware State News:

¹ 2017 WL 3426265 (July 17, 2017).

² *Id.* at *2 (citations omitted).

³ Email from K. Bennett to R. Chase dated August 4, 2017.

“From May 2015 to April 2016, the DOC said, JTVCC has had 80 contraband incidents involving drugs; the numbers peaked with 10 in October 2015, followed by 16 the next month. The number of incidents has dropped significantly since then, highlighted by three in March and one in April.”⁴

In its August 17, 2017 response to your Petition (the “Response Letter”), the DOC stated:

The DOC first created a summary of contraband events involving drugs for the period of May 2015 to April 2016. By an e-mail dated June 1, 2016, the DOC provided the summary in chart format to a reporter with the Delaware State News. The second summary document responsive to the FOIA request aggregates all types of contraband for the fiscal year 2017 (a period from July 2016 to June 2017). The DOC did not create such documents prior to that time frame. In order to create these summaries, the DOC manually reviewed individual incident reports. DOC policies did not require the compilation of these summaries in the past, and those policies do not require creation of similar documents in the future.⁵

The DOC’s response included copies of those documents, an apology, and an explanation that its “FOIA coordinator believed in good faith that summary reports did not exist.”⁶ The DOC maintains – and we agree – that specific reports from which the data was compiled are not public records.

Under the circumstances, it is my determination that the DOC violated FOIA by failing to provide summary documents containing this cumulative information regarding contraband seizures at JTVCC since January 1, 2014. The DOC did not violate FOIA by failing to provide individual reports, as those records are exempted from FOIA’s definition of “public record” pursuant to 29 *Del. C.* § 10002(1)(3), which exempts “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes”⁷ As you have since received all public records responsive to your February 23, 2017 request, this matter is now closed.

⁴ Petition at ¶¶ 5-6.

⁵ Response Letter at 1.

⁶ *Id.*

⁷ Having determined that the records are exempted pursuant to Section 10002(1)(3), I need not determine whether the records are also exempted pursuant to 29 *Del. C.* § 10002(1)(6), and more specifically, 11 *Del. C.* § 4322(a), as the DOC maintains, or 29 *Del. C.* § 10002(1)(9).

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)