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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB24

May 4, 2018

VIA EMAIL

Atnre Alleyne
Atnre.Alleyne@delawarecan.org

RE: FOIA Correspondence Regarding the Delaware Department of Education

Dear Mr. Alleyne:

I write in response to your correspondence alleging that the Delaware Department of Education (“DOE”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your March 5, 2018 request for records. Specifically, you allege that the DOE violated FOIA by denying your request on the basis that the records relate to pending litigation to which the DOE is a party. 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”). As discussed more fully herein, while I am unable to determine on the record before me whether or to what extent the pending or potential litigation applies, it is my determination that the DOE’s wholesale denial of your request violated FOIA. DOE did not violate FOIA by failing to answer your specific questions.

BACKGROUND

On March 5, 2018, you sent the following request to the DOE:

- All email correspondence . . . between Steven Godowsky . . . and Eric Niebrzdowski . . . ; Penny Schwinn . . . and Steven Godowsky; Steven Godowsky and anyone from the Christina School District or Christina school board. I would also like all email correspondence from Steven Godowsky in reference to Priority Schools, Stubbs, Bancroft, Bayard and/or Christina School District.

- What is the total amount of funds the Christina School District was/is eligible to receive for their Priority Schools since 2014? How does this compare with the actual amounts they have received to date? See the spreadsheet that you provided me on 10/5/17. In one email I have received via FOIA, David Blowman references “1.4 million” the district is eligible for. Is this SIG money? If so, how much did they receive and where else was that money disbursed?
- I’d like to know how much money has been given to each of the priority and focus schools (or given to the districts for their priority and focus schools) to date since 2014. I’m looking for any funding beyond the normal unit funding. I’d like this to include state grants, opportunity grants, etc. I would like this by year and to have the dates when money was disbursed to districts indicated.
- I’d like to see any reports or correspondence the district or priority schools have sent to the DDOE since 2014 providing updates on their progress. I would also like to see any reports or correspondence from the DDOE to those schools about their progress or with feedback for improvement.
- Finally, I’d like any reports you have on how the priority schools have spent their money from 2014 to date.

You stated: “I’m doing some research pertaining to the Christina School District priority schools and need some information to fill in a few blanks.” That same day, a DOE representative, Alison May, requested clarification regarding whether you were requesting a search of all DOE email addresses to all Christina School District email addresses or between specific people, and whether you were interested in emails or formal correspondence. You replied that you were interested in whatever format. You stated that you assumed that formal reports were sent, but that you would also take updates that were communicated via email. Ms. May replied that she was trying to work on the email search request for the Delaware Department of Technology and Information (DTI). She stated that a broad request would cost more than a narrow request and encouraged you to narrow your request to the extent you could do so and “still get what you want.”

On March 7, 2018, Ms. May sent you a spreadsheet containing funding information for schools identified as Focus, Focus Plus, and Priority.

On March 12, 2018, Ms. May sent you an email with a list of names and asked whether you would like to narrow your email search request to those individuals. She also invited you to add names to the list. You replied that she could remove one of the listed individuals and stated: “I’m really less interested in an email search and more interested in ‘official communications’ whether via email or via a formal report. Are there no records maintained officially of the correspondence with priority schools?” Ms. May responded that the Secretary of Education

maintains a mail log, which typically contains copies of official correspondence, and asked whether you would prefer a search of the mail log before proceeding with an email search. You replied: “Feel free to proceed as planned.” You also asked: “Are we good with the parameters of the other request for funding information?”

On March 13, 2018, Ms. May sent you an email informing you that a DOE workgroup was working on pulling a report for you containing a full year’s transactions with Christina School District in order to show you what information the DOE maintains. She stated: “As we discussed last week, because our funding goes through the LEA [Local Education Agency], not the school, we can’t search the system just for the school. Then we can do the other years if it’s what you think the report is what you want.”

On March 20, 2018, Ms. May sent you an email setting forth the written cost estimate from DTI to conduct an email search of the identified individuals for any correspondence to or from a Christiana School District email address.

On April 3, 2018, Ms. May sent you an email stating: “Because your request involves records related to pending litigation that the Delaware Department of Education is responding to in court, your request is denied.”

POSITIONS OF THE PARTIES

In your Petition, you allege that the DOE violated FOIA by denying your request on the basis that the requested information relates to pending litigation. You state: “My request . . . was not asking for information critical to the ACLU’s school funding lawsuit. Even if it was, I requested information that the public should already be able to access.” You also state that the pending lawsuit does not reference the type of earmarked money that is the focus of your request: “My inquiry was focused on the funds that the DDOE provided to all of Delaware’s Priority schools and any documentation that showed how the DDOE has held these schools accountable for performance and spending.” You note that your request post-dated the January 2018 filing of the lawsuit, and that the DOE provided some responsive records prior to its April 3, 2018 denial. You cite to this Office’s prior opinion, *Del. Op. Att’y Gen. 03-IB21*, and *Office of the Public Defender v. Delaware State Police*, in support of your argument that the pending litigation exemption invoked by the DOE applies *only* when the requesting party is a litigant.

In its April 11, 2018 response to your Petition, the DOE argues that the requested records relate to pending litigation to which the DOE is a party. Specifically, the DOE states:

A reading of th[e] complaint establishes that it is a far-reaching, multi-layered attack on several state and county authorities, including the Secretary of Education as a named defendant, in connection with the funding of the education system in the State of Delaware. Various scenarios are presented, including those that could result in a school being identified as a priority school. Various school districts are highlighted, including Christina School District.

The DOE argues that “FOIA does not require a document to be ‘critical’ to pending litigation; it merely states that any document that ‘pertains’ to pending litigation is exempt from the definition of ‘public record.’” The DOE acknowledges that you are not a party to the pending litigation, but nonetheless notes that you identified the pending litigation *sua sponte* and suggests that you may indeed be seeking the requested information to assist the ACLU or, alternatively, may be contemplating another education funding lawsuit. The DOE cites a recent opinion from this Office in support of its argument that, at the very least, the circumstances and posture of this matter do not allow this Office to make a determination as to whether the exemption applies.¹ The DOE then states:

DOE initially interacted with Mr. Alleyne in connection with his FOIA request, attempting to explain to him that it did not have public records that were responsive to his request and suggesting he might want to narrow his email request to minimize the cost of a DTI search. DOE even provided a document it thought might help Mr. Alleyne. However, after a deeper review of his request and consideration of the legal implications of providing additional information in light of the pending lawsuit on education funding, DOE notified Mr. Alleyne that it would not be able to provide anything further

Finally, the DOE notes that your request also directs questions to the DOE and states that FOIA does not require a public body to answer questions.

In your April 16, 2018 reply (“Reply”), you again argue that the pending litigation exemption applies only when the requesting party is a party to the pending litigation. You then state: “Let me state categorically that I am not involved in the pending lawsuit. Nor am I contemplating another education funding lawsuit. Thus, the exemption should not be applied in this case.” You maintain that the DOE has not satisfied the legal standard for application of the exemption as it pertains to potential litigation. You appear to challenge the DOE’s assertion that it does not possess certain records responsive to your request, citing to the DOE’s March 13, 2018 correspondence.² Finally, you note that you also requested email correspondence from Secretary

¹ See *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826 (Feb. 20, 2018) (“Neither the Council's claims of attorney-client and attorney work product privileges, nor the Council's claim that documents otherwise responsive to your request are exempt under FOIA's potential litigation exemption, can be analyzed in a timely fashion by DOJ without the benefit of additional information that is not available under the FOIA statute as currently written. The mechanisms necessary to obtain this additional information are available under the procedural rules of our state courts. Those courts have jurisdiction over FOIA disputes, and are the only bodies that can resolve the current dispute.”).

² You also allege that, to the extent that the DOE does not possess certain records, it is out of compliance with budget epilogue language. This allegation is outside the scope of FOIA and shall not be addressed herein.

Steven Godowsky referencing Priority Schools, Stubbs, Bancroft, Bayard, and/or Christina School District and state: “Nothing in DOE’s Response suggests that there is any overlap of this part of my request and the pending lawsuit.”

DISCUSSION

As an initial matter, I note that the applicability of the pending or potential litigation exemption is highly fact-specific. A public body always faces some threat of suit³ and the applicability of this exemption requires inquiry into whether requested records pertain to litigation. Logically, that analysis requires reviewing the at-issue records. This Office and the Delaware Superior Court have recognized that an overly-broad application of the exemption in the context of *potential* litigation would allow the exemption to swallow the rule.⁴ Once a suit has been initiated, the threat of potential litigation is realized and the court’s rules of discovery attach to govern the parties’ access to records. Here, the record is undisputed that the DOE is a party to *pending* litigation regarding education funding in Delaware and it is undoubtedly true that the scope of your request has some intersection with the allegations against DOE in that litigation. It is also uncontroverted that you are not a party to that litigation. Further, the record is devoid of any evidence that you intend to use FOIA in order to assist a party opposing DOE in the pending litigation. This latter concern, if proven, would support DOE’s contention that the exemption applies even if you were not an actual party to pending litigation against DOE.

Under these unique circumstances, and based upon the record before me, I am unable to determine whether, or to what extent, the litigation exemption applies. When it provided you a cost estimate to retrieve certain email prior to invocation of the litigation exemption, DOE identified that certain responsive records were in its possession. Despite that identification, DOE appears not to have conducted any review of the content of those identified emails. DOE’s claim that records responsive to your request are exempt under FOIA’s litigation exemption cannot be analyzed without the benefit of reviewing these records.⁵ Accordingly, DOE has failed to sustain its burden to prove that this portion of the requested records are non-public. As such, and given the breadth of your request, I am not satisfied that DOE’s response comported with FOIA.⁶

³ See *American Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (quoting *Del. Op. Att’y Gen. 02-IB12*, 2002 WL 1282812, at *4 (Dec. 2, 2002)).

⁴ See *American Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *4 (quoting *Del. Op. Att’y Gen. 02-IB12*, 2002 WL 1282812, at *4). To address this concern, both this Office and the courts have adopted a two-step analysis to determine whether the potential litigation applies.

⁵ See *Del. Op. Att’y Gen. 18-IB10*, 2018 WL 1405826, at *5.

⁶ For example, I am not persuaded that the entire content of any and all email communications between Steven Godowsky and Eric Niebrzdowski, or between Steven Godowsky and Penny Schwinn, would necessarily be exempted from public disclosure.

Based upon the record, it is my determination that the DOE's wholesale denial of your request violated FOIA. However, I am unable to determine whether, or to what extent, the exemption applies. The DOE did not violate FOIA by failing to answer your specific questions, as FOIA does not require a public body to answer questions,⁷ or to create records that do not exist.⁸

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General
Catherine T. Hickey, Deputy Attorney General

⁷ See, e.g. *Del. Op. Att'y Gen.* 18-IB16, 2018 WL 1546377, at *1 (Mar. 12, 2018); *Del. Op. Att'y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017); *Del. Op. Att'y Gen.* 17-IB04, 2017 WL 1317846, at *2 (Mar. 8, 2017); *Del. Op. Att'y Gen.* 08-IB05, 2008 WL 1727613, at *1 (Feb. 22, 2008); *Del. Op. Att'y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000); *Del. Op. Att'y Gen.* 97-IB06, 1997 WL 606408, at *5 (Mar. 17, 1997).

⁸ See, e.g., *Del. Op. Att'y Gen.* 17-IB61, 2017 WL 6569377, at *2 (Dec. 5, 2017); *Del. Op. Att'y Gen.* 17-IB32, 2017 WL 3426272, at *3 (July 25, 2017); *Del. Op. Att'y Gen.* 17-IB04, 2017 WL 1317846, at *2; *Del. Op. Att'y Gen.* 17-IB02, 2017 WL 955566, at *6 (Feb. 8, 2017); *Del. Op. Att'y Gen.* 16-IB08, 2016 WL 2619614, at *1 (Mar. 18, 2016); *Del. Op. Att'y Gen.* 16-IB07, 2016 WL 2619613, at *3 (Mar. 18, 2016); *Del. Op. Att'y Gen.* 15-IB02, 2015 WL 3919061, at *2 (June 17, 2015); *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at *4 (Aug. 21, 2006).