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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB30

June 7, 2018

VIA U.S. MAIL & EMAIL

John D. Flaherty
Coalition to Keep Bus Service on Rodney Square
712 W. 26th St.
Wilmington, DE 19802
Jdf0000@aol.com

RE: FOIA Correspondence Regarding the Office of the Governor

Dear Mr. Flaherty:

I write in response to your correspondence alleging that the Office of the Governor ("OGov") violated the Freedom of Information Act ("FOIA") in response to your December 24, 2017 request for records. I treat your correspondence as a petition for a determination ("Petition") of whether OGov violated FOIA in connection with your request. This Office invited OGov to submit a response to the Petition. We received OGov's response ("Response Letter") on May 24, 2018 and your reply thereto ("Reply") on May 25, 2018.

On December 24, 2017, the Coalition to Keep Bus Service on Rodney Square ("Coalition") sent a FOIA request to Governor John Carney for the following:

. . . all communications prior to September 13, 2017 regarding DART bus service on Rodney Square and specifically communications and information regarding the development of the proposal to remove bus routes serving Rodney Square.

On March 5, 2018, Alexandra Clapp, Associate Legal Counsel for OGov, sent you a letter stating that OGov was still reviewing your request. Ms. Clapp stated that she was requesting an additional 15 days, or until March 26, 2018, to provide a response to your request “[d]ue to volume of records sought and the need for extensive legal review.” That same day, you replied via email that the Coalition was in agreement with the requested extension. On March 26, 2018, Ms. Clapp sent you a nearly identical letter, but requesting an additional 21 days, or until April 23, 2018. That same day, you again replied that the Coalition was in agreement with the requested extension. On April 23, 2018, Ms. Clapp sent another nearly identical letter, but requesting an additional 15 days, or until May 14, 2018. On May 11, 2018, Ms. Clapp sent another letter, nearly identical in substance to the first three, requesting an additional 25 days, or until June 18, 2018. You then submitted your Petition on May 18, 2018.

In your Petition, you argued that OGov’s failure to provide a response to date is unreasonable and, as such, violates FOIA. In its Response Letter, OGov stated that it had been working to fulfill your request and had informed you that the requested records were in the process of legal review. OGov noted that you did not contend that OGov failed to respond to your request, lost the requested records, or failed to explain why you had not received the letters by the date of your Petition. OGov also stated that it provided you with a set of responsive records on May 23, 2018, subject to redactions pursuant to 29 *Del. C.* § 10002(1)(6). Finally, OGov stated that it was committed to providing additional records on or before May 30, 2018, and to complete its review and production on or before June 6, 2018.¹ In your Reply, you argued that OGov’s proposed completion date, which is just shy of a half of a year, is “not the response expected from a Governor.” You alleged that OGov has “failed to show supporting proof to excuse their obligations under FOIA.”² You argued that OGov’s May 23 production and its commitment to complete its response by June 6 did not negate the substance of your complaint.

On June 6, 2018, this Office requested a status update from OGov. That same day, OGov responded: “[T]his will confirm that we provided an interim production of records to Mr. Flaherty on May 30, 2018, and we provided the remainder of our records today.”

¹ We note that this date is sooner than June 18, 2018, which OGov identified in its May 11, 2018 letter, a copy of which was included with your Petition.

² Based upon the record, we presume that you are referring to OGov’s FOIA log, as you stated: “Has OGOV submitted a FOIA log listing all the FOIA requests submitted since the Coalitions [sic] request of 12-24-2017 and a timeline for responses for each?”

Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request.³ I nevertheless note that OGov invoked an appropriate exception to the 15 business day response obligation as permitted by 29 *Del. C.* § 10003(h)(1) and kept you informed via written correspondence as its efforts progressed. The record also reflects that you had consented to two requested extensions of time. To the extent that OGov's subsequent production of public records to you is alleged to violate FOIA that matter is not presently before us. Should such dispute arise after production, you are free to submit a separate petition.

Very truly yours,

A handwritten signature in dark ink, appearing to be 'A. Goldstein', written over a horizontal line.

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Danielle Gibbs, Esq. (via email)
Michelle E. Whalen (via email)

³ See *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) (“[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (“Because the documents that are the subject of [plaintiffs’] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot.”).