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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB19

April 3, 2019

VIA EMAIL

Ms. Fleur McKendell
mckendellf@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Safety and Homeland Security

Dear Ms. McKendell:

We write in response to your correspondence alleging that the Delaware Department of Safety and Homeland Security (“DSHS”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your February 5, 2019 request for records. We 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. As discussed more fully herein, we determine that this Petition is moot, as DSHS has since provided you with a response to your FOIA request.

BACKGROUND

On February 5, 2019, you sent “an official FOIA request” to DSHS for “a copy of the final police report related to the complaint” you initiated.¹ Two days later, a DSHS representative responded that your request had been sent for legal review and that DSHS “will provide an update within 15 business days.”² On March 8, 2019, you sent an email to DSHS to follow up on your

¹ Petition.

² *Id.*

initial request. On March 14, 2019, you submitted this Petition to our Office, and on that same day, the DSHS representative responded that the request was still in legal review, and she had been out of town and “will check on the status and provide an update or the requested records as soon as possible.”³ Later that same day, DSHS sent an email in response to your FOIA request, stating that your request under FOIA was denied, as a police report is exempted from public disclosure pursuant to 29 *Del. C.* § 10002(1)(3). However, as a courtesy, DSHS also provided two documents, a “copy of the initial incident report known as a Victim’s Copy” and “a supplemental report by the Delaware Capitol Police that corrects the errors you identified in the Victim’s Copy” pursuant to separate statutory authority under *Delaware Code*.⁴

Your Petition states that DSHS should have responded to your FOIA request within fifteen business days pursuant to 29 *Del. C.* § 10003. However, the fifteen days expired, and you did not receive the responsive information or notification of additional time needed. DSHS provided a response to the Petition through counsel on March 20, 2019 (“Response”). DSHS argues that the Petition should be dismissed as moot, as it responded within two business days, “cited to a statutorily acceptable reason why more time was needed, and provided a good-faith estimate of how much additional time was required to fulfill the request.”⁵ Additionally, DSHS asserts that its denial was proper, as police reports are exempt from public disclosure as a civil or criminal investigative file under 29 *Del. C.* § 10002(1)(3).

DISCUSSION

The Petition alleges that DSHS did not comply with the requisite timeframes in responding to your request.⁶ On March 14, 2019, DSHS provided a final response to your FOIA request denying access to the requested records but as a courtesy, providing other records available to you pursuant to separate statutory authority.⁷ Based on the record in this matter, it is my determination

³ Response.

⁴ *Id.*

⁵ *Id.*

⁶ Pursuant to 29 *Del. C.* § 10003, a public body must “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.”⁶ “If access cannot be provided within 15 business days, the public body shall cite 1 of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”⁶

⁷ We note that the record does not reflect, nor does the Petition allege, that DSHS acted in bad faith or engaged in a pattern of noncompliance.

that your Petition is now moot, as DSHS has completed its response to your FOIA request.⁸ To the extent that such denial is alleged to violate FOIA, that matter is not presently before us, and we express no opinion regarding whether the requested records are, in whole or in part, “public records” as defined by FOIA.

CONCLUSION

For the reasons set forth above, we determine that the Petition is moot.

Very truly yours,



Ilona M. Kirshon
Deputy State Solicitor

cc: Lisa M. Morris, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁸ See, e.g., *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.”); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, *2 (June 7, 2018) (“Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB25, 2018 WL 2994703, *1 (May 15, 2018) (“Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request.”); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, *1 (July 31, 2017) (citing *Library, Inc. AFG Enterprises, Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998) (citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter “is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter’s determination.”).