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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB23

April 26, 2019

VIA EMAIL

Christina Jedra
cjedra@gannet.com

RE: FOIA Petition Regarding the Delaware Department of Correction

Dear Ms. Jedra:

We write regarding your correspondence alleging that the Delaware Department of Correction (“DOC”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with respect to your records request. 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. Because the requested audits are designated by statute as confidential records and DOC is not creating its own audits of Connections, we find that DOC appropriately denied your request for quality assurance audits.

BACKGROUND

On February 25, 2019, you submitted a records request to DOC for the following documents:

1. All quality assurance audits conducted by DOC on Connections Community Support Programs (CSP) for Contract No. DOC1426-Health (i.e. the health services contract) from the beginning of the contract period (2014) to present.
2. All corrective action plans submitted to DOC by Connections relating to Contract No. DOC 1426-Health (i.e. the health services contract).
3. All quality assurance audits conducted by DOC on Connections Community Support Programs (CSP) for Contract No. DOC1202Mental (i.e., the mental health services, substance abuse treatment, sex offender treatment, and DUI programming services contract) from the beginning of the contract period (2012) to the present.

4. All corrective plans submitted to DOC by Connections relating to Contract No. DOC1202Mental (i.e., the mental health services, substance abuse treatment, sex offender treatment, and DUI programming services contract).¹

DOC denied the requests for quality assurance audits conducted by DOC, indicating that no such records exist. DOC stated that peer review reports exist, but peer review reports are exempt from the definition of “public record” pursuant to 24 *Del. C.* § 1768 which specifically excludes the records and proceedings of “members of other peer review committees or organizations whose function is the review of medical records, medical care, and physician’s work, with a view to the quality of care and utilization of hospital or nursing home facilities, home visits, and office visits.”² In response to your request for corrective action plans, DOC provided three records described as “Standards for Mental Health Services in Correctional Healthcare Services - Intake Study, Continuous Quality Improvement Studies – M&M’s with Non-Clinical TCU Findings and JTVCC Sick Call Study.”³

You filed a Petition with this Office challenging the denial of your request for quality assurance audits, asserting that audits must exist that were created by the DOC and are not peer review and thus, are not prohibited from disclosure by statute. You argue that other government entities release audits to the public, such as the City of Wilmington and the State Auditor of Accounts. Additionally, you assert your belief that the peer review process is separate from the quality assurance metrics, and you are not requesting “records that review how well a clinician did their job on a particular patient.”⁴ Instead, you requested “the audits which assess the extent to which Connections is meeting its contractual obligations” which you assert are “not written with ‘a view to the quality of care.’”⁵

On April 11, 2019, DOC submitted a letter (“Response”) explaining that your request for “quality assurance audits conducted by DOC” was denied because the DOC does not create its own audits of Connections and it therefore cannot produce documents that do not exist.⁶ With regard to the section of the contract you cite in your FOIA request, the DOC explains that the requirement of developing “Quality Assurance Metrics” for a Continuous Quality Improvement System (“CQIS”) is indeed part of the contract between DOC and Connections.⁷ The other relevant part of the contract outlines that these “[r]eports of CQIS activity must be provided to the

¹ Petition.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Response; Affidavit of Marc Richman, at ¶ 6.

⁷ Response.

DDOC Chief, Bureau of Correctional Healthcare Services . . . on a monthly basis.”⁸ The DOC then explains the manner and method by which Connections gathers and ultimately reports to the DOC this information, explaining DOC receives reports from Connections after DOC representatives meet with Connections staff at each facility, creating a peer review team named the “Healthcare Advisory Committee.”⁹ Connections produces Health Services Reports created during these committee meetings encapsulating the review of medical and behavioral health treatment the Committee undertook. DOC explains that the Healthcare Advisory Committee may elevate a quality control metric to the statewide continuous quality improvement group, and DOC shares these reports regarding the quality of offender health care with the Adult Healthcare Review Committee.

DOC explains its denial of your request, to the extent you sought these reports, under 29 *Del. C.* § 10002(1)(6), which exempts from the definition of “public record” any records that are “specifically exempted from public disclosure by statute or common law.” In accordance with 24 *Del. C.* § 1768, DOC argues that it is prohibited from disclosing the Health Services Reports created by the Healthcare Advisory Committee because these reports function as a “review of medical records, medical care, and physicians’ work, with a view to the quality care and utilization of hospital or nursing home facilities, home visits, and office visits.”¹⁰ DOC points to specific language in the Request for Proposal for the Connections’ contracts in which the quality assurance reports produced to DOC are specifically identified as documents “protected from disclosure pursuant to state and federal peer review and quality assurance privileges.”¹¹ Finally, DOC provides the affidavit of the Chief of the Bureau of Correctional Health Services detailing the reports that Connections currently provides and affirming that DOC is not creating its own audits of Connections. For these reasons, DOC asserts that that it properly denied the request for quality assurance audits.

DISCUSSION

FOIA exempts certain records from the definition of “public records.”¹² Under 29 *Del. C.* § 10002(1)(6), records exempted from public disclosure by statute or common law are not “public records.” Title 24, Chapter 17 designates as confidential those records used by peer review committees and organizations “whose function is the review of medical records, medical care, and physicians’ work, with a view to the quality care and utilization of hospital or nursing home facilities, home visits, and office visits.”¹³ DOC attests that it regularly receives Health Services

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (quoting 24 *Del. C.* § 1768).

¹¹ *Id.*

¹² 29 *Del. C.* § 10002.

¹³ 24 *Del. C.* § 1768.

Reports from Connections “covering both medical and behavioral health treatment that is used for each” meeting of the Healthcare Advisory Committee.¹⁴ DOC shares the information contained in these Health Services Reports with the Adult Healthcare Review Committee, a committee whose enabling statute provides that “[a]ny document received or generated by the Committee is hereby specifically excluded from the definition of public record”¹⁵ Thus, DOC asserts that Delaware law is replete with the recognition that reports such as those generated by the Healthcare Advisory Committee are peer review materials and not public records pursuant to 24 *Del. C.* § 1768. DOC attests that it is not creating its own audits of Connections.¹⁶

On the basis of this record, we accept DOC’s assertion that the Health Services Reports it receives from Connections are peer review documents and therefore exempt from the definition of public records pursuant to 24 *Del. C.* § 1768 as well as DOC’s sworn representation that it is not conducting its own audits of Connections. Accordingly, we determine that DOC appropriately partially denied your request for records pursuant to 29 *Del. C.* § 10002(1)(6).

CONCLUSION

For the reasons set forth above, we conclude that DOC has not violated FOIA as alleged.

Very truly yours,

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor¹⁷

cc: Gregory E. Smith, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹⁴ Response.

¹⁵ 11 *Del. C.* § 6518(i).

¹⁶ *Del. Op. Att’y Gen.* 02-IB18, 2002 WL 32100328, at *1 (Aug. 19, 2002) (“Under FOIA, a public body is not required to create a document that does not exist”).

¹⁷ The Chief Deputy Attorney General designated the State Solicitor to issue this Opinion.