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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB27

May 29, 2019

VIA EMAIL

Mr. John Wells
Jwells8@aol.com

RE: FOIA Petition Regarding the Delaware Auditor of Accounts

Dear Mr. Wells:

We write in response to your correspondence alleging that the Delaware Auditor of Accounts (“AOA”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your 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 below, we find no basis to conclude that AOA violated FOIA as alleged.

BACKGROUND

On April 19, 2019, you sent a FOIA request to AOA for “copies of all audits conducted on our 19 school districts, our charter schools and DDOE, during the period 1 July 2018 thru 28 February 2019 on ‘current operating funds,’ to verify all expenditures have been legal and proper and made only for the purposes contemplated in the funding acts and other pertinent regulations during the period 1 July 2018 thru 28 February 2019.”¹ AOA denied the request on May 9, 2019, stating the following:

Please be advised that the State’s Comprehensive Annual Financial Report (“CAFR”) for Fiscal Year 2019 (the year ending June 30, 2019) will be responsive

¹ Petition.

to your request when it is issued and published on the Office of the Auditor of Accounts' website (and the Division of Accounting website) in late 2019.

For your reference, the following is a link to the CAFR for Fiscal Year 2018: <https://accountingfiles.delaware.gov/docs/2018cafr.pdf>. For this particular CAFR, financial information regarding each of the State's 19 local school districts can be found beginning on page 157.²

This Petition followed. Specifically, you argue that the 2019 CAFR will not be responsive, as the referenced section of the 2018 CAFR does not, in your opinion, contain each of the elements Title 29, Section 2909 of the Delaware Code requires. You state that "[s]ince the reference provided *does not* provide the information for Fiscal Year 2018 as claimed, and the FOIA Coordinator claims the same report for Fiscal Year 2019 does provide the information requested, I request you direct the Auditor of Accounts FOIA Coordinator provide me the reports requested."³

On May 15, 2019, AOA's counsel replied to your Petition by letter ("Response"), arguing that AOA has fulfilled its obligations under FOIA with respect to your request insofar as it has directed you to the document that it believes is responsive to your request. AOA asserts that the crux of the Petition is your disagreement with the 2019 CAFR's compliance with the requirements set forth in the statute, and you are now demanding reports that you believe to exist "*despite* AOA's response."⁴ AOA contends that it has not "withheld or otherwise denied reasonable access to *any* responsive documents and has *not* violated FOIA."⁵ AOA concludes your disagreement "with respect to the scope and applicability of the CAFR vis-à-vis school district audits is an auditing question that is outside the scope of FOIA and therefore beyond the decision-making authority of the Chief Deputy Attorney General under 29 *Del. C.* § 10005(e)."⁶

In your May 17, 2019 email ("Reply"), you disagree with AOA's assessment, stating "I do not believe the FOIA provides AOA the sole authority on the interpretation of the requirement of FOIA, nor on what reports meet the requirements of the state law that requires AOA to conduct audits to verify all expenditures have been legal and proper and made only for the purposes contemplated in the funding acts and other pertinent regulations."⁷ You caution that such a finding would give AOA "all the authority/power and FOIA would serve no purpose and our society would

² *Id.*

³ *Id.* (emphasis in original).

⁴ Response (emphasis in original).

⁵ *Id.* (emphasis in original).

⁶ *Id.*

⁷ Reply.

not be free and democratic.” For those reasons, you ask our Office to direct AOA to provide the requested information.

DISCUSSION

You requested certain audit reports pertaining to the State’s school districts, charter schools, and the Department of Education. AOA denies having records responsive to your request but indicates that the 2019 CAFR, when it is published later this year, will be responsive. Because you believe the information contained in the 2019 CAFR does not meet the statutory requirements for an audit report, you ask that AOA be directed to produce reports that are compliant. As AOA has denied having responsive documents at this time, we accept this representation and find no violation of FOIA.⁸

FOIA limits this Office to determining whether a violation of FOIA has occurred or is about to occur.⁹ The General Assembly did not confer jurisdiction on this Office to determine whether any law other than FOIA has been violated through the FOIA petition process.¹⁰ While other statutes may require that the 2019 CAFR contain additional information or that AOA create a record in order to comply with statutes other than FOIA, FOIA only requires that AOA provide reasonable access to public records.¹¹ As AOA denies having responsive documents and has directed you to the document it believes to be responsive to your request when it is created, we decline to find a violation of FOIA.

⁸ See, e.g., *Del. Op. Atty. Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015); *Del. Op. Atty. Gen.* 07-IB11, 2007 WL 4732794, at *2 (May 10, 2007); *Del. Op. Atty. Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005).

⁹ 29 *Del. C.* § 10005(e).

¹⁰ See, e.g., *Del. Op. Att’y Gen.* 18-IB50, 2018 WL 6015765, at *2 (Oct. 12, 2018) (finding that this Office has “no authority under FOIA to direct [the public body] with regard to this Office’s interpretation of any other Delaware statute”); *Del. Op. Att’y Gen.* 18-IB27, 2018 WL 2994705, *2 (May 31, 2018) (finding that the school district did not violate FOIA when it provided access to the public records and declining to determine whether those records constituted an accurate portrayal of the district’s revenue pursuant to separate statutory authority); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at *2 (Aug. 8, 1996) (“To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* Section 6921, that matter is beyond the jurisdiction of this office and is not addressed here.”).

¹¹ 29 *Del. C.* § 10003(a).

CONCLUSION

For the reasons set forth above, we find that AOA did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Frank N. Broujos, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General