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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB40

July 15, 2019

VIA US MAIL

Mr. Peter Kostyshyn



Wilmington, DE 19802

RE: FOIA Petition Regarding the Delaware Department of Elections

Dear Mr. Kostyshyn:

We write in response to your correspondence alleging that the Delaware Department of Elections (“DOE”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records request. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, it is our determination that DOE has not violated FOIA as alleged.

BACKGROUND

You filed a Petition with this Office challenging DOE’s responses to your FOIA requests. First, you request an “investigation of all filings” you have made to DOE, attaching a response from DOE dated March 22, 2019 which addresses your April 11, 2019 FOIA requests.¹ You believe that this error in the date indicates that DOE is creating “hindrances to public disclosure.”² Second, you ask this Office to investigate whether DOE has a “mandatory legal obligation” to “conduct and certify and verify voters’ in the [Town of Bellefonte’s] elections.”³ Third, you ask

¹ Our consideration is limited to the specific filings made in the Petition.

² Petition.

³ *Id.* (quoted in original format).

this Office to investigate DOE's previous assertion that DOE does not maintain Bellefonte voter registration records.

DOE responded through counsel on July 2, 2019 ("Response"). DOE contends that the improper date on its response resulted from an inadvertent error. DOE states it receives numerous requests from you on a regular basis, and thus, "pulls up prior letters with [your] address when responding to current requests."⁴ DOE states that the Commissioner used a previous letter dated March 22, 2019 and "inadvertently neglected to change the date on her response."⁵ The DOE Commissioner believes the letter should have been dated April 23, 2019 based on the document maintained in her computer system. Regarding your allegations related to the Bellefonte election and voter registration records, DOE states that it has no such records in its possession and cites to municipal and state authority to support why it has no legal obligation to maintain such records.

DISCUSSION

With respect to your allegation that DOE's typographical error in its response demonstrates a violation of FOIA, the record contains insufficient evidence to support such a finding. DOE explicitly indicates that due to the volume of requests it receives from you, its typical practice is to use letters previously sent to you in response to earlier FOIA requests as the basis for drafting responses to your subsequent FOIA requests. Here, DOE explains it inadvertently failed to change the date on one such letter to the current date before sending the response. A review of the content of the letter dated March 22, 2019 makes clear that it was sent in response to your April 11, 2019 FOIA requests. DOE informed you it possessed no documents responsive to your request for the Town of Bellefonte's voting records. DOE's legal obligations regarding Bellefonte elections and voter registration records do not pertain to the FOIA statute, and thus, our Office lacks the authority to address your inquiries regarding those matters through this petition process.⁶

We determine that DOE did not violate FOIA by mistakenly dating its response, nor do we conclude on this record that DOE engaged in broader efforts to hinder public disclosures required by FOIA as you allege.⁷

⁴ Response.

⁵ *Id.*

⁶ 29 *Del. C.* § 10005.

⁷ See *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628, 636 (Del. 1984) (finding certain standing committees not to be subject to FOIA and stating "the newspapers after a full opportunity to develop the record have not shown that either the intent or effect of the system of standing committees defeats the basic purposes of the Act").

CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Ilona Kirshon, Deputy State Solicitor
Dorey Cole, Deputy Attorney General