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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 19-IB41**

**July 18, 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**

On June 10, 2019, DOE received your records request seeking “time stamped copies of this filing and envelope mailed in,” all “resulting” letters, faxes, emails, and notes “it” generates, and “any financial donors to Mayor of Wilmington campaign of Daniel Frawley and ‘confidential data I ask be blackened out.’”<sup>1</sup> DOE responded by providing copies of your filing and envelope, noting no records were generated in response to your request, and enclosing the “financial donors to Frawley for Wilmington Committee,” with a statement that the remaining 48-page list of contributors costs \$4.80 to produce and would be provided upon receipt of payment.<sup>2</sup> In addition,

<sup>1</sup> Petition (quoted in original format).

<sup>2</sup> *Id.*

the response to the third item stated DOE has no “confidential records of his campaign” and “no other records found for Daniel Frawley apart from his financial reports.”<sup>3</sup>

You filed a Petition with this Office challenging DOE’s responses to your request. You first object to DOE’s statement that no other records were located apart from Daniel Frawley’s financial reports, noting there must be Daniel Frawley’s original filings to run for the office of Mayor and that you “reached out with additional multiple filings (over time) requesting (at a minimum) the candidate’s original filing’s to run for Mayor of Wilmington (2± terms).”<sup>4</sup> You assert that to date, you have “never received those filings” you requested.<sup>5</sup> In addition, you attached DOE’s response to your June 10, 2019 request and “in an attempt to resolve,” handwrote several questions<sup>6</sup> and two assertions about DOE’s response: 1) you reiterate that you disagree with DOE’s response that there are no other records for Daniel Frawley apart from his financial reports, as “there are the original filings to run;” and 2) noting your multiple denied requests, you ask this Office to order the “48 pages sent” to you.<sup>7</sup>

DOE provided a response to the Petition through counsel (“Response”). DOE explains that the current New Castle County Office of DOE was “legislated into being” as the result of a reorganization effective on July 1, 2015.<sup>8</sup> Daniel Frawley was Mayor from 1985 to 1993, and the current New Castle County Office of DOE is not in possession of his candidate filings, which would have been filed with the former New Castle County Department of Elections. DOE alleges that the candidacy filings are not available for a number of reasons, including the amount of time that has passed as well as the State’s record retention policy. DOE’s counsel obtained the retention schedule for the candidate filing records from the Delaware Public Archives, which provides the records must be maintained for twenty-two months, after which they are destroyed. With respect to the financial donor records, DOE waived its previous fee of \$4.80 and enclosed the records considered responsive to your request, attaching the 48-page record in addition to the records it initially provided to its Response, which gives you the “consolidated list of all contributors from all campaign finance reports on file at DOE, totaling 66 pages” at no charge.<sup>9</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (quoted in original format). Our consideration is limited to the specific filings made in the Petition.

<sup>5</sup> *Id.*

<sup>6</sup> FOIA does not require a public body to answer questions. *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at \*3 (Mar. 10, 2017); *Del. Op. Att’y Gen.* 17-IB04, 2017 WL 1317846, at \*2 (Mar. 8, 2017).

<sup>7</sup> Petition.

<sup>8</sup> Response.

<sup>9</sup> *Id.*

## DISCUSSION

FOIA does not require a public body to produce records that do not exist.<sup>10</sup> In the Response, DOE’s counsel confirms that the current DOE office does not have Daniel Frawley’s candidate filing records.<sup>11</sup> DOE also asserts that the State’s retention policy requires these records to be maintained for twenty-two months, after which they are destroyed; the records you seek are more than twenty years old. Accordingly, we conclude DOE did not violate FOIA by failing to produce the candidate filings for Daniel Frawley.

In addition, your request that DOE provide the 48-page financial donor record is moot, as DOE waived the fee and enclosed with its Response the consolidated list of financial donors to Daniel Frawley’s campaign.<sup>12</sup> DOE states that this consolidated list includes the 48-page record you requested.

## CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

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

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<sup>10</sup> *Del. Op. Att’y Gen.* 06-IB10, 2006 WL 1779491, at \*2 (May 4, 2006) (stating that “FOIA does not require a public body to produce public records that do not exist” and that it has been this Office’s “historical practice” to accept the representations of a public body’s counsel regarding the existence of records).

<sup>11</sup> *See id.*

<sup>12</sup> *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. Control 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.”).