



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB46

August 27, 2019

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

RE: FOIA Petition Regarding the Delaware Auditor of Accounts

Dear Mr. Chase:

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 that AOA has not violated FOIA as alleged.

BACKGROUND

You sent AOA a FOIA request on May 22, 2019, requesting the following:

Pursuant to the Freedom of Information Act, 29 *Del. Code* 100, I am requesting copies of all emails, letters, texts, faxes, phone logs and records of all other correspondence sent or received by employees and representatives of the Office of the Auditor of Accounts regarding Odyssey Charter School in Wilmington, Delaware. This FOIA request applies to all such communications via state email accounts and state-issued cell phones, as well as all private email accounts and private cell phones used by state employees or their representatives for communications regarding Odyssey Charter School and other state government matters. I am seeking records of all such communications involving Odyssey Charter School from Nov. 6, 2018 to the present. The persons whose

communications I am seeking include, but are not limited to: Kathleen McGuiness, Kathleen Davies, Spiros Mantzavinos and Elizabeth Vasilikos.¹

AOA responded on June 12, 2019 by providing an initial set of documents which had already been reviewed in connection with another similar FOIA request and stating certain materials were exempt pursuant to 29 *Del. C.* § 10002(1)(3), 29 *Del. C.* § 10002(1)(6), and 29 *Del. C.* § 10002(1)(16).² AOA provided a second response on June 18, 2019, enclosing another set of documents and asserting that exempt material was withheld pursuant to 29 *Del. C.* § 10002(1)(3) and 29 *Del. C.* § 10002(1)(16). On July 2, 2019, you responded to AOA with a list of questions and concerns regarding its response to your FOIA request. On July 19, 2019, AOA replied with two additional public records it had since located. This Petition followed.

The Petition disputes that AOA’s search for responsive records was adequate and alleges that AOA has improperly withheld documents. The Petition made several specific allegations: 1) AOA refused to disclose “records of any communications involving key staffers involved in the Odyssey matter,” including the identified lead contact, “or to assert that no such records exist;” 2) no records were produced regarding discussion of possible conflicts “where it would seem many potential conflicts exist;” and 3) only one text messages was disclosed that was sent or received by AOA, despite having received certain political donations in recent years. The Petition requests that our Office direct AOA to “immediately release all records in its custody, and all communications from private cell phone or email accounts regarding the Odyssey matter, which are public records pertaining to a state government issue.”³

AOA’s counsel replied to your Petition by letter (“Response”), asserting that AOA provided all responsive public records in compliance with FOIA. AOA argues that the theme of the Petition is that other records must exist but AOA has properly conducted a “reasonable and diligent search” of its records and properly withheld the records in accordance with FOIA.⁴ AOA notes that the Petition’s claims “appear to be speculative” and to “involve an inquiry that is beyond the scope of FOIA.”⁵ AOA attached an affidavit of its Chief of Staff who also serves as the FOIA Coordinator to demonstrate that it conducted a reasonable search of its records. This affidavit describes how the documents were gathered, noting that the search results from an earlier, similar FOIA request were first provided. The Chief of Staff then requested the staff review their records for any additional potentially responsive documents to your request. According to the affidavit, those additional documents were then reviewed and the non-exempt records provided. Finally, upon becoming aware of two inadvertent omissions, AOA provided those records.

¹ Petition.

² Response.

³ Petition.

⁴ Response.

⁵ *Id.*

You submitted a Reply to this Office, contending that AOA’s failure to provide all responsive public records is evident from its Response. The Reply points out several alleged deficiencies: 1) AOA failed to provide internal and external records related to the previous similar FOIA request, which you believe to be within the scope of your request; 2) AOA asserted the exemption related to investigatory files despite asserting that it had no authority to conduct an audit or investigation; 3) the search was a “cut and paste” job, because it relied on the responsive records gathered for the similar request and made additions thereto; 4) it is “self-evident” that the search was inadequate as AOA later supplemented with two inadvertently omitted documents; 5) the email that AOA’s Chief of Staff sent to staff members insufficiently described your FOIA request and deliberately misrepresented the text of the request; 6) the Chief of Staff failed to include his email soliciting staff to search their records to respond to your request within the responsive records; 7) the search was insufficient as the staff members were tasked with assessing whether they had responsive records; 8) you question why the identified “lead” or other AOA staff did not provide an affidavit; 9) you question whether, in light FOIA requirements related to DTI searches, AOA’s search by requesting staff to search their records was appropriate; and 10) you question why only 23 of 28 staff received the request to search their records.⁶ Based on these issues, the Reply concludes stating that “AOA has proven in its response to my ‘mere speculation’ that it has withheld records.”⁷

DISCUSSION

The Petition asserts that AOA failed to perform a diligent search and improperly withheld documents, pointing to missing records that should exist and AOA’s reliance on documents gathered from a previous, similar search.⁸ In this case, AOA submitted an affidavit from the Chief of Staff who supervised the search and compilation of records. The Chief of Staff attached a copy of the email which was sent to staff to collect the documents and outlined the following process.⁹ AOA had recently received a similar FOIA request. After a review of this initial set of records resulting from the previous request, the Chief of Staff provided a first batch of public records to you. The Chief of Staff also sent a request to AOA staff to gather the documents related to your specific request; the additional records were reviewed for exempt material and a second batch of

⁶ Reply.

⁷ *Id.*

⁸ Our Office is limited to reviewing those issues raised in the Petition. *See Del. Op. Att’y Gen.* 19-IB25 (May 10, 2019).

⁹ There is an objection to the wording of the email that was sent to AOA staff to gather the responsive documents. The wording in the email is not an exact match to the text of the entire original request, but the email provides notice that the staff must retrieve “communications” regarding the relevant subject matter within the identified timeframe and specifically notes that it applies to private email and cell phone accounts. Response, Ex. E. We consider the Chief of Staff’s email sufficiently similar to the original request to collect the responsive documents.

the resulting records were provided to you. You then asked AOA a number of follow-up questions, and in response, AOA identified and provided two more public records on July 19, 2019. The Chief of Staff expressly avers in his affidavit that, to the best of his knowledge and belief, all responsive documents constituting public records have been provided as of July 19, 2019.

When a public body provides an affidavit, under penalty of perjury, supporting its determination whether public records exist, this Office accepts the public body's sworn representations in reviewing this determination.¹⁰ Based on our review of this record, we find that AOA adequately supported that it conducted a reasonable search for public records and provided those public records in response to your request.

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

¹⁰ See, e.g., *Del. Op. Att'y Gen.* 04-IB14, 2004 WL 1547683, at *3 (June 28, 2004) (accepting affidavit of Chief Financial Officer in determining whether responsive records exist); *Del. Op. Att'y Gen.* 97-IB01, 1997 WL 111279, at *1 (Jan. 14, 1997) (accepting an affidavit from the records custodian attesting she made a diligent search of the records and found no responsive documents); see also *Del. Op. Att'y Gen.* 18-IB32, 2018 WL 3602263, at *2 (July 5, 2018) (accepting the attorney's representations with regard to a reasonable inquiry into the existence of the records).