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

**Attorney General Opinion No. 19-IB49**

**September 9, 2019**

**VIA EMAIL**

Mr. Raynor Johnson  
Mr. John Seitz  
Hickory Hill Group LLC  
[Hickory.hill.group@gmail.com](mailto:Hickory.hill.group@gmail.com)

**RE: FOIA Petition Regarding the Department of State**

Dear Messrs. Johnson and Seitz:

We write in response to your correspondence on behalf of Hickory Hill Group, LLC (“HHG”) alleging that the Delaware Department of State violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). 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. As discussed below, we determine that the Department has not committed a FOIA violation as alleged.

**BACKGROUND**

HHG is involved in a dispute that relates to its date of formation as a business entity. In addition to the FOIA request at issue here, HHG contacted the attorney for the Division of Corporation for assistance with this matter. On June 21, 2019, HHG’s counsel emailed a FOIA request to the Department seeking “all records concerning and related to a new LLC Formation Document received and time stamped on February 19th, 2014 at 12:22 pm by the Division of Corporations for Hickory Hill Group LLC.”<sup>1</sup> The request also specified five categories of

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<sup>1</sup> Petition.

documents sought by this request: 1) the documents “actually” received or filed; 2) records relating to file number 9023378; 3) records relating to reservation number 5484344; 4) correspondence to John Seitz or Scott Edgell, including faxes, emails, and phone records; and 5) charges and/or refunds to credit/debit bank cards for filing and name reservation.<sup>2</sup>

On June 24, 2019, the Department responded to HHG’s request, explaining that in order to obtain copies of items 1 through 3 that HHG requested, HHG needed to submit the request via one of the designated methods and provide payment. The Department offered HHG a link to its website, provided a phone number to call to make the request, offered to LiveChat over its website, and provided an email where HHG could submit the request. The Department explained how the requisite fee may be processed through check, money order, debit card, or credit card. For items 4 and 5, the matter was referred to another staff member for response and HHG was informed that additional time was needed for legal review. By a letter dated July 26, 2019, the Department explained what happened with regard to the 2014 filing and why the Division of Corporations cannot assign a 2014 formation date. HHG followed up on August 15, 2019 about the FOIA request, and the Department submitted a final responsive email, stating that the July 26, 2019 letter addressed items 4 and 5 in the FOIA request and served as a response to the inquiry made to the Division’s attorney. With regard to item 3, this email also clarified the process for reserving a business name and explained that a fee is not typically charged for a name reservation for regular, as opposed to expedited, filings and that the reservation automatically expires after 120 days. Following this email, HHG filed this Petition.

The Petition alleges that the Department improperly responded to the request because no records had been produced and that the Department did not respond to items 4 and 5 at all, and it “appears that no attempt was ever made to produce any records outside of the five specifically identified records in the request such as telephone logs, memos, emails, reports and the like.”<sup>3</sup> In addition, the Petition alleges that HHG filed a request outside the FOIA process as indicated and still received no records in response. The Petition asserts that there is no dispute that the records exist, because documents were referenced in the Department’s July 26, 2019 letter and the extension notice cited the “legal review of the records requested.”<sup>4</sup> The Petition states that it appears that the Department “has acted arbitrarily and capriciously by improperly denying the disclosure of public documents that it has generated, accepted, time stamped, and scanned into their system as they acknowledge that they did in fact do, as well as the refusal to provide records, copies and call logs of communications they alleged they made relative to the matter.”<sup>5</sup>

The Department’s counsel submitted a response on August 26, 2019 (“Response”). The Response first alleges that FOIA is inapplicable due to 6 *Del. C.* § 18-1105(a)(5), which authorizes

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

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

<sup>4</sup> *Id.*

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

the Department to issue photocopies or electronic images of business entity instruments for a fee, notwithstanding Delaware's FOIA statute. Further, the Department states that the requested documents cannot be provided because they do not exist and enclosed an affidavit from its Technical Support Administrator, who explained that some documents were purged, unable to be regenerated due to age, or do not exist in a "document" format. The Administrator explains that the descriptions in the Department's correspondence were produced by reviewing the information in the Delaware Corporate Information System ("DCIS"), and not based on a review of documents. In the July 26<sup>th</sup> correspondence, the Department explains that HHG's entity filing was received on February 19, 2014 and scanned into the system. However, due to a discrepancy, the document was rejected and the submitter was notified. Because the filing was rejected, the image was purged from the system per the Department's standard practice.

The Department also argues that producing this information is inappropriate, because DCIS data is protected by 29 *Del. C.* § 10002(l)(17)(a)(7) as "information technology (IT) infrastructure details, source code, logical and physical design of IT systems and interfaces, detailed hardware and software inventories, network architecture and schematics, vulnerability reports, and any other information that, if disclosed, could jeopardize the security or integrity of an information and technology system owned, operated, or maintained by the State or any public body subject to the requirements of this chapter." Finally, the Department alleges that the FOIA request was properly denied under 29 *Del. C.* § 10002(l)(9), as the requesting entity "has litigation in Pennsylvania, which includes the very issue of its non-existence in 2014."<sup>6</sup> For these reasons, the Department alleges its denial was proper.

## DISCUSSION

FOIA provides citizens access to "public records," but specifically excludes those records that are statutorily exempt from disclosure.<sup>7</sup> FOIA also does not require a public body to provide records which do not exist.<sup>8</sup> The Department has provided an affidavit of its Technical Support Administrator. Although certain data is available on the DCIS application screens, the Administrator describes that no associated "documents" responsive to the request can be produced from DCIS. The Administrator's affidavit explains the available information for each numbered item of HHG's request: 1) the image of the 2014 filing was purged from the system and the only information remaining is data on application screens regarding the submission; 2) the designated file number is linked to a submitter account with some data about the submitter but has no associated documents; 3) the reservation data is on an application screen but no associated document can be provided; 4) the correspondence to the identified individuals is noted in the data in the "old system application screens" but there is no way to regenerate a copy of the letter sent

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<sup>6</sup> Response.

<sup>7</sup> 29 *Del. C.* § 10002(l)(6).

<sup>8</sup> *Del. Op. Att'y Gen.* 06-IB10, 2006 WL 1779491, at \*2 (May 4, 2006); *Del. Op. Att'y Gen.* 05-IB19, 2005 WL 2334347, at \*5 (Aug. 1, 2005); *Del. Op. Att'y Gen.* 96-IB28, 1996 WL 517455, at \*2 (Aug. 8, 1996).

in 2014; and 5) there was no information regarding a charge for the name reservation, only a credit for a filing fee shown on the application screen; the Division previously explained that it did not charge the reservation fee for regular filings.<sup>9</sup>

Delaware law provides the following with regard to the Department's records:

The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well as instruments, documents and other papers not on file, and for all such photocopies or electronic image copies which are not certified by the Secretary of State, a fee of \$10 shall be paid for the first page and \$2.00 for each additional page. Notwithstanding Delaware's Freedom of Information Act (Chapter 100 of Title 29) or other provision of law granting access to public records, the Secretary of State upon request shall issue only photocopies or electronic image copies of public records in exchange for the fees described in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described in this section or § 2318 of Title 29 for each such record associated with a file number.<sup>10</sup>

Thus, despite the requirements of FOIA, the Department of State, Division of Corporations is not obligated to produce any bulk data or digital copies of records, only those records produced by photocopying or electronic image copying, and the Department has confirmed in sworn testimony under penalty of perjury that the only existing information responsive to the five items is data on its application screens.<sup>11</sup>

The Department also alleges that any responsive records would be exempt pursuant to 29 *Del. C.* § 10002(1)(9) as records pertaining to pending or potential litigation. The Petition indicates that HHG is involved in litigation regarding HHG's real property and acknowledges the relevancy of these records to the litigation, explaining that the Department's failure to acknowledge HHG's alleged formation date "has caused a major problem" regarding that litigation.<sup>12</sup> As we conclude this exemption is also applicable, this Office need not decide whether 6 *Del. C.* § 18-1105(a)(5)

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<sup>9</sup> Response, Affidavit of Shawn K. Moore.

<sup>10</sup> 6 *Del. C.* § 18-1105(a)(5).

<sup>11</sup> 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 found no responsive documents).

<sup>12</sup> Petition.

obligates the Department to produce the data from the application screens by any other method, if available.<sup>13</sup>

### **CONCLUSION**

Based on the foregoing, it is our determination that the Department 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: Lawrence W. Lewis and Laura L. Gerard, Deputy Attorneys General  
Dorey Cole, Deputy Attorney General

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<sup>13</sup> See *Office of the Pub. Def. v. Delaware State Police*, 2003 WL 1769758, at \*2-3 (Del. Super. Mar. 31, 2003); *Del. Op. Atty. Gen.* 19-IB01, 2019 WL 639456, at \*2-3 (Jan. 23, 2019); *Del. Op. Atty. Gen.* 17-IB24, 2017 WL 3426264, at \*2 (July 14, 2017).