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

**Attorney General Opinion No. 19-IB53**

**September 17, 2019**

**VIA EMAIL**

Mr. Craig O'Donnell  
Dover Post  
[craig.odonnell@doverpost.com](mailto:craig.odonnell@doverpost.com)

**RE: FOIA Petition Regarding the Delaware Department of Safety and Homeland Security / Delaware State Police**

Dear Mr. O'Donnell:

We write in response to your correspondence alleging that the Delaware State Police ("DSP") 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, while we do not determine that DSP has violated FOIA as alleged, we recommend DSP provide more timely communications in the future.

**BACKGROUND**

You sent DSP a request on January 15, 2019 seeking the following:

[A]n electronic copy of data for individual Part I offenses reported or known to police from 2014-2016, as compiled for purposes of participating in the FBI's national Uniform Crime Reporting (UCR) system and other incident tracking purposes. For each individual UCR Part I offense known to police, please provide the following data fields:

- The incident number of the offense

- Incident/offense date
- Type of offense
- Unfounded (yes/no), i.e. whether or not determined to be false or baseless complaint
- Unfounded Date, if applicable
- Clearance Date, if applicable
- Arrest Date, if applicable
- Type of clearance (arrest / cleared by exceptional means, etc.)
- Exceptional clearance type, if applicable (offender died, victim uncooperative, offender deported, prosecutor declined case, etc.).

It is our understanding your agency participates in the FBI's Uniform Crime Reporting program, and has for years regularly compiled and reported crime statistics in a manner that complies with the requirements of that program. For instance, the FBI's UCR Handbook[[ucr.fbi.gov](http://ucr.fbi.gov)] states that participating agencies must report the total number of offenses known to police, total number of unfounded reports, total number of actual offenses, total number of cases cleared by arrest or exceptional means, and other information. This request is asking for a copy of the underlying, incident-level data that is regularly accessed and used to compile statistical reports for purposes of complying with the requirements of the UCR program.

We specifically request to receive the bulk of this information in a useable electronic format. Data records should be provided in a format such as a delimited text/CSV, or database file such as Microsoft Access database or Microsoft Excel spreadsheet. Data records should NOT be provided as a PDF file or other non-useable electronic format, nor on paper, without first checking with us.

In the event you no longer have incident level data in electronic form going back to 2014, please provide as much electronic data as you do currently have in your possession. It is our intention to work with your agency on this request. We do not wish you to create any new sets of information, or to go to great lengths to re-create older information. In this spirit, to the extent that it is in any way easier on a technical end for you to fulfill this request by providing more information or more data fields (such as if your offense database can easily export all fields in certain tables), we would welcome more information about the incidents as well. Whatever is easiest on your end that still provides at least this minimal amount of requested data, is acceptable. If you have technical questions, or if any aspect or manner in which we have requested this information proves difficult to process, we ask you to reach out to us in advance of formally

responding so we may work with you to make the response as easy as possible using as little staff time as possible.<sup>1</sup>

On January 24, 2019, DSP's FOIA Coordinator acknowledged receipt of your request, advised that it had been sent for legal review, and stated that an update would be provided within fifteen business days. However, you did not receive any further response from DSP until August 27, 2019. You then filed a Petition, alleging the following:

1. DSP failed to provide any notice about the request between January 24 and August 27, 2019 regarding the "untimely delay" in providing records.<sup>2</sup>
2. DSP did not contact you to clarify what you were seeking and consequently provided records which are not responsive to your request.
3. DSP did not provide a good faith estimate of how long it would take to complete a response to your request.
4. The documents provided are not responsive to the request and appear to be database printouts of annual summaries.
5. DSP did not withhold the documents and state that it would require creating new records, as DSP previously stated with regard to other requests. You assert that DSP "cannot decide to create 'some' new records and not to create 'other' new records from databases" and that providing these records proves DSP does not consider database exports or reports to be newly created records.<sup>3</sup>
6. DSP provided the records as HTML files when DSP should have claimed responsive records "could not be provided because they are not documents exported to Excel."<sup>4</sup> You assert that this means DSP's statements in response to prior requests that requesters must use Excel for a machine-readable document were "pretextual."<sup>5</sup> You state that the HTML files are not database files as you had requested, and DSP did not contact you to discuss an alternative format as you had also requested.
7. DSP did not provide a separate letter with the response to explain why you did not receive what you requested.

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<sup>1</sup> Petition.

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

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

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

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

8. DSP did not respond within 24 hours to your request for clarification of the issues raised in item 6 above.
9. DSP's response is a "constructive denial."<sup>6</sup>

On September 4, 2019, DSP's counsel replied to your Petition ("Response"). DSP denies violating FOIA and requests that the petition be dismissed as moot because DSP provided all responsive documents in its possession. In response to item 1, DSP asserts that its January 24, 2019 email complied with FOIA's response requirements because it was sent six business days after your request was received and notified you of a permissible reason that the response would take another estimated fifteen business days. For item 2, DSP disputes that it needed clarity to respond to your request. For item 3, DSP acknowledges that it did not provide any updates between January 24 and August 27, 2019 but claims there is no evidence it acted in bad faith. DSP also notes that you contacted them regarding other FOIA requests during this time and did not request any update on this, though acknowledging you are not obligated to do so.

In response to issues 4 through 7 and 9, DSP asserts that "FOIA does not require a public body to create a new document in response to a record request; however, FOIA does require that a public body allow access to a document in its available format," and because the documents were made available to you in the only format DSP had, there was no need to contact you regarding format.<sup>7</sup> DSP also notes that this Office has previously held that FOIA does not preclude a public body from voluntarily releasing a record. DSP asserts in response to item 7 that FOIA does not require a cover letter or other explanatory document.

In response to item 8, DSP disputes your allegation that it did not reply to your email with questions within 24 hours and argues FOIA does not have this requirement. DSP provided exhibits showing that you asked on August 28, 2019 if there was a cover letter or if you needed to file a FOIA request for such and that the DSP FOIA Coordinator responded a few hours later.

## **DISCUSSION**

Your claims can be grouped into two categories: allegations regarding DSP's initial process in responding to the request and allegations regarding the response itself. First, we determine that the claims regarding DSP's initial process in responding to your request are now moot, as DSP has provided a response enclosing the records it deems responsive.<sup>8</sup> However, we recommend DSP provide more timely communications.

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<sup>6</sup> *Id.*

<sup>7</sup> Response.

<sup>8</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*

Second, we reviewed the claims regarding DSP's response and find no violation of FOIA. FOIA does not prohibit the disclosure of records but merely gives the public body the grounds to withhold records exempt from the definition of "public records."<sup>9</sup> Moreover, DSP's counsel represents that DSP produced the files responsive to the request in the only format available to DSP and "containing existing fields," and in accordance with past practice, our Office accepts this representation regarding the existence of records.<sup>10</sup> FOIA does not require a public body to convert its existing files into other formats.<sup>11</sup> FOIA does not require a public body to explain why the provided records are responsive, send a separate cover letter, or respond to emails received in its normal course of business within certain timeframes. Finally, although DSP acknowledges the FOIA Coordinator did not contact you to state the records would not be produced in the desired format as you requested, DSP alleges this communication was not necessary, as there were no formatting options to discuss. We do not believe that these circumstances rise to the level of a FOIA violation.<sup>12</sup>

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*Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994) (in response to plaintiff's request for a declaration that its access to records was untimely, stating "[b]ecause 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."); *Del. Op. Att'y Gen.* 18-IB25, 2018 WL 2994703, \*1 (May 15, 2018) ("Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request."); *Del. Op. Att'y Gen.* 17-IB35, 2017 WL 3426275, \*n.3 (July 31, 2017) (citing *Library, Inc. v. AFG Enterprises, Inc.*, 1998 WL 474159, at \*2 (Del. Ch. July 27, 1998)(citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter "is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter's determination.").

<sup>9</sup> See 29 *Del. C.* §§ 10002(1), 10003(a).

<sup>10</sup> Response; *Del. Op. Att'y Gen.* 15-IB14, 2015 WL 9701645, at \*n.14 (Dec. 29, 2015) ("It has been our historical practice to accept such representations from an attorney for the custodian of public records to determine that such documents do not exist for purposes of FOIA.") (citations omitted).

<sup>11</sup> *Del. Op. Att'y Gen.* 17-IB13, 2017 WL 3426251, at \*3 (July 6, 2017) (finding that FOIA does not require a public body to convert existing information into a new format to respond to a FOIA request"); *Del. Op. Att'y Gen.* 04-IB14, 2004 WL 1547683, at \*2 (Jun. 28, 2004) (stating that "FOIA does not require an agency to make a summary or compilation of information in public records, or to produce computerized data in a special format requested by a citizen") (citation omitted).

<sup>12</sup> 29 *Del. C.* § 10003(g)(2) ("The FOIA coordinator and/or his or her designee, working in cooperation with other employees and representatives, shall make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in

## CONCLUSION

For the reasons set forth above, while we do not determine that DSP has violated FOIA as alleged, we recommend DSP provide more timely communications in the future.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Lisa M. Morris, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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locating and providing the requested records. The FOIA coordinator and/or his or her designee will also work to foster cooperation between the public body and the requesting party.”).