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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB13

March 30, 2020

VIA EMAIL

Julie Nay
juliecnay@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Ms. Nay:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) 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 DNREC did not violate FOIA as alleged.

BACKGROUND

You submitted a FOIA request to DNREC on February 3, 2020, seeking DNREC’s report regarding a “site safety visit” of a property near your home.¹ DNREC responded on February 24, 2020, stating that the “report is not complete,” but it “will be sent to you as soon as it is finalized.”² This Petition followed.

In your Petition, you allege that it is beyond the timeframe of fifteen business days, and you still have not received a response to your FOIA request. You were informed that the report

¹ Petition.

² *Id.*

was not complete, but the visit occurred on January 20, 2020, and you already received a “conclusive letter” from another entity that participated in the visit.³

On March 9, 2020, DNREC’s counsel replied to your Petition (“Response”), arguing that DNREC has fulfilled its obligations under FOIA. DNREC contends that it did not deny your request, rather it informed you that the report was incomplete and would be sent as soon as it was complete, noting that FOIA does not require a public body to create a new document. DNREC’s counsel represents that the requested report does not yet exist and argues “there is no violation of FOIA for failing to create a report that does not yet exist.”⁴

DISCUSSION

FOIA requires a public body to provide a response to a FOIA request as soon as possible but no later than fifteen business days of receipt by either denying or granting access to the requested records, or stating additional time is needed to complete the request for one of the permitted reasons, providing a good faith estimate for completion.⁵ DNREC provided its response to your request within the requisite timeframe by denying access to this report, as it did not exist at that time. FOIA does not require a public body to provide a record that does not exist.⁶ Consistent with this Office’s precedent, we accept the representation of DNREC’s legal counsel that the report did not exist at the time of the response and conclude that DNREC has not violated FOIA.⁷ In its response to your request, DNREC voluntarily offered to provide this report to you when it is complete, and we encourage DNREC to do so.

³ *Id.*

⁴ Response.

⁵ 29 *Del. C.* § 10003(h).

⁶ *Del. Op. Att’y Gen.* 06-IB10, 2006 WL 1779491, at *2 (May 4, 2006) (citation omitted).

⁷ *Del. Op. Att’y Gen.* 15-IB14, 2015 WL 9701645, n. 14 (Dec. 29, 2015) (citing *Del. Op. Att’y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005)) (“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.”).

CONCLUSION

For the reasons set forth above, we find that DNREC did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Kayli Spialter, Deputy Attorney General
Dorey Cole, Deputy Attorney General