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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB19

June 25, 2020

VIA EMAIL

Sean Dunagan
Judicial Watch, Inc.
SDunagan@JUDICIALWATCH.ORG

RE: FOIA Petition Regarding the University of Delaware

Dear Mr. Dunagan:

We write in response to your correspondence alleging that the University of Delaware (“University”) 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 set forth below, we conclude that the University has not violated FOIA with respect to your records request.

BACKGROUND

On April 30, 2020, you filed a FOIA request with the University seeking the following records:

1. Any and all records regarding, concerning, or related to the proposed release of the records pertaining to former Vice President Joe Biden’s tenure as a Senator that have been housed at the University of Delaware Library since 2012. This request includes, but is not limited to, any and all related records of communication between any official, employee, or representative of the University of Delaware and any other individual or entity, as well as any notes, agendas, minutes, or similar records created in preparation for, during, and/or pursuant to any meeting of the Board of Trustees during which the proposed release of records was discussed.
2. Any and all records of communication between any trustee, official, employee, or representative of the University of Delaware and former Vice President

Biden, any representative of his presidential campaign, or any other individual acting on his behalf between January 1, 2018 and the present.¹

By email dated May 20, 2020, the University responded to your request, stating that it had no responsive public records. The University clarified “[t]here have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.”² In addition, the University stated that the full Board of Trustees holds public meetings, but the senatorial papers were not addressed at a full Board meeting. The University also referred you to its website regarding access to the Biden Senatorial Papers. This Petition followed.

The Petition challenges the University’s denial of access to the requested records on two grounds. First, you argue that because the senatorial papers are housed at the University’s library, the archival storage space and staff members’ time both constitute “things of value,” and therefore, are expenditures of public funds.³ Second, you argue that the University failed to meet its obligation to search for the communications between the University and Vice President Biden and his representatives, contending that the Board of Trustees’ lack of discussion is not relevant, as “[t]he Board of Trustees is not the only component of the University that is subject to the Freedom of Information Act.”⁴

On June 5, 2020, the University’s counsel responded to the Petition (“Response”). The University argues that not all of its activities are subject to FOIA. Rather, its full Board of Trustees is considered a “public body” and must comply with the requirements for a “meeting” as defined by FOIA. Further, the University states its records are not considered “public records” unless those records relate to the expenditure of State dollars. Noting that the State provides approximately 11% of the University’s yearly operating budget, the University contends there are many areas of the University not supported with public funds. Accordingly, the University argues that it appropriately denied your request, stating “[p]ublic funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers.”⁵ The University states the full Board of Trustees did not address this matter at a meeting; thus, no agendas or minutes are available to provide. Finally, the University states that the communications sought between the University and Vice President Biden or his presidential campaign are not considered public records, “as the University has not provided public funds to Vice President Biden or his presidential campaign.”⁶

¹ Petition.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Response.

⁶ *Id.*

DISCUSSION

FOIA does not apply to the University of Delaware with two specific exceptions. First, the Board of Trustees is a public body “and each meeting of the full Board of Trustees . . . [is] a ‘meeting.’”⁷ Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”⁸ Public funds are defined as “those funds derived from the State or any political subdivision of the State.”⁹ To aid in identifying such records, FOIA also requires that “any university request for proposal, request for quotation, or other such document soliciting competitive bids for any contract, agreement, capital improvement, capital acquisition or other expenditure proposed to involve any amount or percentage of public funds by or on behalf of the university shall indicate on the request for proposal or other such document that it relates to the expenditure of public funds.”¹⁰

Neither category of records requested here falls into these exceptions. Your request seeks the records and communications related to the proposed release of the senatorial papers and communications on any topic between the University and Vice President Biden or his campaign. FOIA deems those records relating to public expenditures subject to the public records requirements, not records on any topic. The University’s counsel specifically states that no public funds were used for the senatorial papers and no public funds were paid to Vice President Biden or his campaign.¹¹ As such, we find nothing in this factual record indicating the records you requested relate to the expenditure of public funds, and thus, these records are not considered public records subject to FOIA.¹²

CONCLUSION

For the above reasons, this Office concludes that the University has not violated FOIA as alleged.

⁷ 29 *Del. C.* § 10002(i).

⁸ *Id.*

⁹ 29 *Del. C.* § 10002(k).

¹⁰ 29 *Del. C.* § 10002(i).

¹¹ *See Del. Op. Att’y Gen.* 17-IB59, 2017 WL 6348853, n. 12 (Nov. 20, 2017) (accepting the factual representations made by the public body’s attorney).

¹² *See Del. Op. Att’y Gen.* 10-IB06, 2010 WL 3195780, at *4 (July 15, 2010) (finding that certain bid documents, contracts, payment records, and funding documents of Delaware State University were “public records” as defined by FOIA); *Del. Op. Att’y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000) (finding that “[a]ny documents relating to the spending of state funds for those infrastructure improvements are ‘public records’”).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Jennifer M. Becnel-Guzzo, Associate Vice President and Deputy General Counsel