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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB20

July 1, 2020

VIA EMAIL

Andrew Kerr
Daily Caller News Foundation
akerr@dailycallernewsfoundation.org

RE: FOIA Petition Regarding the University of Delaware

Dear Mr. Kerr:

We write in response to your correspondence alleging that the University of Delaware 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. All agreements, including modifications, revisions, or updates, concerning the storage of more than 1,850 boxes of archival records and 415 gigabytes of electronic records from Joe Biden's senate career from 1973 through 2009.
2. Correspondence including but not limited to email, phone and written communications between staff of the University of Delaware Library and Joe Biden or members of Joe Biden's senatorial staff, Joe Biden's vice presidential staff or Joe Biden's political campaign staff, or for anyone representing any of those entities between 2010 to the date of this request about Joe Biden's senate records.
3. Any logs or sign-in sheets recording any individuals who have visited the special-collections department where records from Joe Biden's senate career are stored between 2010 to the date of this request.

4. All records from Joe Biden's Senate career that have been submitted to the University of Delaware Library.¹

By email dated May 20, 2020, the University responded to your request, stating that it had no responsive public records. The University stated that the “documents you have requested do not relate to the expenditure of public funds.”² The University also referred you to its website regarding access to the senatorial papers. This Petition followed.

This Petition challenges the University’s denial of access to the requested records, arguing that these records relate to the expenditure of public funds. The Petition states the University received over \$118 million in State funds in fiscal year 2019, most of which was allocated to a general unrestricted fund, in addition to a \$3.6 million contingency funds for personnel costs “which could have been used to pay the salaries of University of Delaware library employees” who are responsible for curating and managing the marketing for the senatorial papers.³ Finally, you note that the purpose of the donation of these records was to make them available for public access.

On June 11, 2020, the University’s counsel responded to the Petition (“Response”). 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.”⁴ The University states 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 also explicitly denies your speculation that the two identified employees are paid with public funds; the University’s counsel states they are not. The University further contends even if such salaries were publicly funded, that would not render every document that employee reviews, creates, or receives a public record. The University notes that its full Board of Trustees has not discussed the senatorial papers, meaning that there no public meeting records to provide. Finally, the University states that your request for the log of library patrons does not relate to public expenditures, and even if they did, FOIA’s exemption regarding library patrons’ records would apply.

¹ Petition.

² *Id.*

³ *Id.*

⁴ Response.

⁵ *Id.*

DISCUSSION

FOIA does not apply to the University of Delaware with the exception of two specific areas. First, the Board of Trustees is a public body, “and each meeting of the full Board of Trustees . . . [is] a ‘meeting.’”⁶ Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”⁷ Public funds are defined as “those funds derived from the State or any political subdivision of the State.”⁸ 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.”⁹

The University’s counsel specifically states that no public funds were used for the senatorial papers,¹⁰ and thus, your first and second requests do not seek public records related to the expenditure of public funds.¹¹ The third request also does not seek public records, as a library patron log does not relate to the expenditure of public funds and as the University points out, such records are also exempt from FOIA as “records of a public library which contain the identity of a user and the books, documents, films, recordings or other property of the library which a patron has used.”¹² Finally, the request seeks to obtain the senatorial papers from the University’s library using the FOIA process. Attempting to access library records through the FOIA process is an inappropriate use of FOIA that does not advance FOIA’s objective of furthering the accountability of government to its citizens.¹³ Moreover, the FOIA statute does not designate the University library as a public body nor as discussed above, are the senatorial papers public records.

⁶ 29 *Del. C.* § 10002(i).

⁷ *Id.*

⁸ 29 *Del. C.* § 10002(k).

⁹ 29 *Del. C.* § 10002(i).

¹⁰ *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).

¹¹ *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.’”).

¹² 29 *Del. C.* § 10002(l)(12).

¹³ 29 *Del. C.* § 10001.

CONCLUSION

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

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