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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB32

December 14, 2020

VIA EMAIL

Sam Chick
Samuel.g.chick@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Chick:

We write regarding your correspondence alleging that the Delaware Department of Transportation (“DelDOT”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with respect to your records request. 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. For the reasons set forth below, we find that DelDOT did not violate FOIA by denying your requests for the former DelDOT Secretary’s text messages or the records involving the Governor’s Office.

BACKGROUND

On December 10, 2019, you submitted a records request to DelDOT for the following documents:

All records, forms, and communications relating to the state’s purchase (10/20/2008), sale (12/31/2018), and redeeding (6/18/2019) of real estate parcels 5-08-14100-01-0200-00001 and 5-00-14100-01-0800-00001 including but not limited to communication between selling/purchasing parties and/or their agents and the state, internal state communications within DELDOT and between DELDOT and other state agencies/departments/offices, all review and approval processes, justifications and legal determinations, including right-of-way, engineering, environmental, and archaeological findings, and any other information

related to these properties or regarding their purchase, possession, use, redeeding, or sale by the state.¹

The request also included a list of the parties involved in these records. DelDOT produced responsive records on April 3, April 23, September 17, and October 16, 2020. This Petition followed.

The Petition first claims that certain text messages were improperly excluded from the production. You located an email in which the DelDOT Secretary stated she engaged in text messaging with the purchaser about these property transactions in Fall 2018. You allege that these text messages were improperly excluded from the production, as DelDOT's retention schedule required these texts be retained for three years. Second, you contend that DelDOT's records involving the Governor's Office were also withheld, because no responsive records were provided to you. As a remedy, you request that the DelDOT "be ordered to preserve and produce all records pertinent to this FOIA request" and "be ordered to recover the deleted text messages."²

DelDOT, through its counsel, responded on November 23, 2020 to the Petition ("Response"). DelDOT argues that the texts you seek were sent from a privately owned mobile phone and although this Office has previously determined emails from a private account could be public records under certain circumstances, DelDOT does not concede that text messages from a private mobile phone would also be public records, pointing out that a Delaware court has not addressed this issue. Instead, DelDOT argues that it met the standard for searching for these text records. As the State technology department does not have access to any employees' private phones, DelDOT's counsel states that the former DelDOT Secretary searched her phone before her departure from her position and found that the texts from the Fall 2018 were no longer on her phone. In addition, DelDOT's counsel states that the Property Management Annual Report for 2018 was provided to you, and it is the only document in DelDOT's possession responsive to your request for records involving the Office of the Governor. For these reasons, DelDOT requests the Petition be dismissed.

DISCUSSION

FOIA requires a public body to provide access to public records in accordance with the statute.³ When a public body's denial of access to records is challenged, the public body has the burden of proof to justify its denial.⁴ The non-existence of records is a defense for denying access

¹ Petition.

² *Id.*

³ 29 *Del. C.* § 10003(a).

⁴ 29 *Del. C.* § 10005(c).

to records.⁵ In this case, DelDOT's counsel states that the former Secretary searched her personal phone and the text messages were no longer available on her phone. In other words, DelDOT has no responsive texts to provide. In accordance with this Office's practice, we accept the representations of DelDOT's counsel and determine that DelDOT did not violate FOIA in denying access to these text messages.⁶ The Petition's attendant allegation, that the former Secretary or DelDOT improperly failed to retain these text messages in accordance with its records retention requirements, is a question outside the scope of this Office's authority.⁷

Regarding the records involving the Governor's Office, DelDOT's counsel represents that the only responsive record, the Property Management Annual Report for 2018, has been provided to you and that DelDOT has no other responsive records. We accept this representation and find that DelDOT has not violated FOIA by denying access to these records.⁸

CONCLUSION

For the reasons set forth above, we conclude that DelDOT has not violated FOIA by denying your requests for the former DelDOT Secretary's text messages or the records involving the Governor's Office.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

⁵ *Del. Op. Att'y Gen.* 05-IB19, 2005 WL 2334347, at *4 (Aug. 1, 2005) (“[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.”) (citation omitted).

⁶ *See Del. Op. Att'y Gen.* 17-IB59, 2017 WL 6348853, n. 12 (Nov. 20, 2017) (accepting the factual representations of the public body's counsel to satisfy the public body's burden of proof); *Del. Op. Att'y Gen.* 15-IB14, 2015 WL 9701645, (Dec. 29, 2015) (“We accept the representations regarding the existence of the records and we need not consider whether the requested records could be withheld under FOIA if they did exist.”); *Del. Op. Att'y Gen.* 06-IB10, 2006 WL 1779491, at *2 (May 4, 2006) (“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).

⁷ 29 *Del. C.* § 10005(e) (“Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur.”); *see also Del. Op. Att'y Gen.* 17-IB04, 2017 WL 1317846, n. 7 (Mar. 8, 2017) (noting that a matter regarding a public body's obligation to retain records is outside the scope of FOIA).

⁸ *See* note 6.

cc: Bradley S. Eaby, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General