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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB33

December 18, 2020

VIA EMAIL

William Paskey
William.paskey10@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Safety and Homeland Security

Dear Mr. Paskey:

We write in response to your correspondence alleging that the Delaware Department of Safety and Homeland Security (“DSHS”) 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 set forth below, we determine this Petition is now moot.

BACKGROUND

On October 12, 2020 at 10:45am, you submitted a request for “the off duty firearms policy on carrying personal firearms for the Delaware State Police, Capital Police and DATE.”¹ DSHS acknowledged receipt of the request eleven minutes later, stating your request “has been sent for legal review” and “[w]ithin 15 business days from receipt of your request, we will either provide you with access to the records, deny your request, or state that additional time is needed.”²

¹ Petition.

² *Id.*

This Petition followed on November 17, 2020. You allege that you sent a follow-up email, DSHS did not respond, and it has been well over fifteen business days without a response. On November 30, 2020, DSHS's counsel replied to your Petition ("Response"). DSHS contends that it complied with FOIA, "because it responded to [you] the same business day and cited to a statutorily acceptable reason why more time was needed (*i.e.*, legal review), and provided a good-faith estimate of how much additional time was required to fulfill the request."³ DSHS admits that there were no responsive communications since its October 12, 2020 email. DSHS attached one responsive record to its Response, the off-duty firearms policy for the Delaware Alcohol and Tobacco Enforcement ("DATE") officers carrying personal firearms, but noted it needed an additional seven business days for legal review of the Delaware State Police and Capital Police off-duty firearms policies on carrying personal firearms. By email dated December 1, 2020, you noted DSHS's lack of response despite your follow-up communication on November 2, 2020 and speculated that DSHS is engaged in a practice of routinely sending these notices for legal review as a "delay tactic."⁴ On December 7, 2020, DSHS completed its response to your request, providing copies of the off-duty firearms policy on carrying personal firearms for Delaware State Police and Delaware Capital Police.⁵

DISCUSSION

FOIA requires a public body to respond to a request within fifteen business days or advise of the need for additional time in compliance with the statutory requirements.⁶ In this instance, DSHS responded to your request almost immediately to advise that the request had been sent for legal review and it would respond within fifteen business days, reiterating the statutory deadline. Despite your communication following up on the request, DSHS did not respond until several weeks after this deadline and after you filed this Petition. FOIA is to be construed to further open access to public records, and any extensions to the statutory time period for responses are the

³ Response.

⁴ Email from William Paskey to opengovernment@delaware.gov dated Dec. 1, 2020.

⁵ Email from Deputy Attorney General Lisa Morris to opengovernment@delaware.gov dated Dec. 7, 2020.

⁶ A public body must "respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived." 29 *Del. C.* § 10003(h). "If access cannot be provided within 15 business days, the public body shall cite [one] of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request." *Id.*

exception, not the rule for responding to requests.⁷ DSHS’s noticing of the need for additional time so quickly after receipt of the request, and then failing to respond to the request until the requesting party files a petition with this Office, despite the requesting party’s follow-up inquiry, violates the spirit of FOIA.

After receiving this Petition, DSHS provided you, on November 30, 2020, with one document you sought and responded it would provide the remaining documents responsive to your request within seven business days. Within that timeframe, DSHS provided you the remaining records to complete its response. As such, the Petition’s claim regarding timeliness is now moot, but we caution DSHS to invoke extensions for additional time to respond to requests only when needed and to timely communicate regarding requests in the future.⁸

CONCLUSION

Based on the foregoing, we find that your claim disputing the timeliness of DSHS’s response is now moot but caution DSHS as set forth above.

⁷ *Flowers v. Office of the Governor*, 167 A.3d 530, 545 (Del. Super. 2017) (“The Court is mindful that exemptions are to be narrowly construed and that FOIA is to be construed to further open access to public records . . .”).

⁸ *See, e.g., Flowers*, 167 A.3d at 546 (“[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 Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (in response to plaintiffs’ request for a declaration that the Board wrongfully denied them timely access, 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.* 19-IB25, 2019 WL 4538311, at *3 (May 10, 2019) (“Based on this record, it is my determination that the allegations in your Petition are now moot, as DOC has completed its final response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, *2 (Jun. 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, *1 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., 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.”).

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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