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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB05

March 5, 2021

VIA EMAIL

Jordan Howell
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RE: FOIA Petition Regarding the Delaware Department of State

Dear Mr. Howell:

We write in response to your correspondence alleging that the Division of Corporations of the Delaware Department of State (“Department”) 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 the Department did not violate FOIA as alleged. However, as the Department offered to provide you with additional materials related to the conference upon receipt of your written request, we encourage you to file a request for those records and encourage the Department to provide them.

BACKGROUND

You submitted a FOIA request to the Department on November 13, 2020, seeking “a copy of any remarks prepared by or for agents of the Division of Corporations and the Office of the Secretary of State, including Secretary of State Jeffrey Bullock, that were delivered during the annual Executive Strategic Planning Conference held on Wednesday, October 28 and Thursday, October 29, 2020.”¹ The Department responded on January 21, 2021, stating that “[t]here are no

¹ Petition.

documents or records responsive to your request.”² After receiving this response, you asked if someone who attended the conference would “be able to speak about the event and what was said[,] specifically about new rules requiring annual reports for LLCs.”³ The Director of Community Relations responded to your question: “[w]hat was discussed during the conference, and in a subsequent discussion as a follow-up, was that in light of the recent passage of the federal NDAA the State is no longer looking to require annual reports from LLCs.”⁴ This Petition followed.

In your Petition, you allege that the Department’s response to your request was inaccurate, as a “confidential source” provided you with minutes from the conference, which include remarks made by the agents of the Division of Corporations, and that those remarks were, in part, transcribed verbatim from the conference.⁵ You argue that the remarks in the minutes were responsive to your request and should have been provided. In addition, the Petition asserts that you were provided with the presentations from the conference and although the remarks were not verbatim, they were prepared by agents of the Division of Corporations for the purpose of delivering remarks at the conference, which you again argue should have been produced in response to your request.

On February 16, 2021, the Department’s counsel replied to your Petition (“Response”). The Department states that its response to your request was accurate. Specifically, your request sought a copy of any remarks prepared by or for agents of the Division of Corporations that were delivered during the conference, and the Department asserts that neither the minutes nor the presentation slides constitute a copy of the remarks prepared by or for agents of the Division that were delivered during the conference. The Department’s counsel asserts that there are no “prepared remarks” for the conference and attached an affidavit from the Director of Community Relations, stating: “I believe my email dated January 21, 2021 responded to all of the requested records, explaining that ‘prepared remarks’ did not exist.”⁶ The Department states that if you are indeed seeking the minutes and presentation slides regarding the conference, the Department has not yet received this request, so resolving any claim regarding such a request is outside the scope of this Petition. If you request additional records about the conference, the Department indicates it is willing to provide several records, including an agenda of the conference, minutes, and presentation slides for “IT Talk – Updates and Things to Come,” and “Uniform Commercial Code – Opportunities for Improvement.”⁷

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Response.

⁷ *Id.*

DISCUSSION

FOIA mandates that a public body provide citizens with access to its public records for inspection and copying.⁸ The public body carries the burden of proof to justify its denial of access to public records.⁹ In this case, the primary issue is whether any records exist in response to your request. Your request sought a specific record: a copy of the remarks prepared by or for any agent of the Division of Corporations that were delivered during the conference. The Department's counsel represents that no such record of "prepared remarks" exists, attaching a sworn affidavit from the Director of Community Relations in support thereof. Minutes recorded from the conference and presentation slides do not constitute a copy of prepared remarks delivered during the conference. Based on the foregoing, we find that the Department did not violate FOIA in denying access to these records.¹⁰ A request for the other records related to the conference has not been submitted to the Department, and thus, there is no basis to consider such a request in this Opinion. However, as the Department offered to provide you with additional materials related to the conference upon receipt of your written request, we encourage you to file a request for those records and encourage the Department to provide them.

CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Laura L. Gerard, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁸ 29 *Del. C.* § 10003(a).

⁹ 29 *Del. C.* § 10005(c).

¹⁰ See, e.g., *Del. Op. Att'y Gen.* 20-IB16, 2020 WL 1977525, at *2 (Apr. 8, 2020); *Del. Op. Att'y Gen.* 19-IB27, 2019 WL 4538313, at *2 (May 29, 2019); *Del. Op. Att'y Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015); *Del. Op. Att'y Gen.* 07-IB11, 2007 WL 4732794, at *2 (May 10, 2007); *Del. Op. Att'y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005).