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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB10

May 4, 2021

VIA US MAIL

Millard E. Price
SBI No. [REDACTED]
Howard R. Young Correctional Institution
P.O. Box 9561
Wilmington, DE 19809

RE: FOIA Petition Regarding the Delaware Department of Corrections

Dear Mr. Price:

We write in response to your correspondence alleging that the Delaware Department of Corrections (“DOC”) 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 that the DOC did not violate FOIA as alleged.

BACKGROUND

You mailed two requests for records to the DOC. The first request, dated February 18, 2021, was received by the DOC on February 23, 2021. On March 3, 2021, you resent this same request¹ and included a second request for additional items. These requests sought the following items:

1. Copy of “General Inmate Account” from 7-1-20 to date from Howard R. Young Corr. Inst., with specific accounting as to all debits/credits thereto, and description and purpose thereto;

¹ The text of the March 3, 2021 request slightly varied from the initial request dated February 18, 2021, but the request described the same items.

2. A copy of DOC statutory authority, policy, regulation, etc. permitting the commissary at HRYCI to operate and profit from the sale of commissary items to inmates at HRYCI detailing the purpose of said profits from commissary sales;
3. A copy of DOC statute, policy, regulation, etc. governing the purpose of the “General Inmate Account” at HRYCI and all bylaws governing its operation and withdraws from said account;
4. A copy of the DOC policy, regulation, statute, etc. governing the operation of a law library at HRYCI;
5. A copy of the DOC policy, regulation, statute, etc. governing the charging of inmates for copies of the following: case law, statutory law, pending legal matters, shepardizing case law, annotation of statutory law, etc.;
6. What account are the “charges” deposited and what those deposits are used for;
7. Copy of institutional budget for the law library;
8. A detailed accounting of all charges for copying assessed to all inmates at HRCYI from 7/21/2020 to date.²

On March 12, 2021, the DOC denied your requests, because 29 *Del. C.* § 10002(1)(13) exempts records in possession of the DOC where disclosure is sought by an inmate in the DOC’s custody. In addition, the DOC stated that the requested DOC policies are not public records, citing 29 *Del. C.* § 10002(1)(6), which excludes any records exempted from disclosure by statute. The DOC points to 11 *Del. C.* § 4322(c) and (d), which prohibits disclosure of certain policies and procedures, unless the Commissioner waives that confidentiality. Although the request was denied, the DOC states that the response included instructions for you to obtain a copy of your inmate account. This Petition followed.

The Petition alleges that the DOC failed to respond to your records request within the timeframe permitted under the statute, and that requesting these records from the DOC, which is the same body which you are accusing of malfeasance, creates a conflict of interest. The DOC’s response denying access to its records, in your view, was inappropriate under FOIA. The Petition argues that 11 *Del. C.* § 4322(c) and the FOIA statute are overly broad and violate your rights under the “federally mandated Act” and you ask “the courts to strike down the law for being overly broad.”³ Moreover, you assert that 11 *Del. C.* § 4322 is also vague and overly broad, violating your “right to inspect the financial accounting policies and procedures regarding fiduciary responsibilities.”⁴ Finally, you contend that these records will show that Howard R. Young Correctional Institution improperly handles profits from its inmate commissary.

The DOC’s counsel replied to the Petition on April 15, 2021 (“Response”). The DOC asserts that its response to your requests was proper under FOIA. The DOC points out that 29 *Del. C.* § 10002(1)(13) exempts “any records in the possession of the Department of Corrections where disclosure is sought by an inmate in the Department’s custody.” Attaching copies of both

² Response.

³ Petition.

⁴ *Id.*

envelopes in which the requests were received, the DOC asserts that these documents signify you are an inmate in the DOC's custody, and therefore, are not entitled to access to any of the requested records. Pursuant to 11 *Del. C.* § 4322(c) and (d), the DOC maintains that its Policy and Procedures Manuals, the Bureau of Prisons Policy and Procedures Manuals, and DOC Facilities Operational Procedures, Administrative Regulations and Post Orders are all confidential, unless the Commissioner of the DOC waives confidentiality in writing.

DISCUSSION

The public body has the burden of proof to justify denial of access to its records.⁵ The representations of the public body's legal counsel may satisfy this burden.⁶ The Petition first alleges that it is a conflict to ask the public body for its own records showing alleged malfeasance and the DOC's response in this case was untimely. FOIA requires that requests be submitted to the public body who is the custodian of the records.⁷ Once submitted, 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."⁸ The DOC received your first request on February 23, 2021. The DOC responded to your requests on March 12, 2021, which is within the fifteen business days required by FOIA. Thus, we find that it was proper under FOIA for the DOC to receive and respond to your request for DOC records and that the DOC's response to your requests was timely under the FOIA statute.

Second, the Petition alleges the DOC's reasons for denying access to the requested records are inappropriate. Citizens of Delaware are to be provided reasonable access to, and reasonable facilities for, the inspection and copying of "public records."⁹ However, FOIA provides that certain records are excluded from the definition of "public records."¹⁰ Section 10002(l)(13) exempts "any records in the possession of the Department of Correction where disclosure is sought by an inmate in the Department's custody." The recent case of *Ryle v. Del. Dep't of Justice* addressed a similar request in which an inmate sought a copy of the DOC's employee code of

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Del. Dep't of Justice*, 2021 WL 22550, at *5 (Del. Super. Jan. 4, 2021) (accepting the representations of the public body's attorney to meet the public body's burden of proof under FOIA).

⁷ 29 *Del. C.* § 10003(a).

⁸ 29 *Del. C.* § 10003(h).

⁹ 29 *Del. C.* § 10003(a).

¹⁰ 29 *Del. C.* § 10002.

conduct policy through FOIA.¹¹ The Supreme Court of Delaware affirmed the Superior Court's dismissal of the inmate's appeal because the DOC properly denied the inmate's FOIA request for this policy under 29 *Del. C.* § 10002(1)(13).¹² The factual record here indicates that you are an inmate in DOC's custody at Howard R. Young Correctional Institution, and in accordance with the clear language of Section 10002(1)(13) and *Ryle*, the DOC properly denied your request for records under this exemption.¹³

The remaining issues in the Petition, including your allegations regarding the legality of the FOIA statute and other Delaware statutes, and the propriety of the DOC's use of profits, are outside the scope of this Office's statutory authority to opine on, and are therefore not addressed in this Opinion.¹⁴

CONCLUSION

Based on the foregoing, we determine that the DOC did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Nicole S. Hartman, Deputy Attorney General (via email)
Dorey L. Cole, Deputy Attorney General (via email)

¹¹ 2020 WL 5230736, at *1 (Del. Sept. 1, 2020).

¹² *Id.* at *2.

¹³ The DOC's counsel correctly points out that the requests for policies are also exempt because "any records specifically exempted from public disclosure by statute or common law" are exempt under 29 *Del. C.* § 10002(1)(6), and unless the Commissioner of the DOC waives the confidentiality, those policies requested are protected from disclosure. 11 *Del. C.* § 4322(c) and (d); Response; *see also Laub v. Danberg*, 2009 WL 1152167, at *3 (Del. Super. Mar. 4, 2009) ("Prisoners are precluded from reviewing DOC policies and procedures, regardless of the reason for requesting them"), *aff'd*, 979 A.2d 1111 (Del. 2009) (TABLE).

¹⁴ 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.").