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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB25

October 20, 2021

VIA EMAIL

Molli Carter
mollicarter@hotmail.com

RE: FOIA Petition Regarding the Delaware Department of Health and Social Services

Dear Ms. Carter:

We write in response to your correspondence alleging that the Delaware Department of Health and Social Services ("DHSS") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") with regard to your records request. 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. For the reasons set forth below, it is our determination that DHSS has not violated FOIA as alleged.

BACKGROUND

On August 25, 2021, DHSS received your request for the following records:

I would like to know the COVID case count by district for each week starting 8/15/20 – 8/25/21 (this data has been removed from the public website and no summer data was presented despite robust summer schools being in place). I would like to know the number of staff and number of students each week.[1]

DHSS denied your request on September 3, 2021, stating that "DHSS is unable to produce the records you requested under FOIA as the information is not maintained by DHSS in a readily accessible format that can be accessed without writing a program or creating a new document."[2]

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[1]   Petition.

[2]   *Id.*

Citing to Attorney General Opinion precedent, DHSS states that "FOIA does not require an agency to create a document or program that does not already exist."[3] However, as this request is for health data, DHSS also pointed out that you may submit a data request to the Division of Public Health ("DPH") for the historical data and included a reference to a website. This Petition followed.

The Petition asserts this denial is improper. You contend that the cited opinion "actually referred to a situation where the person submitting the FOIA had received the information in hard copy and [also] wanted the information in electronic form," but unlike this opinion in which hard copies were provided, you were denied any records.[4] In particular, you note that the opinion states that FOIA does not make any distinction between records maintained in manual and electronic storage systems and that the chosen type of storage system does not diminish a public body's FOIA obligations. You state you prefer to receive the records in "hard form" but would take them in any format. You argue that you have not located any information suggesting that "FOIA precludes an agency from creating a document – they might charge [you] for it, but they still create it."[5]   In addition, you question how DHSS can deny your request for these records, if they referred you elsewhere for the same records. In other words, you want to know why DHSS did not obtain the records you requested from this source in response to your FOIA request.

DHSS, through its legal counsel, replied to the Petition on September 24, 2021 ("Response"). DHSS notes are you are correct that the COVID case counts for in-person learning was previously available online broken down by week and district. DHSS explains that this information is now back online, but the data you are seeking is historical data that is no longer populating the DHSS website. Instead, DHSS notes that DPH contracts with an outside vendor who operates the coronavirus website known as "My Healthy Community." DHSS asserts it checked with the vendor and confirmed that the vendor has destroyed any previous reports which would have been responsive to your request. DHSS states that the vendor uses the data from DPH's system which tracks every COVID test and case in Delaware; this vendor, not DPH, creates the reports that appear in this website. In order to fulfill your request for summer school data, DHSS asserts that "the State would be required to dig through months of COVID cases to break out student and teacher cases, create a new report, and submit that to [you]."[6] DHSS explains that summer school data was never on the website; with such low numbers of individuals in summer school, the data could reasonably lead to identification. As many citizens have requested historical data, DPH plans to work with its vendor to add historical data back to the website. In addition, DHSS notes that you are welcome to submit a request for the raw data; those requests are evaluated by the Human Subjects Review Board in order to ensure that the data, and the subjects of the data, are private and secure. Citing precedent, DHSS claims that it has no obligation under FOIA to create a new record, and fulfilling your request for school data would require DPH or its vendor

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[3]   *Id.*

[4]   *Id.*

[5]   *Id.*

[6]   Response.

to "create a new record from existing data sets" and fulfilling the request for summer school data would require DPH "to comb through historical case data, analyze those cases to provide only de-identified data and then create a new record."[7]

DISCUSSION

Under FOIA, a public body carries the burden of proof to justify denial of a request for records.[8] The representations of the public body's legal counsel may satisfy this burden.[9] FOIA requires a public body to provide access to its existing public records, but it does not require a public body to create a new record in order to fulfill a records request.[10]

Your request makes a specific request for COVID case count by district for each week for a timeframe encompassing the 2020-21 school year and 2021 summer school, including the number of staff and number of students each week. Although information about the current school year is now available online, DHSS's counsel represents that the requested reports for the 2020-21 school year reports no longer exist and to recreate them would require DHSS to create a new record from public health case data and that creating new reports about summer school would require DHSS to "comb through historical case data" to break out student and teacher cases, de-identify the data, and create a new record. Based on these representations, we find no violation of FOIA.[11] Your request did not seek the raw data, but we note that DHSS has offered you the opportunity to submit a request for raw data through its Human Subjects Review Board. Furthermore, in the interest of public transparency, we encourage DHSS to follow its plan to make historical data available on its website in the future.

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[7]   *Id.*

[8]   29 *Del. C.* § 10005(c).

[9]   *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).

[10]   *See, e.g., Del. Op. Att'y Gen*. 04-IB14, 2004 WL 1547683, at *2 (Jun. 28, 2004) ("FOIA does not require an agency to make a summary or compilation of information in public records, or to produce computerized data in a special format requested by the citizen. It is not 'necessary for a computer operator to create new records through a computer run, *i.e.*, search of the online database, accomplished by entering the [requesting party's] search criteria.' Nor does FOIA obligate an agency to 'develop a program to accomplish this task for the purpose of complying with [the FOIA] request.'") (internal citations omitted).

[11]   *See id.; see also Del. Op. Att'y Gen*. 19-IB32, 2019 WL 4538318, at *3 (Jun. 24, 2019) ("However, DHSS has not indicated that any such report exists in the fashion you contemplate and FOIA does not require creation of a document.").

CONCLUSION

As set forth above, it is our determination that DHSS has not violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler
Chief Deputy Attorney General

cc: Joanna S. Suder, Deputy Attorney General
       Dorey L. Cole, Deputy Attorney General