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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB27

October 25, 2021

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

RE: FOIA Petition Regarding the Office of the Auditor of Accounts

Dear Mr. Chase:

We write in response to your correspondence alleging that the Office of the Auditor of Accounts (“AOA”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), in connection with your September 2021 FOIA 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.¹ For the reasons set forth below, we determine that AOA, for a period of more than three years, failed to maintain its FOIA logs in accordance with 29 *Del. C.* § 10003(g)(3). We view the balance of your petition as moot or raising factual questions that are not amenable to resolution through the petition process.

BACKGROUND

In early September 2021, you submitted through the statewide FOIA portal a FOIA request seeking a copy of AOA’s FOIA log for the period January 2018 to present. On September 17, 2021, you emailed an AOA employee and informed AOA that you had not yet received a written response or a copy of the FOIA log. Several minutes later, AOA’s FOIA coordinator emailed you,

¹ We construe your petition as including a request under 29 *Del. C.* § 10005(e) for a determination that AOA’s past practices violated FOIA’s the log requirements, rather than merely a request under 29 *Del. C.* § 10005(b) seeking a determination with respect to denial of access to records.

indicating that AOA had no record of receiving your FOIA request and requesting that you send her the FOIA request directly, which you promptly did.² The FOIA coordinator indicated that she would try to have your FOIA request fulfilled by the close of business that day, September 17, 2021.

On September 22, 2021, the FOIA coordinator, via email, provided you with a copy of AOA's FOIA log for the period January 2019 to present reflecting only some of the information required by 29 *Del. C.* § 10003(g)(3) (the "Current Log"). The FOIA coordinator advised that the Current Log began in January 2019, when the current State Auditor was first sworn into office, and that a search of the prior administration's records did not reveal a FOIA log covering FOIA activity for 2018. The FOIA coordinator indicated that she deemed your FOIA request fulfilled.

On September 23, 2021, you emailed the FOIA coordinator and asked for confirmation that AOA could not find its 2018 FOIA log. You also pointed out that the Current Log did not hew to the express requirements of section 10003(g)(3). You indicated that you would allow AOA five additional days "to provide the records that it is required by law to keep and to disclose." The FOIA coordinator emailed you the next day, acknowledging your follow-up email and indicating that she would "be in touch as soon as possible."

On October 4, 2021, you filed the instant petition requesting that this Office determine that AOA violated FOIA by failing to keep accurate FOIA logs and also requesting that we assess the validity of AOA's assertion that it could not locate its FOIA log for 2018.

On October 13, 2021, AOA's FOIA coordinator, by email, informed you that, after additional search efforts, AOA was able to locate a copy of AOA's FOIA log for 2018 (the "2018 Log"). She provided you a copy and explained that the 2018 Log was "created and maintained by staff under the prior administration." The FOIA coordinator also provided you with a revised version of the Current Log, which now includes columns for each category of information required by section 10003(g)(3) and at least some of the missing information.

On October 15, 2021, AOA, through counsel, informed our Office that, two days prior, AOA had located and provided you with a copy of the 2018 Log, as well as an updated version of the Current Log. AOA's counsel indicated that, as to the Current Log, AOA was able to "go through old records and recreate [it] to comport with the statutory requirements." AOA asserts that your petition is therefore moot.

In response, you deny that the petition is moot and argue that we should issue a formal determination that publicly documents AOA's historical failure to maintain FOIA logs in the format required by section 10003(g)(3). You also ask us to determine that AOA deliberately violated FOIA by intentionally providing incomplete records in its initial response.

² The problem, it appears, was that the FOIA portal was automatically sending FOIA requests for AOA records to a defunct email account for a former AOA employee. We understand that that issue has been resolved.

DISCUSSION

The first issue is whether AOA violated FOIA by failing to maintain FOIA logs in accordance with the express requirements of 29 *Del. C.* § 10003(g)(3). We note initially that, contrary to AOA's assertion, this question is not moot. The issue involves historical conduct spanning more than three years and two administrations and may not escape review merely because AOA was able to produce responsive documents.

FOIA coordinators - and by extension the public bodies that appoint them - must maintain logs tracking certain basic information for every FOIA request received by a public body. Section 10003(g)(3) expressly requires FOIA coordinators to maintain a document tracking, for each FOIA request:

- the requesting party's contact information;
- the date the request was received;
- the public body's response deadline;
- the date of the public body's response (including the reasons for any extension);
- the names, contact information and dates of correspondence with individuals contacted in connection with requests;
- the dates of review by the public body;
- the names of individuals who conducted such reviews;
- whether documents were made available;
- the amount of copying and/or administrative fees assessed; and
- the date of final disposition.

29 *Del. C.* § 10003(g)(3). This requirement is part of a public body's overarching duty to document adequately the transaction of public business. Absent complete and accurate records, FOIA's open records provisions would be of little practical utility in furthering the accountability of government to the citizens of this State.

The record here, though sparse, does sufficiently establish that AOA's past practices violated the letter and spirit of section 10003(g)(3). The 2018 Log for the most part tracked only the date of the request, contact information for the requesting party, the date of AOA's response, and the initials of the assigned staff member. The Current Log, as originally provided by AOA, contained five columns and tracked only the date of the request, the response deadline, the name of the requesting party, the date of AOA's response, and the date of final disposition. It thus appears that AOA, under two separate administrations, and for a period of more than three years, maintained FOIA logs that included some, but not all, of the information required by section 10003(g)(3).

We note that FOIA does not directly address the question of when requisite information must be recorded in a FOIA log. We think a fair reading of the statute suggests that FOIA coordinators, though enjoying some flexibility as to when information is inputted, should endeavor to maintain accurate and complete FOIA logs on a current basis, subject to revision or supplementation as circumstances may warrant. FOIA coordinators should not be in the habit of

retrospectively creating or substantially revising FOIA logs to comply with FOIA requests for FOIA logs.

The second issue concerns the validity of AOA's assertion that it initially could not locate FOIA logs maintained under the prior administration. We view this issue as moot, as AOA was able to locate and produce the 2018 Log. Further, this issue involves factual issues and questions of intent that typically are not capable of resolution through the petition process.

CONCLUSION

For the reasons set forth above, we conclude that AOA failed to maintain FOIA logs as required by 29 *Del. C.* § 10003(g)(3), and that the balance of your petition is moot and otherwise not amenable to determination under 29 *Del. C.* § 10005.

Very truly yours,

/s/ Alexander S. Mackler
Alexander S. Mackler
Chief Deputy Attorney General

cc: Patricia A. Davis, Deputy Attorney General