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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB30

November 17, 2021

VIA EMAIL

Susan Dixon
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James Haubrich
Jhaubrich99@verizon.net

RE: FOIA Petition Regarding the Delaware Department of Elections

Dear Ms. Dixon and Mr. Haubrich:

We write in response to your correspondence alleging that the Delaware Department of Elections (“Department”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records requests. 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 the Department has not violated FOIA as alleged.

BACKGROUND

On November 13, 2020, the Department received your request for copies of the following records pertaining to the general election held on November 3, 2020:

1. all Affidavits of Affirmation of Voter Identity for each Election District in New Castle County;
2. the computer or machine data storage devices (e.g., hard drives) from all voting machines used in New Castle County;
3. voting machine paper ballots for each Election District in New Castle County;

4. “[u]nmarked or blank” ballots as described on pages 27 and 28 of the Election Officer Checklist 2020 General Election instruction booklet;
5. the paper print-out summary tapes from each voting machine and the corresponding poll books for each Election District in New Castle County;
6. all absentee ballots, their accompanying envelopes, and the corresponding poll books for each Election District in New Castle County;
7. all mail-in ballots, their accompanying envelopes, and the corresponding poll books for each Election District in New Castle County;
8. [] all provisional ballots and the corresponding poll books for each Election District in New Castle County; and
9. any other documents or electronic records that refer or relate to the above requested items.¹

The Department asserts that it sent an email on November 25, 2020, stating that it needed additional time and asking you to advise if you would narrow or refine the request. The Department alleges you did not respond, and it denied your request in its entirety on August 21, 2021 under 15 *Del. C.* § 4980. The response also noted the “Post-Election Audit of the State of Delaware New Castle County 2020 General Election” was completed in three phases and included a website link to these audits. This Petition followed.

The Petition asserts this denial is improper, as Section 4980 does not exempt the records you seek from disclosure. First, you contend that this basis is not valid, as the “paper print-out summaries” are publicly posted at the conclusion of the general election day, the federal primary election day, and the state primary election day; one copy from each voting machine is taped to the building door so it can be read from outside; and the results from the tape of each machine are to be read to any candidate or authorized challenger or anyone waiting outside the polling place.² You also note that this statute conflicts with the obligation to allow candidates to review election records, and Mr. Haubrich was a candidate for State Representative in the 7th District in 2020. You allege that the audits mentioned in the Department’s response cannot substitute for the Department’s FOIA obligations, because only four districts were reviewed, you believe no audit of mail-in or absentee ballots occurred, and the Department indicated that it was working on the FOIA request after those audits were conducted. The Petition further argues that the Department’s response “does nothing to inspire public confidence in the integrity of elections in Delaware” and makes similar assertions.³ The Petition concludes by alleging that the Department has not met its burden of proof, the court can award attorneys’ fees to a successful plaintiff, and as the request has

¹ Petition.

² *Id.*

³ *Id.*

been outstanding for nine to ten months, you believe “the information is readily available in a form to be produced.”⁴

The Department, through its legal counsel, replied to the Petition on October 25, 2021 (“Response”) and attached an affidavit of the State Election Commissioner. The Department states that each county convenes a board of canvass on the second day after the general election for the purpose of canvassing the vote and reporting the official election results. Following the closing of the polls, the Department turns over custody of all voting materials to the respective court prothonotary for each county during the canvass. The Department states that each prothonotary deploys guards to the Department’s warehouse facilities where voting machines, voted ballots, and other election-related materials, excluding the records transported to the respective prothonotaries, are stored to ensure that these items remain within the custody of the board of canvass during the canvass process. If any materials must be accessed that are not in the prothonotary, the Department asserts that the board must issue an order permitting Department representatives to access those materials and deliver them to the respective prothonotary where the canvass is being conducted. Pursuant to Section 4980, the Department asserts that after the canvassing is complete, the voting materials are returned to the Department’s custody and must be secured “undisturbed and locked for 22 months after the day of election.”⁵

Noting that this request is unprecedented in its nature and scope and “akin to a record request for a recount or forensic audit of Delaware’s 2020 General Election Results in New Castle County, neither of which is provided for under Delaware law,” the Department contends that you are essentially asking for every voting record and piece of equipment, other than the voting machines, associated with all the 2020 General Election races throughout New Castle County, including “a total of 60 races, 271 election districts, 170 polling places, and 651 voting machines countywide.”⁶ The Department calculated that the total number of records sought exceeds 380,000. Even though the Department believes its denial under Section 4980 is appropriate, the Department asserts it was reasonable to ask for a narrowed request. The Department maintains that Section 4980 requires that “voting materials . . . undisturbed and locked for 22 months after the day of the election.”⁷ The Department argues that the requested materials fit under the term “voting materials.” In his affidavit, the State Election Commissioner attests that “all of the items requested in Items 1 through 8 of the FOIA Request (with the exceptions noted in Paragraphs 6, 7, and 8 below) are ‘voting materials’ (including ‘voted paper ballots’ and ‘documentation extracted from the media containing the election results’) and as such, those items have been stored ‘undisturbed and locked’ and under seal by the Department since November 11, 2020 as required by that section.”⁸ He further notes that this practice has been in place since at least 2007. The exceptions from the stored “voting materials” include the physical USB drives and memory cards

⁴ *Id.*

⁵ Response.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

(excluding the data which is downloaded into written reports, which he considers voting materials), the copies of the voting machines tapes which are not stored with the Department's voting materials, and the physical corresponding poll books, which are electronic tablets, the data on which is statutorily required to be uploaded to the State's voter registration system immediately following the election.

The Department points out that the General Assembly permitted limited exceptions to this restricted access, but only for authorized members or agents of the General Assembly, the Attorney General, or the Department for purposes of completing an audit under Title 15, Section 5012A; access for requesting parties under FOIA is not an exception. Thus, the Department argues that its reliance on 29 *Del. C.* § 10002(o)(6) was appropriate, as these records are specifically exempted from public disclosure by statute.

Further, the Department argues that the physical equipment, including computer or machine data storage devices and poll books, may not be requested through FOIA, because these physical items do not qualify as information under the definition of "public record" and thus, are not subject to FOIA. The Department also denies your claim that the public posting of the printed tapes of voting machines implies these records are public, because that public posting occurs prior to the board of canvass's certification process; the completion of this certification process then triggers the provisions of Section 4980. In addition, the Department states your argument that Section 4980 is inconsistent with a candidate's entitlement to review these records is also without merit, because any candidate and accredited challenger may be admitted to the voting room after the closing of the polls to observe the counting and tabulation of the votes; this opportunity is prior to the board's certification process, the subsequent completion of which triggers the requirements under Section 4980. The Department also clarifies that its provision of a link to the available audits in its response was not intended as a substitute for its FOIA response but instead to provide you with additional information about these statutorily-mandated audits that used the voting materials maintained in accordance with Section 4980. Finally, the Department declined to respond to the Petition's statements regarding the election integrity, as those matters are not within the scope of FOIA.

DISCUSSION

Under FOIA, a public body carries the burden of proof to justify denial of a request for records.⁹ The representations of the public body's legal counsel may satisfy this burden.¹⁰ FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.¹¹ However, "records specifically exempted from public disclosure by

⁹ 29 *Del. C.* § 10005(c).

¹⁰ *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).

¹¹ 29 *Del. C.* § 10003(a).

statute or common law” are exempt from the definition of “public record” pursuant to 29 *Del. C.* § 10002(o)(6).

In this instance, the Department alleges that 15 *Del. C.* § 4980 prohibits access to the records you have requested. Section 4980 states the following:

(a) Immediately after the election, and within the 2 days immediately following the day of election, all voting materials, including the voting devices, media containing the election results, and secured containers of voted paper ballots, must be stored in a safe and secure place provided by the Department. While the board of canvass is conducting its canvass of the vote, all voting materials must be in the custody of the Prothonotary. While in the Prothonotary’s custody, the voting materials may be examined by order of the board of canvass or any other court of competent jurisdiction.

(b) After the board of canvass has completed its canvass of the vote, the Prothonotary shall turn custody of the voting materials over to the Department. The Department shall leave the voted paper ballots and all documentation extracted from the media containing the election results undisturbed and locked for 22 months after the day of the election. During this period, the voted paper ballots and all documentation extracted from the media containing the election results may be inspected by any duly authorized member or agent of the General Assembly, the Attorney General, or the Department for the purpose of conducting an audit under § 5012A of this title.

This statute provides that the voting materials, which include voting devices, media containing the election results, and secured containers of voted paper ballots, must be turned over to the Department and the voted paper ballots and all documentation extracted from the media containing the election results are to remain undisturbed and locked for 22 months after the day of the election after the canvass of the vote is completed. The State Election Commissioner attested that the items in your request, other than the physical electronic devices without stored data and certain records not in its possession, are voting materials subject to this requirement to remain undisturbed and locked for 22 months after the day of the election.¹² Pursuant to Section 4980, the Department cannot permit access to such records, except under the circumstances designated in the statute, and there is no exception for a citizen making a FOIA request. Accordingly, we determine that the Department appropriately denied access to the requested records under 29 *Del. C.* § 10002(o)(6).

¹² “Public record” is defined in 29 *Del. C.* § 10002(o) as “*information* of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.” (emphasis added).

CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Frank Broujos, Deputy Attorney General
Dorey Cole, Deputy Attorney General