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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB09

April 7, 2022

VIA EMAIL

Janice Lorrhah
Janicelorrhah2012@yahoo.com

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

Dear Ms. Lorrhah:

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 in the Petition.

BACKGROUND

On February 2, 2022, DHSS received your request for the following records:

At the weekly Press Conference of the Governor on February 1, 2022, Dr. Karyl Rattey, Director, Division of Public Health, stated that the “absolute effectiveness” with 2 doses of the COVID-19 vaccine is 80 percent but with a booster the “absolute effectiveness” was 99-100 percent. Please provide any and all documents, studies, and data to support this statement which was also on the slide presentation.¹

¹ Petition, Ex. A.

DHSS provided a response to your request on March 7, 2022, stating DHSS “referenced information regarding vaccine effectiveness during the press conference from a recently released national study from the Journal of the American Medical Association: Studies Suggest COVID-19 Vaccine Boosters Save Lives at <https://jamanetwork.com/journals/jama/fullarticle/2787929>.”² In addition, DHSS cited the website where the slides shared during the presentation could be found. After receiving this response, you asked DHSS to confirm that the only documents contained within DHSS supporting the referenced public statement was the link that was provided. You questioned whether the Director of the Division of Public Health reviewed the website only, or whether the Director also reviewed the underlying data. This Petition followed.³

The Petition asserts DHSS improperly responded to your request because DHSS did not respond to your follow-up question about the response and merely citing a website is not compliant with FOIA. You argue that DHSS must produce all public records responsive to the request or submit an affidavit that there are no such records to produce. You contend that the March 7, 2022 response to your request does neither.

DHSS, through its legal counsel, replied to the Petition on March 22, 2022 (“Response”). DHSS concedes it did not initially answer your question about the response but states that while it was considering whether to respond to your follow-up email, this Petition was filed. DHSS provided the sworn affidavit of the Chief of Staff who handled your FOIA request; she attested that other than the records available through the links cited in the response, DHSS does not have additional records that are responsive to your request. In addition, DHSS notes that FOIA does not require a public body to answer questions, but the Director authorized responding to you that “she has read all the studies associated with the slide [you have] questioned, as well as all other studies she has discussed publicly.”⁴

DISCUSSION

Under FOIA, a public body carries the burden of proof to justify denial of a request for records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ In this instance, after receiving the response to your FOIA request, you questioned whether DHSS provided all the records responsive to your request to support a specific public statement made by the Director. Although DHSS correctly noted that FOIA does not require a public body to answer

² *Id.*

³ This Petition was filed in reply to an earlier petition that is no longer pending, which alleged that DHSS improperly denied this request initially. Thus, portions of the Petition are not applicable to this Opinion.

⁴ Response.

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

questions,⁷ DHSS provided the affidavit of the Chief of Staff attesting that other than the records available through the links cited in the response, “DHSS does not have additional records that are responsive to [your] February 2, 2022 request.”⁸ DHSS also voluntarily offered the Director’s response to your inquiry, stating that the Director read all of the studies associated with the slide that you questioned, in addition to the other studies she publicly discussed. We find no violation of FOIA has occurred.

The Petition also questions whether the response directing you to websites for access to records violates FOIA. Consistent with our precedent, we find that such a response is compliant with FOIA.⁹ FOIA provides that “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”¹⁰ DHSS provided links to websites with responsive records. You have not stated that you are unable to access these records. On this factual record, we find that DHSS has not violated FOIA by providing links to records in response to your FOIA request.¹¹

⁷ See, e.g., *Del. Op. Att’y Gen.* 18-IB24, 2018 WL 2266975, at *4 (May 4, 2018); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017); *Del. Op. Att’y Gen.* 17-IB04, 2017 WL 1317846, at *2 (Mar. 8, 2017).

⁸ Response, Affidavit of DHSS Chief of Staff.

⁹ *Del. Op. Att’y Gen.* 16-IB22, 2016 WL 6684919, at *2 (Oct. 24, 2016) (determining that a response directing a requesting party to a webpage containing the responsive records did not violate FOIA).

¹⁰ 29 *Del. C.* § 10003(a).

¹¹ *Del. Op. Att’y Gen.* 16-IB22, 2016 WL 6684919, at *2 (finding reference to a website where documents may be found an appropriate FOIA response where there is no indication the requesting party does not have internet access).

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

Alexander S. Mackler
Chief Deputy Attorney General

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