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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB12

April 18, 2022

VIA EMAIL

Jordyn Pusey
Jordynmpusey@gmail.com

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

Dear Ms. Jordyn Pusey:

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”) with regard to your February 9, 2022 FOIA 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, we determine that AOA has violated FOIA by failing to include a sworn affidavit that described its search for documents in response to the Petition.

BACKGROUND

On February 9, 2022, you submitted a FOIA request through the AOA’s FOIA request email box, seeking “[a]ll documents regarding requests for proposal, statement of work, and contracts between the Office of Auditor of Accounts and 1787 Consulting” and “[a]ll documents regarding requests for proposal, statement of work, and contracts related to the project gray fox initiative.”¹

¹ Petition, p. 6.

On March 3, 2022, AOA responded with “documents that are responsive to your request, which include the statements of work for each vendor.”² AOA noted that it considered its response to your FOIA request to be complete.³ AOA produced two documents; one is a statement of work with 1787 Consulting and the other is a statement of work with OpenGov.⁴

In response, you stated that AOA’s response was insufficient. Specifically, you argued: (1) that the statement of work for 1787 did not show a scope of work being performed or the actual services being provided by the vendor; (2) contracts and invoices for this work should be provided per the FOIA request; and (3) that the Auditor testified to the Joint Finance Committee that \$200,000 was spent on the OpenGov portal for Project Gray Fox, which is above the FRP threshold and should fall under the formal bidding process. You requested AOA to provide that information and “the contracts pertaining to the work performed, as per my request.” This Petition followed.

The Petition asserts this denial of records beyond the two documents provided is improper. You state that you made a request for these records to AOA and received a reply with only a small portion of your request. You assert that you clarified what you were asking for and was told after a significant delay in response to file a new FOIA request. You argue that the information should have been provided in your original request. You allege that AOA is intentionally withholding public information in violation of FOIA and requiring you to make additional requests as a means to further delay providing the requested information.

AOA, through its Chief Deputy Auditor, replied to the Petition on March 28, 2022 (“Response”). AOA asserts that it provided a statement of work for each vendor and has no further documents responsive to this request. In support of its position, it cites to caselaw that “an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.”⁵ In addition, AOA asserts that your March 4, 2022 response sought the production of new items not mentioned at the time of the initial FOIA request and directed you to file a new FOIA request. AOA emphasizes your request for invoices present in your March 4, 2022 response.

DISCUSSION

FOIA allows Delaware citizens the opportunity to observe and monitor its public officials to further the accountability of government to Delaware citizens.⁶ Consistent with this purpose,

² *Id.*, p. 5.

³ *Id.*, p. 6.

⁴ *Id.*, p. 7-13.

⁵ *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D. C. Cir. 1982) (internal citations omitted). *See Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1546783, at *2 (Jun. 28, 2004) (Delaware Department of Justice finding the law in Delaware to be the same).

⁶ 29 *Del. C.* § 10001.

FOIA requires a public body to provide citizens with reasonable access to its public records for inspection and copying.⁷ Public record is defined 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.⁸ The public body has the burden of proof to justify its denial of access to any records.⁹

The crux of your Petition is that you believe that AOA has responsive records that it has not provided to you and this incomplete production is a violation of FOIA. You asked for “[a]ll documents regarding requests for proposal, statement of work, and contracts between the Office of Auditor of Accounts and 1787 Consulting” and “[a]ll documents regarding requests for proposal, statement of work, and contracts related to the project gray fox[sic] initiative.” In response, AOA provided two documents, one standard of work with 1787 Consulting and one standard of work with OpenGov. AOA does not allege that any responsive records fall under statutory exemptions. Rather, AOA says that all responsive documents to your initial FOIA request were produced. To focus your Petition, you question the adequacy of AOA’s search under the belief that, if AOA had exhausted its FOIA obligations, additional responsive documents would have been found.

The Delaware Supreme Court recently addressed this very issue. The Court held that unless it is clear on the face of the request that the demanded records are not subject to FOIA, the public body must search for the responsive records *and* a description of the search and the outcome of the search must be reflected through statements made under oath, such as statements in an affidavit, in order for the public body to satisfy its burden of proof the burden of proof under § 10005(c).¹⁰ The Court reasoned that this requirement ensures that any reviewing court can determine whether the public body performed an adequate search for the responsive documents and redresses FOIA’s inherent information imbalance.¹¹

When the Petition was filed, the burden of proof under § 10005(c) was placed on AOA. The FOIA request is for documents that are public records as defined by § 10002(o). As such, the ruling of *Judicial Watch* required AOA to provide a sworn affidavit including the efforts taken to determine whether there are responsive records and the results of those efforts.¹² Our Office

⁷ See 29 Del. C. §§ 10002, 10003(a).

⁸ 29 Del. C. § 10002(o).

⁹ 29 Del. C. § 10005(c).

¹⁰ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *10, 11 (Del. Dec. 6, 2021).

¹¹ *Id.* at *11, 12.

¹² *Id.* at *12.

understands that AOA provided documents in response to the FOIA request, and this was not a complete denial of any records. However, AOA failed to include the factual circumstances surrounding its search and provided only the results of its efforts. Without this information, it is impossible for this Office or any reviewing court to determine if AOA performed an adequate search. We recommend that AOA supplement its response with a sworn affidavit in accordance with this opinion and the FOIA statute.¹³

CONCLUSION

For the foregoing reasons, it is our determination that AOA has violated FOIA by failing to include a sworn affidavit in its response to the Petition and recommend that it supplement its response.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Patricia A. Davis, Deputy State Solicitor
Victoria Groff, Assistant Attorney General

¹³ Based on this determination, because AOA needs to provide a suitable affidavit, we do not need to address your other arguments at this time. We believe it would be more efficient to address any questions you have regarding whether AOA has provided all the responsive documents requested after AOA has provided the affidavit explaining AOA's efforts to search.