



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB15

April 26, 2022

VIA EMAIL

Xerxes Wilson
xwilson@delawareonline.com

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

Dear Mr. Wilson:

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 October 27, 2021 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 sufficiently justify its redactions in the produced documents and recommend that it supplement its response.

BACKGROUND

On October 27, 2021, you submitted a FOIA request to the AOA, requesting “[a]ll emails among staff in the Delaware State Auditor’s office including Auditor Kathleen McGuinness and officials for My Campaign Group, including Christie Gross sent between January 2019 and present” and “[r]ecords reflecting the job title of Elizabeth McGuinness as of Sept[ember] 21, 2021 as well as Elizabeth McGuinness’ pay in Sept[ember] 2021.”¹

On November 18, 2021, AOA notified you that it would require additional time to complete one part of your request, because the first request for emails required legal advice and AOA was

¹ Petition Supporting Documents, p. 7, 8, 210.

determining how voluminous the request may be and the length of time to fulfill it. AOA appeared to provide sufficient documentation to satisfy your second request, indicating the Elizabeth McGuiness' job title was intern and received one paycheck in September 2021.² AOA sent a follow up email on January 6, 2022 stating that the email request was voluminous and anticipated having the responsive documents to you within two weeks.³ On January 20, 2022, AOA responded that due to Covid related staff member absences, it would be unable to produce the requested emails at that time.⁴ In a later correspondence, AOA anticipated having the request completed by February 25, 2022.⁵

On February 25 and 28, 2022, AOA produced multiple email documents from Christie Gross to AOA employees.⁶ AOA redacted portions of the communications on the basis of “[d]etails of audits and other engagements between team members (known as ‘work papers’), [p]ersonally identifiable data, such as bank account numbers of Social Security numbers, and [a]ny information related to personnel matters or ongoing litigation.”⁷

In response, you filed a request for a determination as to whether AOA violated FOIA law. This Petition followed.

The Petition asserts the emails produced were heavily redacted and some appear to include redactions that would not fall into any of the categories cited for redaction in AOA's response.⁸ You argue that: (1) the “work papers” exemption cited does not have statutory authority for which you are aware, and if it does have statutory authority, it is misplaced; (2) the personally identifiable data exemption does not have statutory authority for which you are aware and you believe it has been misapplied; and (3) the “personnel matters” or “potential or ongoing litigation” are misplaced, as the email communications requested would not contain the narrow interpretation of personnel matters and that you are not a party to any litigation involving AOA.⁹ You argue that the pending litigation exemption “turns on the identity of the requestor and the purpose of the request” and since you are not a party to any litigation involving the State government or the AOA,

² *Id.*, p. 7.

³ *Id.*, p. 6.

⁴ *Id.*, p. 5.

⁵ *Id.*, p. 5.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*, p. 1.

⁹ *Id.*

the exemption should not apply.¹⁰ You further argue that the only potential litigation is the pending criminal case against Auditor Kathy McGuiness and it is not clear if the pending litigation exemption applies to criminal cases.¹¹ You request that this Office conduct an *in camera* review of responsive documents to assess the legitimacy of the redactions included in the auditor's response and determine whether a violation of FOIA has occurred.¹²

AOA, through its Deputy Auditor, replied to the Petition on April 5, 2022 ("Response"). AOA explains that it believes Mr. Wilson is taking issue only with respect to his request for the emails among staff in AOA, including Auditor Kathleen McGuiness and officials for My Campaign Group, including Christie Gross sent between January 2019 and present. AOA explains that it provided a copy of Ms. Elizabeth McGuiness' one paycheck from September 2021 and an explanation that her job title was intern and Mr. Wilson's petition does not take issue with that.

AOA asserts that it compiled a voluminous number of records, sorted them, and removed duplicates, and made several redactions pursuant to 29 *Del. C.* § 10002(o). The Deputy Auditor, Tori Ann Parker, signed a sworn affidavit that in AOA's search to answer Mr. Wilson's FOIA request, it printed all the requested email communications, reviewed, and duplicate communication was removed, and confidential information redacted. The Deputy Auditor asserts that AOA's redactions were made for three categories of information: (1) working papers, characterized as engagement planning, nature, timing, extent, legal and regulatory requirements, auditor procedures, evidence gathered, significant judgements, and subsequent information considered "working papers" by the Generally Accepted Government Auditing Standards (GAGAS) produced by the United States Government Accountability Office (GAO); (2) personally identifiable data; and (3) personnel file material.¹³

DISCUSSION

As an initial matter, you request that this office make a determination whether a violation of FOIA has occurred and to conduct an *in camera* review of responsive documents to assess the legitimacy of the redactions included in the auditor's response.¹⁴ Under Delaware's FOIA law,

¹⁰ *Id.*, p. 1 citing *Del. Op. Att'y Gen.* 03-IB21, 2003 WL 22669566.

¹¹ *Id.*, p. 1.

¹² *Id.*, p. 2.

¹³ It appears that AOA initially indicated that some redactions were based on potential or ongoing litigation. *See* Petition Supporting Documents, p. 3. However, in its Response to this Office, it claimed no redactions based on potential or ongoing litigation. As such, we will not address this exemption.

¹⁴ Petition Supporting Documents, p. 2.

this Office nor the courts are *required* to conduct an *in camera* review of withheld records.¹⁵ This Office has previously held that only a court with its ability to order *in camera* review can make that analysis.¹⁶ Rather, our inquiry is limited to whether or not the public body provided sufficient reasons for withholding the redacted information to satisfy its burden of proof.¹⁷

Under FOIA, a public body carries the burden of proof to justify denial of a request for records.¹⁸ 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.¹⁹ By statute, the definition of “public record” excludes “any records specifically exempted from public disclosure by statute or common law.”²⁰

Your petition asserts that AOA’s reasons for redactions are either not recognized FOIA exemptions or are misapplied. AOA, as the public body with the burden of proof, submitted three exemptions for its redactions.

First, AOA asserts that working papers are confidential pursuant to “5 U.S.C. § 552(b)(3) Deliberative Process Privilege as 29 *Del. C.* § 10002(o) protects records exempt under common law.”²¹ AOA gives a definition of working papers from Generally Accepted Government Auditing Standards (GAGAS) by the Governmental Accountability Office (GAO).²²

The problem, however, is that 5 U.S.C. § 552(b)(3) only states that § 552 [referring to FOIA laws] “does not apply to matters that are specifically exempted from disclosure by statute...if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types

¹⁵ *Flowers v. Office of the Governor*, 167 A.3d 530, 548-49 (Del. Super. 2017).

¹⁶ *See Del. Op. Att’y Gen.* 18-IB36, 2018 WL 3947261, at FN 13 (Aug. 10, 2018) (finding that OGov’s Response with the affidavit of counsel stating that it has a good faith basis for its claims of executive privilege and extensive legal analysis of the application of the application was sufficient to find no violation of FOIA).

¹⁷ *Flowers v. Office of the Governor*, 167 A.3d at 549.

¹⁸ 29 *Del. C.* § 10005(c).

¹⁹ 29 *Del. C.* § 10002(o).

²⁰ 29 *Del. C.* § 10002(o)(6).

²¹ Response Supporting Documents, p. 1, 2.

²² *Id.*, p. 2.

of matters to be withheld; and, if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.”²³ Nothing in § 552(b)(3) establishes (or recognizes) a “working papers” privilege. AOA’s reliance on 29 *Del. C.* § 10002(o) has the same problem, § 10002(o) excludes from FOIA certain records in seventeen specific exemptions.²⁴ “Working papers” is not specifically stated in these exemptions.

AOA suggests that working papers are protected by a deliberative process privilege and explains that working papers are something recognized by both the GAO and GAGAS. It may be true that working papers could be exempted from FOIA through the deliberative process privilege, but the problem with AOA’s response is that it fails to provide any legal basis (statute, caselaw, etc.) that would allow this Office (or the public) to conclude that working papers have been recognized as exempt from FOIA in Delaware. More directly, AOA needs to explain why its working papers are subject to the deliberative process privilege and then explain that the deliberative process privilege has been recognized in Delaware such that the AOA’s working papers are exempt from FOIA.²⁵ For these reasons, AOA has not met its burden to justify its redaction based on a purported working papers exemption.

Next, AOA asserts that some redactions were for personally identifiable data, such as bank account numbers or Social Security numbers.²⁶ You question the statutory basis for this exemption.²⁷ This Office has previously held that personally identifiable data like bank account numbers or Social Security numbers is not essential for government accountability and disclosure of such information would invade personal privacy.²⁸ We maintain that redactions based on bank account numbers or Social Security numbers is not a violation of FOIA.

Finally, AOA cites personnel file material as its third reason for redactions. Personnel files whose disclosure would be an invasion of personal privacy are exempted from FOIA by statute.²⁹ Your petition appears to take no issue with the legal basis for personnel file material but argues that it is misplaced.³⁰ Personnel files, which would constitute an invasion of personal privacy is

²³ 5 U.S.C. § 552(b)(3).

²⁴ 19 *Del. C.* § 10002(o).

²⁵ It does not appear that AOA is suggesting that working papers are draft documents, but if that is the case, AOA needs to clearly state that.

²⁶ Response Support Documents, p. 2.

²⁷ Petition Supporting Documents, p. 1.

²⁸ *Del. Op. Att’y Gen.* 06-IB17, 2006 WL 2630107, at *8 (Aug. 21, 2006) citing *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 37 (D.D.C. 2000).

²⁹ 29 *Del. C.* § 10002(o). See *Del. Op. Att’y Gen.* 17-IB19, 2017 WL 3426259.

³⁰ Petition Supporting Documents, p. 1.

statutorily exempted under Delaware law.³¹ While you dispute the application of this exemption, this Office's inquiry is limited to assessing whether the State agency properly raised and explained its decision to make redactions. Accordingly, we cannot assess the underlying legal validity of the application of its reasons for redactions.

We find that AOA has violated FOIA. AOA may either supplement its response with the legal basis for its working papers redactions, or release the requested documents without those redactions.

CONCLUSION

For the foregoing reasons, it is our determination that AOA has violated FOIA by failing to sufficiently justify its redactions in the responsive documents. AOA may either supplement its response with the legal basis for its working papers redactions, or release the requested documents without those redactions.

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

³¹ 29 *Del. C.* § 10002(o)(1).