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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB28

August 23, 2022

VIA EMAIL

Dan Shortridge
danshortridge@gmail.com

RE: FOIA Petition Regarding the Delaware Auditor of Accounts

Dear Mr. Shortridge:

We write in response to your correspondence alleging that the Delaware Auditor of Accounts (“AOA”) 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. Although AOA failed to meet the 15 business day statutory deadline to respond to your Request, we find your Petition is now moot because AOA, in its Response, provided an affidavit response to your FOIA request.

BACKGROUND

On the evening of June 29, 2022, you sent a FOIA request to AOA for “access to and copies of all communications between the Auditor’s office and any individual, organization or representative from the pharmacy industry or individual pharmacists regarding the report titled “Strengthening our Frontlines Securing Provider Status for Delaware’s Pharmacists [and] covers the time period from the start of the planning, preparation, research, or writing of this report to date.”¹ Your request included that “[c]ommunications’ should be interpreted as broadly as possible, and include but not be limited to letters, emails, text messages, memos, notes or transcripts of phone or video conversations, faxes, and notes or transcripts of meeting.”² You also

¹ Petition.

² *Id.*

requested “any materials provided, prepared, or written by any individual, organization or representative from the pharmacy industry or individual pharmacists and used during the research, writing, or preparation of, the report titled ‘Strengthening our Frontlines Securing Provider Status for Delaware’s Pharmacists’” excluding materials cited on page 6 of the report.³

On June 30, 2022, AOA acknowledged your FOIA request and AOA’s Deputy Auditor stated that she would begin gathering the information. On July 22, 2022, you asked about the status of your request and noted the 15 business day deadline passed the previous day. Later that day, AOA’s Deputy Auditor responded that she will prepare the required affidavit to respond to your FOIA request and respond with the requested information. You then replied and asked when that would be forthcoming.

On July 27, 2022, you filed this Petition asking our Office to determine if AOA violated FOIA by failing to respond as required by the statutory deadline.⁴ You stated that you made a request on the evening of Wednesday, June 29, 2022 with an effective receipt day of June 30, 2022 and the 15 business day deadline for a response expired on Thursday, July 21, 2022 and AOA did not respond.

AOA, through its Deputy Auditor, replied to the Petition with a sworn affidavit on August 5, 2022 (“Response”). The Deputy Auditor asserted that she reviewed your request, reviewed email, text, and phone communications during the time period that the relevant report was written, referenced phone calls, and communications between individuals in the office of AOA.⁵ There were no documents produced with the Response. It appears that AOA is asserting that there are no responsive documents to your FOIA request.

On August 5, 2022, you submitted a response to this Office (“Reply”) where you argue that AOA’s Response is insufficient both in substance and in failing to identify any defense or explanation for its lack of response by the statutory deadline.^{6,7}

³ *Id.*

⁴ *Id.*

⁵ Response, p. 1.

⁶ Petitioner’s Reply.

⁷ Because the responding party has not had an opportunity to reply, this Office is unable to address an issue outside of the allegations of the Petition. *See Del. Op. Att’y Gen.* 18-IB51, 2018 WL 6591816, at *FN 4 (Nov. 20, 2018).

DISCUSSION

FOIA requires a public body to respond to a request as soon as possible but no later than 15 business days after receiving the request.⁸ This response must grant or deny access to the record, or if more time is needed, the public body must provide a permissible reason for the delay and a good faith estimate of the amount of time needed to respond.⁹ In certain circumstances, a sworn affidavit from the public body may be required.¹⁰

AOA did not provide the statutorily required good faith estimate of the additional time needed. In its Response, AOA did provide a sworn affidavit responding to your records request, albeit beyond the 15 day statutory deadline. We caution AOA to supply responses or statutorily acceptable reasons that more time is needed within the 15 day statutory deadline in compliance with FOIA in the future.

As your Petition was directed to whether AOA violated FOIA by failing to provide the requested documents within 15 business days, this Petition is found to be moot because AOA has responded to your FOIA request. The new issues raised in the Reply are separate from this petition.¹¹ If you wish to challenge AOA's response, you may do so through a separate petition.

CONCLUSION

As set forth above, it is our determination that the Petition is considered moot.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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

⁸ A public body must “respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.” 29 *Del. C.* § 10003(h).

⁹ *Id.*

¹⁰ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

¹¹ *Del. Op. Att’y Gen.* 19-IB25, 2019 WL 4538311, at *3 (May 10, 2019).