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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB38**

**October 17, 2022**

**VIA EMAIL**

Karl Baker  
[Kbaker6@gmail.com](mailto:Kbaker6@gmail.com)

**RE: FOIA Petition Regarding the Delaware Department of Insurance**

Dear Mr. Baker:

We write regarding your correspondence alleging that the Delaware Department of Insurance violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we find that the Department demonstrated that its need for additional time to respond to your request was appropriate under the statute and that no violation of FOIA occurred with respect to the Department’s estimations of when a response would be complete.

**BACKGROUND**

On March 8, 2022, you submitted the following FOIA request to the Department:

[A]ll documents related to contracts awarded by the Delaware Department of Insurance to Zack Stamp Consulting LLC between 2009 and the present day. These should include, but not be limited to, requests for proposals, requests for information, award notices, consulting agreements, monthly invoices, and statements of invoice disputes.<sup>1</sup>

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<sup>1</sup> Petition.

On March 29, 2022, the Department sent an interim response, noting that additional time was needed, as the request had been submitted to legal counsel for review; the Department expected the review would take up to an additional thirty business days. On May 10, 2022, the Department sent a second interim response, again stating that the request remains under legal counsel's review and noting that it may take up to an additional thirty business days. On June 21, 2022, the third interim response was identical to the second response, noting that the request may take up to an additional thirty business days. The fourth interim response, sent on August 2, 2022, and the fifth interim response, sent on September 13, 2022, were also the same.

This Petition followed. Given the inaccuracy of the original time estimate and that subsequent time reassessments were thirty business days in each instance, you argue that the Department has employed "a bad-faith delaying tactic."<sup>2</sup> You argue that the statute requires that the public body give a good faith estimate of how much additional time is needed to fulfill the request. In this case, more than six months have passed since the date the Department received your request. You contend that even though the Department FOIA coordinator called the request quite broad, you believe a request for government contracts should be the most basic type of request that a public body handles, as these records are "among the necessary for the public to see, as they show how Delaware government spends taxpayer money on private consultants – in this case one that directs an entire office within the Delaware Department of Insurance."<sup>3</sup>

The Department, through its counsel, responded on September 23, 2022 to the Petition ("Response") and included the affidavit of its Deputy Insurance Commissioner in support of its arguments. The Department first argues that this Petition is not ripe because no violation has occurred or is about occur. Instead, the Department alleges that it is still in the process of compiling and reviewing records; thus, no denial of access to records has occurred. Second, the Department asserts that FOIA permits public bodies to extend response times when a request is for voluminous records, requires legal advice, or is in storage or archived, and this request qualifies for all three reasons. The Deputy Commissioner attests that this request seeks approximately thirteen years of records, and the Department has identified twenty categories of responsive records and compiled over 1,000 potentially responsive records so far; some records may be archived or in storage or subject to retention policies. The records, she attests, were received between March 11, 2022 and June 21, 2022 from the Director of the Bureau of Captive and Financial Insurance Products and the Department's accounting division. The Deputy Commissioner's affidavit further states that the assigned legal counsel had emergent and time sensitive matters through July to September of this year. In the affidavit, the Deputy Commissioner states that the Department will release the contracts on September 23, 2022 and provide a cost estimate for all other potentially responsive records. Finally, the Department's counsel expressly denies that it is employing a bad-faith delay tactic. As more records were, and continue to be, discovered, the Department asserts that its extensions are necessary. The Department states that it has limited resources to investigate, compile, and review such a broad and voluminous request.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

## DISCUSSION

The public body carries the burden of proof to demonstrate compliance with the FOIA statute.<sup>4</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>5</sup> FOIA requires public bodies to “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.”<sup>6</sup> If access cannot be provided within 15 business days, the public body must give one of the designated reasons “why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”<sup>7</sup>

The Petition challenges the Department’s delay in providing the records, questioning whether the repeated 30-business day extensions of time were made in bad faith. We determine that this allegation is ripe for consideration. Although not all the applicable rationale was listed in the Department’s correspondence advising of the extension, the Department provided sworn testimony to support its reasons for the delay, which are acceptable under the statute. The Deputy Commissioner also explained in her affidavit the facts surrounding the request, including the circumstances that affected the timing and processing of the request. Based on this record, there is no indication that the Department’s invocation of the need for additional time for the stated reasons was improper nor is there any evidence of the Department’s bad faith in estimating its timeframes for completion.<sup>8</sup> Therefore, although we encourage the Department to identify its reasons for delay and its time estimates with greater specificity in the future, we find the Department demonstrated that its delay was appropriate under the statute and determine no violation of FOIA occurred with respect to the Department’s extensions in responding to your request.

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<sup>4</sup> 29 Del. C. § 10005(c).

<sup>5</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>6</sup> 29 Del. C. § 10003(h)(1).

<sup>7</sup> *Id.*

<sup>8</sup> *Del. Op. Atty. Gen.* 21-IB23, 2021 WL 4786753, at \*3 (Oct. 4, 2021); *Del. Op. Att’y Gen.* 17-IB23, 2017 WL 3426263, at \*9 (July 14, 2017) (“While I recognize that you believe the additional time for legal review to have been ‘egregious,’ I see no evidence that DPH’s invocation of the need for additional time for legal review was improper, nor do I see evidence of bad faith in DPH’s estimate of how much additional time was needed.”).

## **CONCLUSION**

For the foregoing reasons, we determine that the Department demonstrated that its need for additional time to respond to your request was appropriate under the statute and that no violation of FOIA occurred with respect to the Department's estimations of when a response would be complete.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Kathleen P. Makowski, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General