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

**Attorney General Opinion No. 22-IB39**

**October 17, 2022**

**VIA EMAIL**

Hannah Edelman  
[hedelman@delawareonline.com](mailto:hedelman@delawareonline.com)

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

Dear Hannah Edelman:

We write regarding your correspondence alleging that the Delaware Department of Correction (“DOC”) 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 conclude that the DOC violated FOIA, as the DOC failed to meet its burden of justifying the denial of access to the requested record.

**BACKGROUND**

On August 30, 2022, you submitted a request to the DOC asking for the “number of inmate deaths broken down by year, cause of death and facility from 2018 to present.”<sup>1</sup> The request stated that this same information for an earlier time period was previously provided to another reporter on June 11, 2018. The DOC responded on September 14, 2022, providing a log that listed the names of inmates, dates of birth, dates of death, race, and facility, but the cause of death was redacted due to the privacy of medical information.

This Petition followed, alleging that the response was improper because you “did not ask for the names of people who died in DOC custody – only the total number of inmates who died

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<sup>1</sup> Petition.

broken down by cause of death.”<sup>2</sup> You assert that excluding the names from this record would have made this information non-identifiable, and you believe providing the cause of death would not violate medical privacy under 29 *Del. C.* § 10002(o)(1). Further, you contend that the DOC has a precedent of providing this information, and as proof, you attached the 2018 response with the information in the format you requested.

The DOC, through its counsel, responded on September 22, 2022 to the Petition (“Response”). The DOC’s counsel claims that its response was proper and in support of this contention, provided the affidavit of its FOIA coordinator. The DOC’s FOIA coordinator attested that “the DOC tracks the decedent’s name, date of birth, race, date of death, location of death, and cause of death in compliance with the federal Death in Custody Reporting Act,” and that to respond to your request, he contacted the DOC’s Bureau of Healthcare, Substance Abuse, and Mental Health Services who provided this log with the name, dates of birth and death, race, facility, and cause of death. The FOIA coordinator attests that he produced this log to you for the timeframe requested, after redacting the cause of death. The DOC’s counsel further explains in the Response, which is not sworn under penalty of perjury, that for its 2018 response to the previous request, the DOC created those summaries, which classified the deaths by natural cause or completed suicide, but those binary choices did not account for overdose deaths or homicides. The DOC’s counsel states that since this 2018 request, the DOC changed the way it collected and reported the cause and manner of death to the U.S. Department of Justice to comply with its statutory obligations, and the DOC’s past provision of information in this format does not obligate the DOC to continue to collect and produce information in that format. In addition, the DOC’s counsel states that the DOC did not have other documents in the format you sought.

## DISCUSSION

The public body has the burden of proof to justify its denial of access to records.<sup>3</sup> The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”<sup>4</sup> “[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”<sup>5</sup> The *Judicial Watch, Inc.* case is still pending, and at this point in the proceedings, the Superior Court of Delaware has indicated that generalized assertions in the affidavit will not meet the burden.<sup>6</sup> If a

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

<sup>3</sup> 29 *Del. C.* § 10005(c).

<sup>4</sup> 267 A.3d 996, 1010 (Del. 2021).

<sup>5</sup> *Id.* at 1012.

<sup>6</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at \*3 (Jun. 7, 2022) (“The Court finds that the generalized statements in the Affidavit do not meet ‘the burden to create a record

public body does not have existing responsive records, FOIA does not require a public body to create a new record to respond to a request.<sup>7</sup>

In this case, the request sought specific information in a format that the DOC provided several years ago in unredacted form. Despite the DOC's acknowledgement that it previously provided this information in the form you requested, the affidavit merely describes how the DOC obtained the record that the DOC currently provided to you, which was produced in a form with more than what you requested, and with the cause of death redacted. However, the affidavit does not provide specific sworn testimony regarding whether the DOC made any efforts, and the results of those efforts, to determine whether there are any DOC records with this specific information in the particular format requested. The DOC counsel's unsworn statements in the Response that expound on the circumstances regarding these records cannot be used to satisfy the DOC's burden of proof.

Thus, we find that the DOC violated FOIA, as the DOC did not meet its burden of justifying the denial of access to the requested information. It is recommended that the DOC, in compliance with the timeframes set forth in Section 10003, supplement its response to your request to address these issues, and if applicable, provide any existing record in the format with the specific information you requested.

### **CONCLUSION**

For the foregoing reasons, we determine that the DOC violated FOIA, as the DOC failed to meet its burden of justifying the denial of access to the requested record.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Gregory E. Smith, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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from which the Superior Court can determine whether the University performed an adequate search for responsive documents.'").

<sup>7</sup> *Del. Op. Att'y Gen.* 15-IB02, 2015 WL 3919061, at \*2 (Jun. 17, 2015) ("FOIA does not require a public body to create records that do not exist . . .") (citing *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at \*4 (Aug. 21, 2006)); *Del. Op. Att'y Gen.* 08-IB05, 2008 WL 1727613 at \*1 ("There are no existing documents that provide the information [the requesting party] seeks, and he has no right under FOIA to anything other than existing documents.'").