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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB40

October 19, 2022

VIA EMAIL

Scott Becker
scottjbecker@outlook.com

RE: FOIA Petition Regarding the Delaware Department of Safety and Homeland Security

Dear Mr. Becker:

We write regarding your correspondence alleging that the Delaware Department of Safety and Homeland Security ("DSHS") 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. We determine that the DSHS violated FOIA by failing to provide a cost estimate or follow FOIA's requirements to assert that additional time is needed.

BACKGROUND

You submitted a request to the DSHS on August 19, 2022 seeking various types of records and correspondence related to the "voluntary certificate of possession" and that discuss House Bill No. 450, including the procedures specified by the Delaware General Assembly in this legislation. After receiving no response to your request, you filed this Petition, which was accepted on September 14, 2022. On that same day, the DSHS's FOIA coordinator contacted you and apologized for missing your request and stated it was sent for legal review, and a response would be provided by September 19, 2022. A couple of days later, the DSHS emailed you again noting that a response would be provided on September 20, 2022 and asking you to withdraw the petition; you declined to do so.

On September 21, 2022, the DSHS’s counsel replied to this Petition (“Response”), providing a copy of the DSHS’s response sent the previous day and arguing that this Petition is now moot. The September 20, 2022 email stated that the DSHS “will undertake to identify the persons who may have responsive records and will provide you with a cost estimate to collect the correspondence you are requesting.”¹

DISCUSSION

The public body carries the burden of proof to demonstrate compliance with the FOIA statute.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ 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.”⁴ 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.”⁵ Prior to fulfilling a request that would require a public body to incur administrative fees, the public body must provide an itemized written cost estimate.⁶ “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”⁷

In this case, the DSHS admits that it did not respond to your request within fifteen business days. To date, the DSHS has still not responded to your request by providing access, denying access, following the requirements to assert that additional time is needed, or providing a cost estimate as authorized by the statute, which serves as an interim response and requires the requesting party to advise if the party wishes to proceed, cancel, or modify the request. The September 20, 2022 email indicates that the DSHS will work on providing a cost estimate; such a response does not qualify as a response to a request compliant with the statute. Accordingly, we find that the DSHS violated FOIA by not responding to your request as provided by Section 10003.

¹ Response, Ex. A.

² 29 Del. C. § 10005(c).

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

⁴ 29 Del. C. § 10003(h)(1).

⁵ *Id.*

⁶ 29 Del. C. § 10003(m)(2).

⁷ *Id.*

CONCLUSION

For the foregoing reasons, we determine that the DSHS violated FOIA by not responding to your request in accordance with the FOIA statute.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Lisa M. Morris, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General