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

**Attorney General Opinion No. 23-IB15**

**May 18, 2023**

**VIA EMAIL**

Susan Dixon  
[sid29@prodigy.net](mailto:sid29@prodigy.net)

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

Dear Ms. Dixon:

We write regarding your correspondence alleging that the Delaware Department of Elections 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 did not violate FOIA by denying access to the records you requested.

**BACKGROUND**

On December 1, 2022, you sought three items from the Delaware Department of Elections: “all Election Day Issues Logs for each Election District in New Castle County; all Poll Book Certification Forms for both Opening and Closing the Poll Books for each Election District in New Castle County; and all Voting Machine Certificates for Opening and Closing the Voting Machines for each Election District in New [Castle] County.”<sup>1</sup> After advising of the need for additional time to process this request, the Department replied on February 28, 2023, providing issues logs in response to the first item, and denying access to the two remaining items, as they are considered “voting materials” under 15 *Del. C.* § 4980(b) and therefore exempt from disclosure under 29 *Del. C.* § 10002(o)(6). This Petition followed.

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<sup>1</sup> Petition.

The Petition alleges that the Department improperly denied access to these two items. You argue that the Department did not assert that the documents are exempt from FOIA under 29 *Del. C.* § 10002. In addition, you contend that the Department’s reliance on 15 *Del. C.* § 4980(b) is misplaced. In your opinion, the certificates do not fall within 15 *Del. C.* § 4980 or the definition of “voting materials,” as they are not ballots or documentation extracted from media, and the sections of the Code referring to voting certificates have been repealed. You argue that the term “voting materials” is not statutorily defined, and you believe this does not include the certificates you requested. You claim the Department’s denial conflicts with the public policy to make information about the electronic voting systems publicly available. As the Department has been working on this request for three months, you believe that the requested information should be provided to you.

The Department’s counsel responded to the Petition on the Department’s behalf (“Response”) and included an affidavit from the State Election Commissioner. The Department explains that the Board of Canvass in each county, on the second day after the general election, convenes to canvass the vote and report the election results. Those voting materials are collected by the Department and stored, under guard, at the Department’s warehouse facilities and at the courthouse. The Department, upon closing of the polls, delivers and turns over the voting materials to the respective county Prothonotary for the duration of the canvass. During the canvass, if any materials must be accessed from the warehouse, the Board of Canvass must issue an order to access the records and deliver them to the courthouse. Once the canvass is complete, Section 4980 requires the Prothonotary in each county to return all voting materials to the Department to be secured “undisturbed and locked for 22 months after the day of the election.”<sup>2</sup> Both the Delaware Constitution and Delaware Code reference “voting machine certificates” in their descriptions of the records to be reviewed by the Board of Canvass.

Although voting materials are not defined in the Code, the Department asserts that these poll book certifications and voting machine certificates you request are voting materials, and as they are precluded from disclosure by Section 4980, the records are exempt from FOIA under 29 *Del. C.* § 10002(o)(6). Even though Section 4980(a) includes a description of some voting materials, the list in this definition is preceded by the word “including,” which indicates the list is not exhaustive. The Department also points out that Section 5008A pertains to certification processes that occur prior to an election, as opposed to the certifications you seek that are completed at the polling places on the day of the election and are used by the Board of Canvass after the election when certifying the materials. For the 2022 general election, the Election Commissioner attests that “those specific records [you requested] were included in the voting materials provided by the Department to the New Castle County Board of Canvass . . . immediately following the 2022 General Election, and have been stored ‘undisturbed and locked’ and under seal by the Department since November 14, 2022, when all of the voting materials were returned to the Department by the Board of Canvass following its canvassing (certification) process, as required by Section 4980.”<sup>3</sup>

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<sup>2</sup> Response, p. 4.

<sup>3</sup> *Id.*, Ex. 2.

## DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.<sup>4</sup> In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.<sup>5</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>6</sup>

Under FOIA, “records specifically exempted from public disclosure by statute or common law” are excluded from the definition of “public record.”<sup>7</sup> In other words, when another statute outside of FOIA exempts a record from public disclosure, that record is also exempt from disclosure under FOIA pursuant to 29 *Del. C.* § 10002(o)(6). In this case, the Department explains that 15 *Del. C.* § 4980 prohibits the disclosure of the records you have requested, as they are voting materials. Section 4980 states that “[i]mmediately after the election, and within the 2 days immediately following the day of election, *all voting materials, including the voting devices, media containing the election results, and secured containers of voted paper ballots*, must be stored in a safe and secure place provided by the Department.”<sup>8</sup> While this term is not defined in the statute, a plain reading of the term “voting materials” broadly refers to records in the voting process, which include the poll book certification forms and voting machine certificates you have requested.<sup>9</sup> Section 4980’s use of the term “including” indicates that the list of examples following “voting materials” is not exhaustive.<sup>10</sup> In addition, we note that the voting machine certificates are expressly cited as part of the materials the Boards of Canvass must review.<sup>11</sup>

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<sup>4</sup> 29 *Del. C.* § 10003(a).

<sup>5</sup> 29 *Del. C.* § 10005(c).

<sup>6</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>7</sup> 29 *Del. C.* § 10002(o)(6).

<sup>8</sup> 15 *Del. C.* § 4980(a) (emphasis added).

<sup>9</sup> *Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492, 495-96 (Del. 2012) (“‘The goal of statutory construction is to determine and give effect to [the] legislative intent.’ When a statute is interpreted, ‘[u]ndefined words ... must be given their ordinary, common meaning.’ Those words ‘should not be construed as surplusage if there is a reasonable construction which will give them meaning.’ Courts ‘must ascribe a purpose to the use of statutory language, if reasonably possible.’ Where the statutory language is clear on its face and is fairly susceptible to only one reading, the unambiguous text will be construed accordingly, unless the result is so absurd that it cannot be reasonably attributed to the legislature.”).

<sup>10</sup> *Arwood v. AW Site Services, LLC*, 2022 WL 973441, at \*2 (Del. Ch. Mar. 31, 2022) (“Delaware courts similarly view ‘including’ as ‘a term of enlargement, and not of limitation.’”).

<sup>11</sup> Del. Const. art. V, § 6; 15 *Del. C.* § 5701(a).

The Election Commissioner attests that the records you seek have been “undisturbed and locked’ and under seal” since November 14, 2022 when the Board returned those materials after completing its canvassing process under Section 4980.<sup>12</sup> These items are only accessible as provided in Section 4980, which does not include inspection by the public pursuant to the FOIA request process.<sup>13</sup>

### **CONCLUSION**

For the foregoing reasons, we determine that the Department did not violate FOIA by denying access to the requested records.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Frank N. Broujos, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>12</sup> Response, Ex. 2.

<sup>13</sup> 15 *Del. C.* § 4980(b).