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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB24

August 9, 2023

VIA EMAIL

Meredith Newman
The News Journal
mnewman@delawareonline.com

RE: FOIA Petitions Regarding the Delaware Department of Health and Social Services

Dear Ms. Newman:

We write regarding your correspondence alleging that the Delaware Department of Health and Social Services (“DHSS”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as two Petitions for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. We issue this combined Opinion to address both Petitions. For the reasons set forth below, we conclude that the DHSS violated FOIA by failing to make a good faith estimate of the time needed to complete these requests.

BACKGROUND

On August 23, 2022, you submitted a FOIA request to the DHSS seeking emails from the DHSS employees with the terms “assisted living” and “discharge” from January 1, 2022 to September 14, 2022. After you narrowed this request to a list of employees and paid the \$114.00 fee that the DHSS assessed, you state that the DHSS lost your check. After mailing a new check, the DHSS FOIA coordinator confirmed receipt of the check on November 16, 2022. Almost two weeks later, in response to your email requesting an update, the DHSS FOIA coordinator emailed you advising that an additional ten business days would be needed to fulfill the request. After you followed up in February, the DHSS, on March 28, 2023 asserted that an additional fifteen business days would be required, as the records retrieved were voluminous. On April 21, 2023, the DHSS noted that another fifteen business days would be needed. On June 27, 2023 and July 6 and 7,

2023, you asked for updates. Receiving no reply, you then filed a petition on July 7, 2023, alleging that the DHSS's FOIA coordinator did not give timely and accurate good faith estimates of the time needed to complete the request ("First Petition").

On April 25, 2023, you submitted a FOIA request for all emails of the DHSS Division of Health Care Quality employees regarding Harmony at Kent since 2020. On this same day, you narrowed this request to certain employees. After the DHSS provided you with a cost estimate on May 5, 2023, you paid the requested fee. After you requested an update on May 17, 2023, the DHSS emailed you on May 31, 2023 stating that the DHSS would require an additional ten business days for legal review. On June 27, 2023 and July 6 and 7, 2023, you requested updates. On July 7, 2023, you then filed a second petition, alleging that you have not received the response to this request and the FOIA coordinator has not timely communicated when you asked for updates ("Second Petition").

The DHSS, through its legal counsel, replied to both Petitions, enclosing the affidavit of its FOIA coordinator in support of its response. With respect to the First Petition, the DHSS FOIA coordinator outlined the steps she took to process your request, noting that she received the resulting 1,295 emails from the Delaware Department of Technology and Information ("DTI") on January 5, 2023. The FOIA coordinator acknowledged under oath "rather than provid[ing] a good faith estimate of the time needed for review, I repeatedly asked for 15 business day extensions due to the voluminous records."¹ In addition, she stated that she anticipated completing her review of the records by July 28, 2023 and advised that an additional thirty days would be needed for legal review. For the Second Petition, the FOIA coordinator again provided sworn statements regarding the processing of this request, noting that she received 461 emails, totaling 2,830 pages, from DTI for this request. She again asserted that she expected to complete her review by July 28, 2023 and legal review is expected to be completed by August 28, 2023. The DHSS contends that as you have not been denied access to the records under Section 10005, no violation of FOIA has occurred. Additionally, given the volume of records and the need for legal review, the requested extensions for both requests are necessary.

DISCUSSION

The public body bears the burden of proof to justify its denial of access to records and to otherwise demonstrate its 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

¹ Response, Aff. of the DHSS FOIA Coordinator dated July 18, 2023.

² 29 *Del. C.* § 10005(c).

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

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

In both Petitions, you contend that the DHSS did not submit timely updates or make good faith estimates of the time needed to fulfill the request. It is apparent from this factual record that the DHSS FOIA coordinator did not consistently communicate with you, and the FOIA coordinator acknowledges the failure to estimate timeframes in good faith, noting that she repeatedly asked for additional increments of fifteen business days, rather than conveying good faith time estimates. Thus, we find that the DHSS violated FOIA by failing to provide good faith estimates of the time needed, as required by the FOIA statute. As the DHSS asserts in its Response to these Petitions that it estimates fulfilling both requests by August 28, 2023, no further steps are recommended to remediate this violation. However, the DHSS should promptly update you if it determines that it cannot fulfill these requests within this expected timeframe.

CONCLUSION

For the foregoing reasons, we determine that the DHSS violated FOIA by failing to provide good faith estimates of the time needed to respond to these requests.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Lauren E. Maguire, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁴ 29 Del. C. § 10003(h)(1).

⁵ *Id.*