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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB27

September 18, 2023

VIA EMAIL

Robert Heiligman, M.D., M.P.H.
robertheiligman@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Dr. Heiligman:

We write regarding your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) 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 DNREC did not violate FOIA by denying access to the requested record.

BACKGROUND

On August 9, 2023, you submitted a FOIA request to DNREC for an electronic copy of the necropsy report for Haechan, a pudu (a very small South American deer) that died at the Brandywine Zoo after a brief illness. DNREC denied this request, stating “public bodies are only required to comply with FOIA when the requesting party is a citizen of the State of Delaware.”¹ This Petition followed.

In the Petition, you contend that denying this request solely based on citizenship is not appropriate in these circumstances. You allege that the Brandywine Zoo is a public body whose mission statement demonstrates its intent to serve both citizens and noncitizens of the State, including citizens of Brandywine Valley in Pennsylvania, and DNREC, by incorporating the Zoo

¹ Petition.

into its parks system, also is obligated under FOIA to noncitizens. Further, you point out that the Zoo welcomes public support and donations “regardless of geographical source,” making it accountable to a greater audience than Delaware citizens. You assert that this pudu “should be regarded as an animal citizen of the world and not the parochial interest of the State of Delaware.”² While you acknowledge that Attorney General Opinion 16-IB20 concluded that “public bodies are only required to comply with FOIA when the requesting party is a citizen of the State of Delaware,” you believe that the facts in this case compel a different conclusion than the one reached in that opinion.³

DNREC, through its legal counsel, replied to the Petition (“Response”), maintaining its denial was appropriate. DNREC states that your mailing address indicates you reside in Louisiana and you do not dispute your status as a noncitizen in your Petition. DNREC asserts that as the petition process under Section 10005 is only available to Delaware citizens, you lack standing to file this petition.⁴ Additionally, DNREC argues that the Petition’s arguments focus on the Zoo’s operations and mission rather than on the statutory obligations imposed by FOIA. DNREC contends that this opinion “was decided on a legal issue rooted in the language of the FOIA statute and therefore no particular factual scenario can alter that determination.”⁵

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.⁶ In Attorney General Opinion No. 16-IB20, this Office concluded that “citizen” as used in 29 *Del. C.* 10003(a) refers to a citizen of Delaware and that Delaware’s FOIA statute only guarantees access to public records to citizens of Delaware.⁷ The factual record indicates, and you do not dispute, that you are not a citizen of Delaware. DNREC does not have a legal obligation to provide access to public records in response to a FOIA request from a noncitizen. Accordingly, we conclude that DNREC’s denial of your FOIA request based on your lack of Delaware citizenship was proper under FOIA.

² *Id.*

³ *Id.*

⁴ While we have decided to issue a determination here as a courtesy, we feel compelled to note that as a noncitizen, you lack standing to avail yourself of the provisions contained in Section 10005, including the petition process set forth in Section 10005(e).

⁵ Response.

⁶ 29 *Del. C.* § 10005(c).

⁷ *Del. Op. Att’y Gen.* 16-IB20, 2016 WL 5888776, at *5 (Sept. 30, 2016); *see also Del. Op. Att’y Gen.* 21-IB11, 2021 WL 2144533, at *2 (May 12, 2021).

CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Kayli Spialter, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General