



KATHLEEN JENNINGS  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
CRIMINAL DIVISION (302) 577-8500  
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400  
FAMILY DIVISION (302) 577-8400  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-2610

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

**Attorney General Opinion No. 24-IB09**

**February 19, 2024**

**VIA EMAIL**

Xerxes Wilson  
[xwilson@delawareonline.com](mailto:xwilson@delawareonline.com)

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

Dear Mr. Wilson:

We write regarding your correspondence alleging that the Delaware Department of Correction (“DOC”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“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 DOC did not violate FOIA as alleged in the Petition with respect to the second and third items and that the remaining items in the Petition are now moot.

**BACKGROUND**

On May 3, 2023, you submitted a FOIA request for five items:

1. Use of force data by type, location and employee for all Level 4 institutions dating back to Jan. 2014.
2. Any memorandum, signed by the warden or deputy warden of Sussex Community Correction Center, staff of the Bureau of Community Corrections or officials in the Office of the Commissioner between Jan. 1, 2014 and now, discussing offenders being ordered to: roll logs, hold their mattresses, roll pencils, pick up bottle caps or stand stationary on painted footprints.
3. Any policy/procedure documents signed warden of Sussex Community Correction Center, staff of the Bureau of Community Corrections or officials in the Office of the Commissioner between Jan. 1, 2014 and now,

relating to offenders being ordered to: roll logs, hold their mattresses, roll pencils, pick up bottle caps, or stand stationary on painted footprints.

4. All reports pertaining to Sussex Community Correction Center conducted through the American Correctional Association's accreditation process. This is to include the visiting committee report, minutes reflecting any accreditation hearings, accreditation decisions, any appeals and each annual report filed once accreditation was granted. This request seeks responsive documents from Jan. 1, 2014 to present.
5. Any and all written communications involving leadership of the Office of the Commissioner and Sussex Community Corrections Center dating back to Jan. 1, 2014 and regarding offenders being ordered to: roll logs, hold their mattresses, roll pencils, pick up bottle caps or stand stationary on painted footprints. For purposes of conducting a search for electronically stored information, requestor proposes the following terms: Custodians: Individuals that have held the position of Department of Correction Commissioner and/or Deputy Commissioner as well individuals that have held the position of Sussex Community Correction Center and Warden and/or Deputy Warden during the relevant timeframe. Repositories: Electronic mail, text messages, word documents. Search terms:  
Log and (roll or push)  
Pencils and (roll, push, floor or ground)  
Mattress or bedroll  
[B]ottle tabs or bottle caps  
[F]ootprints  
[E]xtra work incentive or (extra work incentives).<sup>1</sup>

The DOC gave three responses to the request. On May 25, 2023, the DOC responded to the fourth item, providing reports pertaining to Sussex Community Correction Center conducted through the American Correctional Association's accreditation process and noting that "the above attached Final accreditation, reaccreditation, annual and Significant Incident Summary reports in this email are from SVOP; SWRU reports will be emailed separately."<sup>2</sup> The email also stated that the first, second, and third items were denied pursuant to 29 *Del. C.* § 10002(o)(6), which exempts records exempted by statute or common law, in this case, under 11 *Del. C.* § 4322(d). The DOC stated that it was still working to gather the remaining annual accreditation reports, as well as the electronically stored information in response to the fifth item. The DOC requested fifteen additional business days for the fifth item. The DOC sent a second response minutes later, attaching more records "regarding SWRU."<sup>3</sup> On June 9, 2023, the DOC followed up with more records, the "missing SVOP, SWRU 2017 Annual ACA reports and Significant Incident Summary

---

<sup>1</sup> Petition.

<sup>2</sup> *Id.* "SVOP" means Sussex Violation of Probation, and "SWRU" means Sussex Work Release Unit.

<sup>3</sup> *Id.*

report that was not included in the prior response.”<sup>4</sup> The parties’ communications ceased until January 9, 2024, when you followed up with the DOC about the electronically stored information, noting that the DOC asked for fifteen business days several months ago. This Petition followed.

In the Petition, you allege that the DOC violated FOIA by failing to assert the justifications for the redactions in the document production, noting some sections are entirely redacted. You argue that the use of force data is not a policy or procedure and is thus not properly withheld under 11 *Del. C.* § 4322. Additionally, you contend that the memoranda, policy, and procedures you requested are not appropriately withheld under this law, because it is “unclear how DOC policy as it relates to in-facility punishments, which prisoners are likely aware of when they are housed in a DOC facility, could endanger anyone.”<sup>5</sup>

The DOC, through its legal counsel, replied to your Petition on January 31, 2024. The DOC first argues that the Petition should be rejected as untimely, as the responses to four of the five items were provided more than six months ago. The DOC points to the statute and notes that as a matter of practice, this Office does not consider petitions alleging FOIA violations more than six months before the receipt of the petition. Alternatively, the DOC argues that it properly responded to four of the five items. For the first item, the DOC states that on January 31, 2024, it gave you the use of force data you requested.

As to the second and third items regarding the policies, procedures, and memoranda, the DOC argues that if such documentation exists, providing them would put the facility, staff, and community at risk and therefore, the records are nonpublic. The DOC provided sworn statements of the Bureau Chief of Community Corrections, who attests to being familiar with the unique security and safety issues associated with the level 4 facilities and that the disclosure of these requested documents would create an officer safety issue as well as provide “the offenders the ability to possibly escape or disrupt plans” and that “[p]re-knowledge of operational procedures of this nature is concerning because it allows offenders to know the outcomes of certain actions and plan accordingly.”<sup>6</sup> For the accreditation documents requested in the fourth item, the DOC explains that the redactions were made under Section 10002(o)(9) and (17) and provides the affidavit of the Chief of Planning, Research, and Reentry attesting to the basis for the redactions. The fifth item, the DOC acknowledges, was not responded to within the statutory timeframe. The DOC committed to prepare a cost estimate for the requested search of electronically stored information as soon as the Department of Technology and Information provided an estimate. On the following day, the DOC provided a copy of the cost estimate for fulfilling the fifth item and asked you to send payment if you wished to proceed.

---

<sup>4</sup> *Id.*

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

<sup>6</sup> Response, p. 122.

## DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.<sup>7</sup> The public body has the burden of proof to justify its denial of access to records.<sup>8</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>9</sup> As a preliminary issue, we address the DOC's argument that the claims you made are untimely under the FOIA statute. The applicable provision in Section 10005(b) provides that "a person denied access to public records by an administrative office or officer, a department head, commission, or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title must within 60 days of denial, present a petition and all supporting documentation to the Chief Deputy as described in subsection (e) of this section." In this case, the request to the DOC contained five items, and the DOC acknowledges it failed to respond to one of the items. Thus, we find that the Petition is timely, as the DOC failed to complete its response to the entire request to trigger this time limitation.

For the first, fourth, and fifth items, we find that these items are no longer in controversy. Since the filing of this Petition, the DOC provided use of force data in response to your first request.<sup>10</sup> For the fourth request, the DOC explained the rationale for its redactions and provided an affidavit from the Chief of Planning, Research, and Reentry in support.<sup>11</sup> For the fifth item seeking communications, the DOC provided you with a cost estimate.<sup>12</sup> Pursuant to Section 10003(m), you may notify the DOC if you wish to proceed with, cancel, or modify your request for the records in the fifth item. As no further controversy exists with regard to these three items, they are considered moot.<sup>13</sup>

---

<sup>7</sup> 29 *Del. C.* § 10003(a).

<sup>8</sup> 29 *Del. C.* § 10005(c).

<sup>9</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>10</sup> Response, p. 228-29.

<sup>11</sup> Response, p. 121.

<sup>12</sup> Response, p. 231-33.

<sup>13</sup> See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994); *Del. Op. Att'y Gen.* 18-IB30, 2018 WL 3118433, at \*2 (Jun. 7, 2018); *Del. Op. Att'y Gen.* 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at \*2 (Del. Ch. July 27, 1998)). If you believe that the DOC's responses to these items violate FOIA in any manner, you are free to file a new petition with our Office in accordance with the FOIA statute and the DOJ's Rules of Procedure for FOIA Petitions and Determinations, including the timeframes and other restrictions the Rules of Procedure and 29 *Del. C.* § 10005.

For the second and third items, the DOC contends that the procedures, policy, and memoranda are subject to 29 *Del. C.* § 10002(o)(6), which excludes records that are exempt by statute or common law. The applicable statute, 11 *Del. C.* § 4322(d), states that a “Department of Correction policy or procedure which, in the judgement of the Commissioner, contains information that could jeopardize the safety or security of a correctional facility, corrections staff, inmates or the public shall be confidential and subject to disclosure only upon written authority of the Commissioner.” The statute is clear that the Commissioner must judge whether the record jeopardizes the safety or security of the facility, staff, inmates, or the public, and the DOC Bureau Chief’s sworn statements in the Response do not establish that the Commissioner made the requisite judgement under the statute. We do not believe that the DOC has met its burden for asserting 29 *Del. C.* § 10002(o)(6).

However, another exemption, 29 *Del. C.* § 10002(o)(17), applies in these circumstances. The DOC’s Bureau Chief of Community Corrections attests that the disclosure of these requested documents would create an officer safety issue and provide the offenders the ability to possibly escape or disrupt plans and that knowing these operational procedures of this nature would allow offenders to know the outcomes of certain actions and plan accordingly.<sup>14</sup> Section 10002(o)(17) relates to “records, which, if copied or inspected, could jeopardize the security of any structure owned by the State or any of its political subdivisions, . . . or could endanger the life or physical safety of an individual.”<sup>15</sup> One of those categories is “[r]esponse procedures or plans prepared to prevent or respond to emergency situations, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures.”<sup>16</sup> The Bureau Chief’s affidavit supports that the records you seek relate to the facility’s operations and security, allowing offenders to anticipate actions, creates an officer safety issue, and potentially jeopardizes community safety as well. Based on the sworn statements provided, we believe that the requested documents in the second and third items fall under this exemption, and we do not find a violation of FOIA on that basis.<sup>17</sup>

---

<sup>14</sup> Response, p. 122.

<sup>15</sup> 29 *Del. C.* § 10002(o)(17).

<sup>16</sup> *Id.*

<sup>17</sup> While we have determined that the DOC’s denial of your request was authorized by FOIA, we caution the DOC to give careful consideration to the reasons provided for any FOIA denial. *See, e.g., Del. Op. Atty. Gen.* 22-IB16, 2022 WL 1547876, at \*3 (Apr. 29, 2022); *Del. Op. Atty. Gen.* 19-IB44, 2019 WL 4538330, n. 19 (Aug. 12, 2019); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, n. 37 (Mar. 10, 2017).

**CONCLUSION**

For the foregoing reasons, we determine that the DOC did not violate FOIA as alleged in the Petition with respect to the second and third items and that the remaining items in the Petition are now moot.

Very truly yours,

/s/ Alexander S. Mackler

\_\_\_\_\_  
Alexander S. Mackler  
Chief Deputy Attorney General

cc: Michael H. Tipton, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General