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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB14

April 15, 2024

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

RE: FOIA Petition Regarding the Delaware Department of Elections

Dear Mr. Chase:

We write regarding your correspondence alleging that the Delaware Department of Elections 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 Department has not violated FOIA by failing to provide records responsive to your request or by providing its responses without sufficiently justifying the materials that were denied.

BACKGROUND

On November 21, 2023, you submitted the following request to the Department:

Pursuant to the Freedom of Information Act, 29 *Del. Code* 100, I am requesting copies of all communications sent or received by any employee, representative, agent or contractor of Department of Elections regarding 1) the political campaigns of, and 2) the campaign finance reports of, Bethany Hall-Long from Jan. 1, 2023 to the present. The records I am seeking include, but are not limited to, all internal and external emails, letters, faxes, texts, memos, reports, audits, phone logs, direct messages, and communications via social media and cellphone apps. I am requesting all such records sent or received by any employee, agent, representative or

contractor of the Department of Elections, including, but not limited to, Anthony Albence, Patrick Jackson, Cathleen Hartsky-Carter, all members of the COE's self-described "campaign finance team," all members of the Board of Elections, and all directors of county election offices.¹

The Department provided responsive records with redactions in three batches, delivering its final response to your request on February 2, 2024 and noting that the Department had no other responsive records. The Department asserted that some responsive emails were not disclosed, as they were subject to attorney-client privilege and exempt under 29 *Del. C.* § 10002(o)(6). The Department noted that it made other redactions pursuant to Section 10002(o)(6) and the investigatory files exemption under Section 10002(o)(3). In its previous responses on January 18 and 26, 2024, the Department noted that it made redactions pursuant to Section 10002(o)(6). This Petition followed.

In the Petition, you claim that the Department did not provide all responsive records. In the second batch of records, some pages were completely blank, and you allege that despite the broad scope of your request, the Department failed to provide anything but a limited number of emails and nothing from private communication devices. Second, you allege that in its response to your request, the Department withheld records without providing proper justification, noting that a public body must justify its denial of access to records, and in some cases, provide a sworn affidavit to do so. You assert the Department redacted email addresses of current and former campaign treasurers, but those emails are on the required committee filings on the Department's website.

The Department, through its legal counsel, replied to your Petition on March 14, 2024 and attached the affidavit of the Community Relations Officer, who also serves as the Department's FOIA Coordinator. The Department states it provided 343 pages of records in response to your request in three batches. Regarding your first claim, the Department argues that it conducted a diligent search and cites to its FOIA Coordinator's affidavit in support. The Department notes that in addition to searching her own records, the FOIA Coordinator inquired with ten Board of Election members, all six Department's County Directors and Deputy Directors, the State Election Commissioner, and the Department's Campaign Finance Manager. The FOIA Coordinator attests she identified this group as "potentially having responsive records" and after legal review, she produced the resulting records to you with redactions.² Regarding your second claim that the Department withheld records without legal justification, the Department asserts that the referenced emails are indeed on the website and acknowledges that the publicly available email addresses did not require redaction, but you have indicated you have received them, effectively removing the redaction. Further, the Department states that it provided adequate legal justification in its response to your request, as it met Section 10003(h)(2)'s requirement that the Department provide you with its reasons for denying access to responsive materials.

¹ Petition.

² Response, Ex. B.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.³ The public body has the burden of proof to justify its denial of access to records.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵ As a preliminary matter, your allegation about the email addresses available to you on the website is not appropriate to address, as there is no justiciable controversy with respect to that issue.⁶

The first claim in the Petition is that the Department did not provide all the responsive records. The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”⁷ “[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”⁸ Generalized assertions in the affidavit will not meet the burden.⁹ For example, the Superior Court of Delaware determined that an affidavit outlining that legal counsel inquired about several issues, without indicating who was consulted, when the inquiries were made, and what, if any documents, were reviewed, was not sufficient to meet this standard.¹⁰

³ 29 Del. C. § 10003(a).

⁴ 29 Del. C. § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁶ *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008) (“Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it.”) (citation omitted); *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)).

⁷ *Judicial Watch*, 267 A.3d at 1010.

⁸ *Id.* at 1012.

⁹ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022) (“The Court finds that the generalized statements in the Affidavit do not meet ‘the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.’”).

¹⁰ *Id.*

In this case, the Department provided specific sworn statements from the FOIA Coordinator who conducted the search, including who was asked for records and when those inquiries were made. The FOIA Coordinator, who also serves as the Community Relations Officer and has more than 25 years of experience in the Department, after consulting with the Election Commissioner, attested to her opinion that this group of individuals potentially has responsive records in the Department. The FOIA Coordinator included the group you identified in this search. The FOIA Coordinator attested that the records resulting from these searches, after the review for exempt materials was completed, were produced to you in three batches. The blank pages did not indicate withheld information, as they were the result of the printing and scanning process.¹¹ Based on this sworn testimony, we find that the Department met its burden of demonstrating that it conducted an adequate search for responsive records and provided those records to you, and no violation occurred.

The Petition's second claim is that the Department withheld records without providing proper justification in its response to your request. Under 29 *Del. C.* § 10003(h)(2), if the public body denies a request in whole or in part, the public body must "indicate the reasons for the denial." The FOIA statute does not require a public body to satisfy a burden of proof in its response to a request; the burden of proof applies to the petition or court process under Section 10005.¹² The Department met the requirement in Section 10003(h)(2) by providing copies of its correspondence, in which the Department asserted the statutory exemptions justifying its redactions in its January 18, 2024, January 26, 2024, and February 2, 2024 responses.¹³ The last response on February 2, 2024 also stated that some emails were withheld pursuant to two statutory exemptions, 29 *Del. C.* § 10002(o)(3) and 29 *Del. C.* § 10002(o)(6).¹⁴ As such, we find that the Department did not violate FOIA by withholding its records without asserting adequate justification in its responses.

¹¹ Response, Ex B.

¹² 29 *Del. C.* § 10005(c) ("In any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.").

¹³ Response, Ex. B.

¹⁴ *Id.*

CONCLUSION

For the foregoing reasons, we determine that the Department has not violated FOIA by failing to provide the records responsive to your request or by providing its responses without sufficiently justifying the materials that were denied.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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