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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB32

August 14, 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 did not violate FOIA in responding to your request.

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 records of all communications and correspondence of Department of Election staff members and employees that were sent to or received from the following individuals: Andrew Volturo, Jennifer Rini, Lacey Eriksen, Nicole Algarin, Matt Dougherty, and Keith Warren. The records I am seeking include but are not limited to texts, emails, landline and cell phone logs, memos, faxes, letters, and direct messages using any social media platform. My request includes all such records, regardless of whether the communications were sent or received using state email addresses, personal email addresses, state-issued phones, personal cell phones, state-issued computers or other electronic devices, or personal

computers other electronic devices. I am seeking records of all such communications and correspondence from May 1, 2023 to the present.¹

The Department provided a response on May 22, 2024, stating that the “Department possesses no responsive records to your request.”² This Petition followed.

In the Petition, you claim that the Department refuses to provide responsive records to your request. You argue that the Department’s assertion that it possesses no records is categorically false and “its falsity can be proven by records I previously obtained pursuant to a FOIA request.”³ However, the Petition did not give any information beyond this general statement, nor provide any evidence in support of your allegation.

The Department, through its legal counsel, replied to your Petition on July 23, 2024 and attached the affidavit of the Community Relations Officer, who also serves as the Department’s FOIA Coordinator. The Department states that it conducted a diligent search for records responsive to your request. The FOIA Coordinator states under oath that she sent a department-wide email to gather emails responsive to this request and attaches a copy of this email; only two employees responded affirmatively. The FOIA Coordinator attests that one employee possessed a communication with one of the referenced individuals while employed at another agency, falling outside of the Department’s records, and the other employee provided a “series of election-related text messages sent from (and received on) the Department employee’s personal (non-State) cell phone.”⁴ Further, the FOIA Coordinator states under oath, after consultation with the State Election Commissioner, Deputy Attorney General, and Department employee that the text messages “(1) were not required by or in fulfillment of the Department employee’s job duties or position; (2) were not prepared (i.e., sent or received) by the Department employee at the direction of the Department or any supervising individual; and (3) were not necessary to discharge the Department employee’s official duties.”⁵ The Department asserts that these texts are therefore not public records under the test established for communications in personal accounts in Attorney General Opinion No. 17-IB51. Finally, the Department requests that you share any records that suggest that there are more responsive Department records that were not identified during its search, so that the Department may engage in a more focused search.

¹ Petition.

² *Id.*

³ *Id.*

⁴ Response, Ex. 1.

⁵ *Id.*

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁶ The public body has the burden of proof to justify its denial of access to records.⁷ In certain circumstances, a sworn affidavit may be required to meet that burden.⁸

The Petition asserts without explanation that the Department has responsive records that it did not produce. The *Judicial Watch, Inc. v. University of Delaware* case states that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”⁹ “[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.”¹⁰ Generalized assertions in the affidavit will not meet the burden.¹¹ 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.¹²

In this case, the Department provides specific sworn statements from the FOIA Coordinator and details the extensive search, which involved seeking records from every Department employee. The affidavit describes the records that were uncovered in the search and demonstrates that those discovered records are not public records of the Department. An employee’s email, which was sent while working for another State agency, is not a record of the Department.¹³ To determine whether they are public records subject to FOIA, the series of texts sent on a personal

⁶ 29 Del. C. § 10003(a).

⁷ 29 Del. C. § 10005(c).

⁸ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁹ *Id.* at 1010.

¹⁰ *Id.* at 1012.

¹¹ *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.’”).

¹² *Id.*

¹³ 29 Del. C. § 10002(o); 29 Del. C. § 10003(a).

cell phone must be analyzed under the standard adopted in Attorney General Opinion No. 17-IB51.¹⁴ In this Opinion, this Office adopted the reasoning of two court opinions issued by the California Supreme Court and the Washington Supreme Court, which focused on whether the private emails were prepared, owned, used, or retained within the scope of employment and considered the specific content, context, and purpose of such communications and the audience to whom the communications were directed.¹⁵ Based on these cases, this Office determined that the communications in the personal accounts would be possibly subject to production under FOIA, if they were either: 1) required by or in the fulfillment of the employee's job duties or position; 2) prepared by the employee at the direction of a supervisor or the public body, or 3) necessary to the discharge of the public body's official duties.

The FOIA Coordinator, who also serves as the Community Relations Officer, attested, after consultation with the State Election Commissioner, the Department's assigned Deputy Attorney General, and the Department employee, that these text messages "(1) were not required by or in fulfillment of the Department employee's job duties or position; (2) were not prepared (i.e., sent or received) by the Department employee at the direction of the Department or any supervising individual; and (3) were not necessary to discharge the Department employee's official duties."¹⁶ Based on these sworn statements, we find that the Department has sufficiently demonstrated that the Department completed an adequate search for records and that no responsive public records were found as a result of this search.

CONCLUSION

For the foregoing reasons, we determine that the Department did not violate FOIA in responding to your request.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

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

¹⁴ 2017 WL 4652341 (Oct. 9, 2017).

¹⁵ *Id.* at *5-6.

¹⁶ Response, Ex. 1.