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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB44

October 22, 2024

VIA EMAIL

Jordan Howell
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RE: FOIA Petition Regarding the Office of the Lieutenant Governor

Dear Jordan Howell:

We write regarding your correspondence alleging that the Office of the Lieutenant Governor (“OLG”) 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 OLG did not violate FOIA by providing records late or denying access to the requested records. However, we caution the OLG to review its FOIA practices and ensure compliance with all FOIA requirements, including the retention of a FOIA log.

BACKGROUND

On August 16, 2024, you submitted a FOIA request (the “Request”) to OLG for “the FOIA logs from the Lieutenant Governor’s Office from January 2018 until the date this request is fulfilled.” On September 9, 2024, OLG responded with a FOIA log recording requests beginning on January 18, 2023, and ending on August 29, 2024. On September 12, 2024, you filed a petition (the “Petition”), alleging that the FOIA logs provided by OLG were late, incomplete, and did not fulfill your request.

On September 20, 2024, OLG, through its legal counsel, replied to the Petition and enclosed the affidavit of its Communications Director (the “Response”). In the Response, OLG contends that its response to the Request was timely and that it provided all FOIA log materials in its possession and did not withhold any materials in its possession.

DISCUSSION

The public body has the burden of proof to justify its denial to public records as well as compliance with the FOIA statute.¹ In certain circumstances, a sworn affidavit may be required to meet that burden.²

The first issue raised by Petitioner is whether OLG violated FOIA by failing to timely respond to Petitioner’s FOIA Request. 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 legal advice, or a record is in storage or archived.”³

Both OLG and Petitioner agree that OLG responded to Petitioner’s FOIA Request by providing FOIA logs on September 9, 2024, which is exactly fifteen business days after receiving the Request. As OLG provided a response within the fifteen business days as required by FOIA, we find that OLG’s response was timely.⁴ Accordingly, as to this issue, we find no evidence that a violation of FOIA occurred as alleged.

The second issue raised by Petitioner is whether OLG violated FOIA by withholding FOIA logs or providing an incomplete response. Included in OLG’s Response was an affidavit of its Communications Director that states the affiant “conducted a search of the office and electronic records to locate older FOIA logs. The search was physical and electronic.” The affidavit further states that affiant, after searching for older FOIA logs, “did not locate older FOIA logs [and] . . . then contacted a person in the office with historical knowledge to inquire as to other locations that may house older FOIA logs, and searched those locations to no avail. Nothing responsive to the Request was withheld.”

As OLG provided all the FOIA logs in its possession that were responsive to the Request and provided an adequate sworn statement that it conducted both a physical and electronic search for older FOIA logs to no avail and did not withhold anything responsive to the Request, we find that the OLG has met its burden to demonstrate that it provided all records in its possession that were responsive to your request.

¹ 29 *Del. C.* § 10005(c).

² *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

³ 29 *Del. C.* § 10003(h).

⁴ Petitioner contends that since OLG responded to the FOIA request at 5:06 PM on the 15th business day after OLG received the request, the response was late. This contention fails. Outside of the requirement of 29 *Del. C.* § 10003(h) that the public body shall respond to a FOIA request within fifteen business days after the receipt thereof, there is no deadline with respect to the hour by which the response must be made on the 15th business day. *Cf. Del. Op. Atty. Gen.* 19-IB57, 2019 WL 6047160 (Oct. 24, 2019) (determining that a posting “after business hours” on the last notice day does not violate FOIA).

Finally, the record, while sparse, appears to indicate that OLG may not have retained FOIA logs for the period between January 1, 2018 and January 18, 2023 (a 5-year period). We caution OLG to ensure it properly compiles and maintains a document tracking all FOIA requests.

CONCLUSION

For the foregoing reasons, we determine that OLG did not violate FOIA as alleged.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: James H. McMackin, III, Esq.
Edward Kosmowski, Deputy Attorney General