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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB50

November 26, 2024

VIA EMAIL

Andrew Bernstein
American Civil Liberties Union of Delaware
abernstein@aclu-de.org

RE: FOIA Petition Regarding the Delaware Department of Correction

Dear Mr. Bernstein:

We write regarding your correspondence, on behalf of the American Civil Liberties Union of Delaware (“ACLU”), 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 by denying access to the requested records.

BACKGROUND

On August 19, 2024, the ACLU filed a request “seeking information about Delaware’s incarceration numbers related to voter eligibility.” Specifically, the ACLU sought:

1. The number of people currently incarcerated within DOC Level V facilities with a lead charge of a misdemeanor offense.
2. For each person identified in request line 1, please provide their name, Delaware State Bureau of Identification number, and date of incarceration.
3. The number of people currently incarcerated on pre-trial detention within DOC Level V facilities.
4. For each person identified in request line 3, please provide their

name, Delaware State Bureau of Identification number, and date of incarceration.¹

On September 18, 2024, the DOC denied this request, asserting the records were exempt pursuant to 29 *Del. C.* § 10002(o)(9). This Petition followed.

This Petition alleges that the DOC has not met its burden to justify its denial of this information, because the DOC failed to specifically identify why the requested information has been denied. You allege that the litigation exemption and the concerns with personally identifiable information do not apply here. You allege that the litigation regarding ballot access to incarcerated individuals was dismissed in August and cannot be appealed now. As such, you argue that there is no basis for the DOC to assert the potential litigation exception, now the claim has been dismissed, nor would eligible incarcerated individuals be involved in future litigation. Regarding any concerns about personally identifiable information, you contend that the exemptions involving personal privacy, Sections 10002(o)(1) and (4), are both inapplicable, as your requests do not involve personnel, medical, or pupil files or criminal files or records.

The DOC, through its legal counsel, replied to the Petition (“Response”). The DOC argues that the litigation exemption applies, as the previous lawsuit was merely dismissed for lack of jurisdiction and standing and that the appeal right was still pending at the time of DOC’s response. The DOC asserts that the matter also could be refiled, and the requested records have a clear nexus to the potential litigation about incarcerated individuals. Additionally, the DOC argues that it does not keep the records in a manner that would provide accurate information regarding voter eligibility. To support this, the DOC provided the affidavit of its Deputy Chief of Planning, Research, and Reentry, who attests she is intimately familiar with the DOC’s electronic records database and running reports in this system, and the current system “is not equipped with a designated search function that could produce the above-requested information” and “any report generated would require manual verification for accuracy, often by cross-referencing with the criminal records database of other agencies like DELJIS.”² The DOC maintains that FOIA does not require it to convert data into a new format or create programming or request records from another public body outside its control. Producing these records, the DOC argues, would “require extensive programming and data from at least three separate State agencies.”³

Finally, the DOC points out that the other interactions between ACLU and the DOC regarding a similar matter do not relate to this request, but the Petition has “attempted to expand the records request made on August [19], 2024, into a new request for registered incarcerated voter’s names and identifying information.”⁴ If such a request had been submitted, the DOC asserts this information would be exempt from FOIA based on 11 *Del. C.* § 4322(a) and 11 *Del. C.* § 8513(d).

¹ Petition.

² Response, Ex. 4.

³ Response.

⁴ *Id.*

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ In this instance, the DOC asserts in its Response to this Petition that it does not have the records requested. The DOC's Deputy Chief of Planning, Research, and Reentry attests that current system could not accurately produce the requested information and "any report generated would require manual verification for accuracy, often by cross-referencing with the criminal records database of other agencies like DELJIS."⁷

As the DOC provided sworn statements attesting that it does not have the requested records and FOIA does not require a public body to create programming or compile information from different sources to create a new record in response to a request, we find that the DOC met its burden to justify the denial of access to these records.⁸ As this rationale for denying the request was presented for the first time in the DOC's Response, we caution the DOC to fully assert its basis for denying the request in its response to the requesting party.⁹

CONCLUSION

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ Response, Ex. 4.

⁸ See *Del. Op. Atty. Gen.* 17-IB02, 2017 WL 955566, at *6 (Feb. 8, 2017) ("This Office has further stated that 'FOIA does not require a public body to compile the requested data from other public records that may exist.'") (quoting *Del. Op. Att'y Gen.* 04-IB14, 2004 WL 1547683, at *2 (Jun. 28, 2004)); *Del. Op. Att'y Gen.* 15-IB02, 2015 WL 3919061, at *2 (Jun. 17, 2015) ("FOIA does not require a public body to create records that do not exist . . .") (citing *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at *6 (Aug. 21, 2006)); *Del. Op. Att'y Gen.* 08-IB05, 2008 WL 1727613 at *1 (Feb. 22, 2008) ("There are no existing documents that provide the information [the requesting party] seeks, and he has no right under FOIA to anything other than existing documents.").

⁹ 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) ("While, in this instance, we have determined that DNREC's denial of your request was indeed authorized by FOIA, we nevertheless caution DNREC to give careful consideration to the reason(s) provided, pursuant to 29 *Del. C.* § 10003(h)(2), for any FOIA denial.").

Accordingly, we determine that the DOC did not violate FOIA by denying access to the requested records.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Logan", is written over a horizontal line.

Daniel Logan
Chief Deputy Attorney General

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