



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. 25-IB01

January 3, 2025

#### VIA EMAIL

Randall Chase  
[rchase@ap.org](mailto:rchase@ap.org)

#### **RE: FOIA Petition Regarding the Delaware Office of Lieutenant Governor**

Dear Mr. Chase:

We write regarding your correspondence alleging that the Delaware Office of 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 that the OLG violated FOIA by failing to assert and support the reasons for withholding records in its response to your July 31, 2024 request, by failing to demonstrate it performed an adequate search for records for your July 31, 2024 request, and by failing to properly assert the need for additional time for the remaining requests.

#### **BACKGROUND**

You submitted four FOIA requests to the OLG. The first request, sent July 31, 2024, stated the following:

Pursuant to the Freedom of Information Act, 29 Del. Code 100, I am requesting copies of all records including but not limited to contracts, agreements, memoranda, RFPs, proposals, bid documents, work orders, invoices, receipts, bills, vouchers, payment records, emails, letters, texts, faxes, direct messages and phone records related to expenditures made by or on behalf of the lieutenant governor's office to BGP Publicity Inc. and/or Bridget

Paverd, in fiscal years 2021, 2022, 2023 and 2024. I am also seeking copies of all such records related to payments to Slice Communications LLC and/or Bridget Paverd, in fiscal year 2024.

The second request, sent August 15, 2024, stated:

Pursuant to the Freedom of Information Act, 29 Del. Code 100, I am requesting copies of all records, including but not limited to receipts, invoices, vouchers, bills, payment records, texts, faxes, memos and email correspondence with Delaware OMB and the Delaware Division of Accounting, related to P-Card purchases in October and November of 2021 made by Bethany Hall-Long and all other staff members and representatives of the lieutenant governor's office.

The third request, sent August 16, 2024, stated:

Pursuant to the Freedom of Information Act, 29 Del. Code 100, I am requesting copies of all communications and correspondence between employees of the lieutenant governors' office, including Bethany Hall-Long, and Anne Farley from Jan. 1, 2022 to the present. The records I am seeking include but are not limited to emails, texts, letters, faxes, direct messages, phone logs and messages on communication platforms such as Microsoft Teams and Slack.

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I am also seeking copies of all Excel spreadsheets compiled by or for the lieutenant governor's office from Jan. 1, 2022 to the present regarding contacts and/or communications of employees in the lieutenant governor's office with people outside of the lieutenant governor's office. I am also requesting copies of all emails, texts and other communications related to the compilation of those spreadsheets, all records showing who received those spreadsheets after they were compiled, and records of all communications with those recipients.

Finally, I am requesting records of all agreements, contracts, memoranda or understandings, whether written or verbal, regarding any work, consultation, advice or recommendations requested from, and/or provided by, Farley and/or anyone assisting Farley or acting on her behalf, regarding operations within the lieutenant governor's office.

The fourth request, sent August 21, 2024, sought the following:

All correspondence including but not limited to emails, texts, direct messages, social media and posts on communication platforms such

as Slack and Microsoft Teams from Sept. 1, 2023 to the present, between Andrew Volturo and the following individuals: Bethany Hall-Long, Dana Long, Keith Warren, Matthew Dougherty, Anne Farley, Bridget Paverd, Brandon Cox, Christina Freundlich, Dory MacMillan, Donnie Johnson, Quentin Heilbroner, Jennifer Mueller, Sydney Diewald, Allison Murray, Cheryl Webb, Dan McCormick, Tanner Polce, Anthony Albence, Cathleen Hartsy-Carter and Patrick Jackson.

The Petition alleges that the OLG is in violation of FOIA by refusing to provide public records that you requested. You note that the OLG provided some records responsive to the July 31, 2024 request related to BGP Publicity and Bridget Paverd but provided no records regarding Bridget Paverd and Bethany Hall-Long or any correspondence regarding the review, approval, or comments by the OLG regarding products or services proposed or created by BGP Publicity. You state that no records have been provided in response to the requests regarding Anne Farley, P-cards, or Andrew Volturo.

The OLG's counsel responded on its behalf on December 10, 2024 ("Response") and attached the affidavit of the Chief of Staff who also serves as the FOIA Coordinator. He attested that the averments and facts in the Response were correct. The OLG asserts that it is short-staffed with seven employees in the office, and one on extended leave, and it has been inundated with FOIA requests, receiving at least 36 requests since July 1, 2024. Regarding the July 31, 2024 request, the OLG states that productions of internal records were made on August 30, 2024 and September 6, 2024, and the Delaware Department of Technology and Information ("DTI") was engaged on the remaining requests. Another production was made on November 19, 2024, and this request resulted in the review of nearly 1500 documents, comprising thousands of pages. The OLG states that it appropriately searched and withheld certain documents, and it has attached the affidavit of its Chief of Staff in support. The Chief of Staff attests that the "OLG undertook a good faith and diligent search to locate public records responsive to this request, and produced what was not otherwise privileged or exempt" and that "no documents of the nature complained of were located and withheld."<sup>1</sup>

Regarding the August 15, 2024 request, the OLG states that you and staff discussed and agreed to narrow the scope of the custodians. The OLG asserts that documents were provided on September 5, 2024 and you were kept informed of the reasons for delay, volume of requests, the DTI's involvement in the processing, and the expected delivery dates. The OLG notes that request involves the review of over 1500 documents and thousands of pages. For the August 16, 2024 request, the OLG states you were notified that additional time was necessary to fulfill the request due to the volume, documents being possessed by a third party, and the need for counsel review. The OLG asserts that documents were provided in early September 2024, and you were kept apprised of the legal review status, the volume of requests, and expected delivery dates. The OLG states the review entails over 2000 documents and thousands of pages.

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<sup>1</sup> Response, Aff. of Chief of Staff and FOIA Coordinator dated Dec. 10, 2024.

Regarding the August 21, 2024 request, the OLG states that it informed you that additional time was needed due to volume, the records being in possession of a third party, and the need for counsel review. The OLG states it advised that your search would return an extraordinary number of communications and asked for keywords to narrow the search. Following which, you provided dozens of search terms by DTI. On October 8, 2024, the OLG informed you that DTI was processing the request and on November 27, 2024, the OLG received over 4000 documents, which the OLG notes will be produced to you after legal review. The OLG states that those records will be produced as soon as possible, but the OLG is short staffed and making best efforts in good faith.

## DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.<sup>2</sup> The public body has the burden of proof to justify its denial of access to records.<sup>3</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>4</sup> In this case, your Petition broadly alleges that the OLG violates FOIA by refusing to provide records to the four requests. You also state you were provided records in connection with your July 31, 2024 request, but none of those records received concerned Bridget Pavard and Bethany Hall-Long or contained any correspondence regarding the review, approval, or comments by the OLG regarding products or services proposed or created by BGP Publicity.

With respect to the July 31, 2024 request, records were in fact provided, but the crux of the allegation is that the records provided were not complete. The OLG's Chief of Staff attested that the records you assert are missing were not uncovered during the search, but the OLG made a good faith diligent search to locate public documents responsive to the request and produced what was not exempt.

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.”<sup>5</sup> “[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.”<sup>6</sup> However, generalized assertions in the affidavit will not meet the burden.<sup>7</sup> For example, the

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<sup>2</sup> 29 Del. C. § 10003(a).

<sup>3</sup> 29 Del. C. § 10005(c).

<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>5</sup> 267 A.3d 996, 1010 (Del. 2021).

<sup>6</sup> *Id.* at 1012.

<sup>7</sup> *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

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 too generalized to meet this standard.<sup>8</sup> In addition to these standards, when records are withheld, the reasons for withholding the records must be stated in the response to the requesting party.<sup>9</sup> Depending on the asserted exemptions, an affidavit may be required to support the assertion of the exemptions.<sup>10</sup>

The OLG's sworn assertions fall short of these requirements. While the OLG specifies that it used DTI for searching for the records responsive to the July 31, 2024 request, the OLG's sworn statements do not provide further detail and are too generalized to meet the standard.<sup>11</sup> The OLG did not address the basis for the withheld, exempt materials. In addition, the three cover emails for the document productions made in response to the July 31, 2024 request do not indicate that any records were withheld, or the reasons for doing so. Thus, the OLG did not state the reasons for withholding records in its responses to this request or provide sworn statements to support the exemptions, if needed. We find violations on these bases.

Regarding the three remaining requests that the OLG is still processing, a public body is permitted additional time to process requests, as long as it meets FOIA's requirements to extend the time. Additional time is allowed for one of three reasons: voluminous records, legal advice, or the records are in storage or archived. "If access cannot be provided within 15 business days, the public body shall cite [one] of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request."<sup>12</sup>

The OLG gave an appropriate reason, legal counsel's review, when advising of the need for additional time in its last communication prior to this Petition on November 12, 2024. However, in this November 12, 2024 communication and in several previous instances, the OLG did not give a good faith estimate of the time needed to fulfill the requests, nor did the OLG provide time estimates in its Response. While estimating the completion times for a request may be challenging, particularly when a public body is awaiting search results from a records custodian, the statute requires public bodies to provide a good faith estimate when asserting the need for

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from which the Superior Court can determine whether the University performed an adequate search for responsive documents."").

<sup>8</sup> *Id.*

<sup>9</sup> 29 *Del. C.* § 10003(h)(2).

<sup>10</sup> See *Flowers v. Office of the Governor*, 167 A.3d 530, 549 (Del. Super. 2017).

<sup>11</sup> *Judicial Watch, Inc.*, 2022 WL 2037923, at \*3 (determining 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).

<sup>12</sup> 29 *Del. C.* § 10003(h)(1).

additional time. Public bodies must make the estimate in good faith using the information available to them, however limited. As such, we find an additional violation for the OLG's failure to provide estimates of when the request would be fulfilled, as required in its assertions of additional time.

As remediation for these violations, it is recommended that the OLG, in compliance with the timeframes set forth in Section 10003, supplement its response to your July 31, 2024 request to address these issues, including asserting the basis for the withholding of records, and if applicable, providing any additional public records. In addition, it is recommended that the OLG provide good faith estimates to complete each of the outstanding requests and continue to do so until the requests are completed.

### CONCLUSION

For the foregoing reasons, we determine that the OLG violated FOIA by failing to assert and support the reasons for withholding records in its response to your July 31, 2024 request, by failing to demonstrate it performed an adequate search for records for your July 31, 2024 request, and by failing to properly assert the need for additional time for the remaining requests.

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: James H. McMackin, III, Special Counsel to the Office of the Lieutenant Governor  
Dorey L. Cole, Deputy Attorney General