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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB67

October 23, 2026

Via Email

Jenifer Sandonato
j.sandonato@me.com

Re: FOIA Petition Regarding the Delaware Department of Human Resources

Dear Jenifer Sandonato:

We write in response to your correspondence alleging that the Delaware Department of Human Resources violated Delaware's 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 of whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the Department violated FOIA by failing to meet its burden to demonstrate that its search for records was adequate and its withholding of two categories of records under the right of privacy was permissible under FOIA. The remaining allegations are not violations of FOIA.

Background

On August 10, 2026, you submitted a FOIA request to the Department seeking multiple categories of records related to two recruitments for the Chief Technology Officer position.[1] In the Petition, you state that you sought records related to "both the handling of [your] January 13, 2026 application and the transition from the first [position] recruitment into the second."[2] On August 27, 2026, the Department produced records and noted the redactions made to these records,

[1] Petition.

[2] *Id.*

including the names of rejected applicants pursuant to 29 *Del. C.* § 10002(o)(1) and password and login credentials pursuant to 29 *Del. C.* § 10002(o)(6). You then emailed the Department to object to this response and identify the deficiencies but state you received no response from the Department. This Petition followed.

In the Petition, you contend that the response was inadequate and note thirteen categories of records you requested. You allege that you received an investigation report from the Department of Technology and Information that implicates the existence of categories of records you requested, including "applicant disposition, JobAps history, recruitment closeout, responsibility for closeout, and communications concerning the transition to" the second recruitment.[3] You ask this Office to determine whether the Department conducted an adequate search; sufficiently addressed the responsive records that were not produced; adequately explained the absence of responsive records beyond the two categories of redactions it identified; was required to conduct a supplemental search or otherwise address the specific deficiencies identified by you; and failed to substantively respond to the deficiencies you noted within the requisite timeframe to respond.

On September 25, 2026, the Department, through its legal counsel, replied to the Petition ("Response"). The Department attached a submission from the Communications and Community Relations Coordinator that was labeled as an "unsworn declaration pursuant to 10 *Del. C.* § 3927" which described the search for records conducted. The Department included in its Response a list of the thirteen items and gave a specific response for each category. The Department indicated that five categories were exempt under Section 10002(o)(6): (1) your complete JobAps application record and applicant-status history; (2) qualification screening, rating, referral, disposition, closure, cancellation, and notice records concerning your application; (3) any JobAps audit trail or system history showing reviewer activity, status changes, or actions concerning your application or Recruitment 1; and (4) records showing whether the selected candidate had been identified, contacted, discussed, or under consideration before Recruitment 2 was finalized or opened. For the fifth item seeking "records showing whether Recruitment 1 applicants were reviewed, carried forward, notified of Recruitment 2, invited to reapply, or otherwise considered" was also deemed nonpublic, but the Department gave a partial response, noting that "on June 2, 2026, the Second Recruitment opened, and DTI sent an email to all DTI staff, including Ms. Sandonato, announcing same, though Ms. Sandonato did not apply."[4] For the exempt records, the Department expanded on its legal position regarding the job applicants' privacy rights. For the remaining items, the Department indicated how it searched for those records.

Discussion

Delaware's FOIA law "was enacted to ensure governmental accountability by providing Delaware's citizens access to open meetings and meeting records of governmental or public

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3 *Id.*

4 Response.

bodies, as well as access to the public records of those entities."[5] 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 first claim pertains to the adequacy of the Department's search. The applicable standard for demonstrating an adequate search was established in *Judicial Watch, Inc. v. University of Delaware*; in this case, the Supreme Court of Delaware determined 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] However, the submission supporting the Department's search in this case was unsworn; it is labeled an unsworn declaration pursuant to a separate Delaware Code section. However, the Department has not established that this statutory section allowing unsworn affidavits by court rule is applicable.[11] As such, we find the Department violated FOIA by failing to show, with sworn statements, that it conducted an adequate search for records and recommend that within the timeframes of Section 10003, the Department supplement its response to you with additional responses, information, or records, as may be appropriate under FOIA.

The remaining two claims challenge the Department's failure to reply to your objections to the production sent after receiving the response and the Department's failure to assert denials for each category of requested records. The statute does not address post-response correspondence. Thus, there is no violation in that regard.

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5 *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

6 29 *Del. C.* § 10003(a).

7 29 *Del. C.* § 10005(c).

8 *Judicial Watch, Inc*., 267 A.3d at 1008-1012.

9 *Id.* at 1010.

10 *Id.* at 1012.

11 10 *Del. C.* § 3927 ("(a) To the extent authorized by court rule, any matter, except as otherwise provided in subsection (b) of this section, that is required or permitted by the laws of this State to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same, such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, verification, certificate, or statement, in writing of such person which is subscribed by him or her, as true under penalty of perjury, and dated, in substantially the following form. . .").

For the claim regarding the individual denials of record categories, the Department presented an item-by-item explanation of its rationales for denying the thirteen categories in its Response. When denying access to records or redacting information from a record, a public body is required to state its rationale for its denial of records in its initial response.[12] The Department indicates that it withheld five categories of records under Section 10002(o)(6), which permits nondisclosure of records exempted by common law, and the Department asserts that it specifically withheld these records under the common law right of privacy for job applicants. Those five categories included the following: (1) your complete JobAps application record and applicant-status history; (2) qualification screening, rating, referral, disposition, closure, cancellation, and notice records concerning your application; (3) any JobAps audit trail or system history showing reviewer activity, status changes, or actions concerning your application or Recruitment 1; (4) records showing whether the selected candidate had been identified, contacted, discussed, or under consideration before Recruitment 2 was finalized or opened; and (5) "records showing whether Recruitment 1 applicants were reviewed, carried forward, notified of Recruitment 2, invited to reapply, or otherwise considered."[13] Consistent with applicable precedent, as these items all concern content or actions taken with regard to your job application, the first three categories are exempt under the right of privacy, and this privacy right is not outweighed by any minimal public interest.[14] This result is not altered, because the records you seek are your own applicant records.[15]

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[12] 29 *Del. C.* § 10003(h)(2) ("If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial.").

[13] Response.

[14] *See, e.g., Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) ("The information submitted by unsuccessful applicants is treated differently because disclosure may embarrass or harm them."); *Del. Op. Att'y Gen.* 24-IB30, 2024 WL 3916854, at *2 (Aug. 9, 2024) ("Discussions of qualifications and competencies of applicants are subject to a significant privacy interest. As this significant privacy interest outweighs any minimal public interest in such records, we believe that the common law right of privacy protects the communications you requested regarding selecting candidates."); *Del. Op. Att'y Gen.* 10-IB17, 2010 WL 5186152, *2 (Dec. 15, 2010) ("This office has extended the right of privacy to 'records relating to the job qualifications of applicants for public employment."') (citing *Del. Op. Att'y Gen.* 05-IB20, 2005 WL 2334348, *2 (July 27, 2005); *Del. Op. Att'y Gen* 99-IB03, 1999 WL 1093143, at *2 (Apr. 28, 1999) ("For sound public policy reasons, job applicants have a right of privacy to information disclosed during the application process, at least until they are hired. [D]isclosure may embarrass or harm applicants who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive appointment.") (citations omitted).

[15] *See Del. Op. Atty. Gen.* 18-IB13, 2018 WL 1405829, at *1 (Mar. 6, 2018) ("Importantly, Delaware's FOIA provides that "*[a]ll* public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body." In other words, if a record meets FOIA's definition of "public record," then the public body must make the record available for inspection and copying to *any* Delaware citizen who requests access thereto. Similarly, if the record does *not* meet FOIA's definition of "public record," then

Regarding the last two categories, any discussions of the qualifications and competencies of other applicants included in these categories also would be subject to a significant privacy interest, but the Department does not sufficiently articulate how the responsive records it has for these items would be private. In sum, we find that the first three categories related specifically to your application were exempt, but the Department did not provide sufficient evidence to demonstrate the remaining two items were exempt under the common law privacy right recognized for job applicants and recommend the Department supplement its response with additional responses, information, or records, as appropriate under FOIA. Finally, as the Department raised Section 10002(o)(6)'s privacy rationale for these five items for the first time in its Response to the Petition, we caution the Department to give careful consideration to the reasons for denying access to records, or portions thereof, in its responses.[16]

Conclusion

For the foregoing reasons, we conclude that the Department violated FOIA by failing to meet its burden to demonstrate that its search for records was adequate and its withholding of two categories of records under the right of privacy was permissible under FOIA. The remaining allegations are not violations of FOIA.

Very truly yours,

Daniel Logan
Chief Deputy Attorney General

cc: Tyler J. Waad, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

Delaware's FOIA does not mandate its disclosure and a public body cannot be found to have violated FOIA for failing to disclose the record *in response to a FOIA request*. Of course, that is not to say that the requesting party has no legal entitlement whatsoever to the requested records. However, any such entitlement would have no basis in Delaware's FOIA and is therefore beyond the scope of our role in this context.") (emphasis in original).

[16] *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.").