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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB32

July 5, 2018

VIA US MAIL

Mr. Charles B. Sanders
James T. Vaughn Correctional Center
SBI# [REDACTED]
1181 Paddock Road
Smyrna, Delaware 19977

RE: FOIA Petition Regarding the Delaware Department of Justice

Dear Mr. Sanders:

We write in response to your correspondence received on June 15, 2018, alleging that the Delaware Department of Justice (“DDOJ”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a petition (“Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. You allege that the DDOJ has violated FOIA by not providing records in response to your request for the 1994 and 2017 policies regarding how State prosecutors handle photographic lineups. For the reasons set forth below, we conclude that the DDOJ has not violated FOIA with respect to your records request.

PROCEDURAL BACKGROUND

On April 25, 2018, the City of Wilmington forwarded¹ our Office a copy of your FOIA request, as follows:

“Can I Receive A Copy of the Policy the Attorney General crafted (Past and Present) detailing how “He” required “his” Deputy Attorney General’s to handle criminal cases that Involved photographic Lineup’s. I would like a copy of the 1994 Policy and the 2017 Version of the Policy that deals directly deals with how State Prosecutors handle cases that deal with Photographic Lineups”(“Request”). How the photo Lineup should be done; who is the Dept. of Justice should conduct the photo Lineup; should the

¹ You first sent this FOIA request to the City of Wilmington, who then provided a copy to this Office via the Open Government email account.

Viewing be recorded The Department of Justice should have an policy enacted that states clearly what conduct by Prosecutors are deemed policy conduct and outside policy conduct regarding cases dealing with photo Lineups I am requesting a copy of that Policy, 1994 and 2017 Version.”²

In its correspondence, the City of Wilmington advised you to contact our Office separately to initiate the FOIA request, and on May 8, 2018, the DDOJ received your additional correspondence, which stated as follows:

“I am making an Secondary Written request for the policy(s) 1994 and 2017 Version on how the Dept. of Justice handles cases that Involve photographic Lineups, After the Dept. of Justice Initiates the prosecution of a defendant. I am requesting what procedures do Deputy Attorney Generals Follow, Via a written policy, when the Case Involve conducting a Secondary photographic Lineup, who in the D.O.J. creates the array, is the Viewing recorded, how is the Choice recorded. I want the policy.”³

The DDOJ FOIA Coordinator responded to your request on May 16, 2018 informing you that additional time was needed for legal review and included a good faith estimate of a response time. On May 24, 2018, the DDOJ FOIA Coordinator responded that the DDOJ did not have any records responsive to your request. As a courtesy, the DDOJ FOIA Coordinator enclosed a model policy for eyewitness identification adopted by the Delaware Police Chiefs’ Council.

On June 15, 2018, our Office received your Petition contesting the DDOJ’s response to your records request, speculating that the “Department of Justice must have [the policy] due to the simple fact the Department of Justice is the highest branch of law enforcement in the State of Delaware on a State level, [and] the Department of Justice must have some written policy regarding how photographic lineup are Conducted, preserved, recorded and documented,...”[emphasis in original].⁴ Pursuant to our routine procedures, we invited the DDOJ to provide a response to your Petition (“Response”). In a Response dated June 26, 2018, Deputy Attorney General Michelle Whalen stated that the DDOJ was unable to locate any responsive records to your request and described the DDOJ’s efforts to locate any such documents, which included inquiries with the State Prosecutor and the Chief of Staff.

DISCUSSION

As a general matter, FOIA states that all “public records,” as defined by statute, be open to inspection and copying during regular business hours and requires a public body to “provide reasonable assistance to the public in identifying and locating public records to which they are

² See DDOJ Response Exhibit A (quoted in original format).

³ See DDOJ Response Exhibit D (quoted in original format).

⁴ See Petition.

entitled access.”⁵ However, “FOIA does not require a public body to produce public records that do not exist.”⁶ Therefore, the “nonexistence of a record is a defense for the failure to produce or allow access to a record.”⁷ In determining whether this defense applies, we accept a public body’s representations regarding whether records exist for purposes of FOIA.⁸

In this instance, Deputy Attorney General Whalen has indicated that the DDOJ, through its FOIA Coordinator, made reasonable inquiry into the existence of your requested records and found none.⁹ Accordingly, we accept this representation as true and find no violation of FOIA regarding your April 25, 2018 and May 8, 2018 records requests to the DDOJ.¹⁰

CONCLUSION

For the reasons discussed above, it is our determination that the DDOJ has not violated FOIA with respect to your April 25, 2018 and May 8, 2018 records requests.

Very truly yours,

/s/ Aaron R. Goldstein

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Michelle Whalen, Deputy Attorney General
Dorey Cole, Deputy Attorney General

⁵ 29 *Del. C.* § 10003.

⁶ *Del. Op. Att’y Gen.* 06-IIB10, 2006 WL 1779491, at *2 (May 4, 2006); (quoting *Del. Op. Att’y Gen.* 05-IIB19, 2005 WL 2334347, at *5 (Aug. 1, 2005) (quoting *Del. Op. Att’y Gen.* 96-IIB28, 1996 WL 517455, at *2 (Aug. 8, 1996)).

⁷ *Id.*

⁸ *See Del. Op. Att’y Gen.* 15-IIB14, 2015 WL 9701645, at *3 (Dec. 29, 2015); citing *Del. Op. Att’y Gen.* 07-IB21, 2007 WL 4733804, at *2 (Oct. 22, 2007) (quoting *Del. Op. Att’y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005)) (“It has been our historical practice to accept such representations from an attorney for the custodian of public records to determine that such documents do not exist for purposes of FOIA.”).

⁹ *See* DDOJ Response at 2-3.

¹⁰ *See also Del. Op. Att’y Gen.* 17-IB22, 2017 WL 3426262, at *3 (July 13, 2017) (finding that the DDOJ did not violate FOIA because the FOIA Coordinator conducted a reasonable search and notified petitioner that the requested document did not exist).