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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB44

September 24, 2018

VIA EMAIL

Mr. Kevin Ohlandt
Kevino3670@yahoo.com

RE: FOIA Petition Regarding the Delaware Auditor of Accounts

Dear Mr. Ohlandt:

We write in response to your correspondence alleging that the Delaware Auditor of Accounts (“AOA”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your August 7, 2018 request for records. 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. As discussed more fully herein, we determine that AOA violated FOIA by not providing a timely response in accordance with the FOIA statute. However, we do not recommend any remediation. In addition, we find that AOA did not violate FOIA by failing to answer the questions in your records request.

BACKGROUND

On August 7, 2018, you sent a records request to AOA for the “full contract for Grant Thornton.”¹ In this same request, you also asked several questions, including “who from the Auditor of Accounts Office leaked a confidential report to the News Journal;” “what AOA contributed to the report in terms of content;” what is “the nature of any editing power AOA had with this report;” and “how AOA spent over \$120,000 for a contract without going through

¹ Petition.

procurement.”² You also included several statements alleging election interference, various leaks from a Merit Employee Review Board process, and collaboration with the News Journal.³

On September 4, 2018, you submitted a Petition to this Office stating that AOA violated FOIA since you received no response to your FOIA request. On September 7, 2018, you sent an update stating that you received a response from AOA, including the full Grant Thornton contract as requested, on that same day. However, you specifically stated that you wished to continue to pursue your Petition, noting that AOA released the requested document the day after a contested primary election in Delaware in which, you allege, the responding AOA staff member had a “vested interest in the outcome.” Additionally, you stated that another AOA staff member suggested on social media that there was another reason that the documents were withheld. Based on such evidence, you concluded that the responding AOA staff member “willingly violated FOIA,” and you asked our Office “to render a legal opinion on these bizarre circumstances.” Further, you asserted that “despite [the responding AOA staff member’s] stark refusal to answer questions about the conduct of the Auditor of Accounts in regards to a Primary election and leaking of confidential material from that office to the News Journal and other media, I believe, in conjunction with that office not following FOIA law, those questions need to be answered.”

On September 10, 2018, AOA’s legal counsel submitted a letter (“Response”) acknowledging that a response including the full Grant Thornton contract, albeit late, was provided to you. AOA further asserted that it had no obligation under FOIA to provide answers to the questions posed, and thus, AOA had now adequately responded to your FOIA request. By email also dated September 10, 2018 (“Reply”), you again asserted that these are not “normal circumstances” and given the nature of the request and that the timing of AOA’s response to the FOIA request was the day after the primary election, you “believe that [your] questions should be sandwiched in with my FOIA complaint and have a legal opinion rendered given these circumstances.”

DISCUSSION

Your Petition raises two legal questions: 1) whether AOA violated FOIA by providing an untimely response to your records request; and 2) whether AOA should be required to answer the questions you posed in your records request in light of unusual circumstances. Regarding the first issue, you submitted the records request to AOA on August 7, 2018, and AOA sent you a response on September 7, 2018.⁴ Since this timing exceeds the permissible statutory timeframe of fifteen business days to provide a response or assert an appropriate reason for an extension, we find a

² *Id.*

³ *Id.*

⁴ *See* Petition; Response.

technical violation of the FOIA statute.⁵ However, since you have received a response, we do not recommend any remediation.⁶

With respect to the second issue, you assert that “bizarre circumstances” exist, requiring your questions be answered. However, this Office previously established that FOIA does not require a public body to answer questions.⁷ Neither the factual record here nor the applicable legal authority support a deviation from this long-standing precedent. We therefore find that AOA did not violate FOIA by declining to answer your questions.

CONCLUSION

For the reasons set forth above, we determine that AOA’s untimely response is a violation of the FOIA statute. However, since you have received a response, no remediation is recommended. In addition, we also conclude that AOA did not violate FOIA by declining to answer the questions in your records request.

Very truly yours,

/s/ Aaron R. Goldstein

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Frank N. Broujos, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁵ 29 *Del. C.* § 10003(h).

⁶ See *Del. Op. Att’y Gen.* 17-IB65, 2017 WL 6948884, *1 (Dec. 29, 2017); *Del. Op. Att’y Gen.* 17-IB36, 2017 WL 3426276, *1 (Aug. 3, 2017); *Del. Op. Att’y Gen.* 17-IB30, 2017 WL 3426270, *1 (July 24, 2017); *Del. Op. Att’y Gen.* 17-IB02, 2017 WL 955566, *6 (Feb. 8, 2017).

⁷ See, e.g., *Del. Op. Att’y Gen.* 18-IB24, 2018 WL 2266975, *4 (May 4, 2018); *Del. Op. Att’y Gen.* 18-IB16, 2018 WL 1546377, at *1 (Mar. 12, 2018); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017); *Del. Op. Att’y Gen.* 17-IB04, 2017 WL 1317846, at *2 (Mar. 8, 2017); *Del. Op. Att’y Gen.* 08-IB05, 2008 WL 1727613, at *1 (Feb. 22, 2008); *Del. Op. Att’y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000); *Del. Op. Att’y Gen.* 97-IB06, 1997 WL 606408, at *5 (Mar. 17, 1997).