



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB51

November 20, 2018

VIA EMAIL

Mr. David Carter
818 Union Church Road
Townsend, Delaware 19734
davidctr@udel.edu

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Carter:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control ("DNREC") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur with regard to your records requests. For the reasons set forth below, we conclude that DNREC has not violated FOIA as alleged.

BACKGROUND

You have undertaken a project to study the effectiveness of the septic permit program in certain areas of New Castle County. On October 10, 2018, you sent DNREC a records request under FOIA for the following:

I write to request a digital copy of the Class H onsite wastewater system field inspection database for New Castle County, Delaware. More specifically, this is the database of information entered from the attached "Ground Water Discharge Section - Existing On-Site Wastewater System Field Inspection Report" form provided to DNREC by the Class H-System Licensed Inspectors. These are the licensed inspectors that are authorized by DNREC to conduct inspection, investigation and data collocation to make determinations regarding the present operational condition of on-site wastewater treatment and disposal systems.

I further request that the data be exported and provided in a Microsoft Excel file format, or as a text file if an excel file export cannot be produced. This data format will allow us to import the data into a statistical software package for analysis, and potentially for geocoding and use in a geographic information system for further spatial analysis. Additionally, I request a copy of any existing metadata documentation and the list of data field descriptors for this database (assumed to correspond with inspection sheet entries).

It is my understanding that this database is a public record in the possession of DNREC. As such, I request that the Class H onsite wastewater system field inspection data be provided pursuant to the Delaware Freedom of Information Act.¹

DNREC's FOIA Coordinator responded to your request on October 19, 2018 by providing some responsive records and advising that DTI will need to process "all of the information that is on the Class H Inspection Form."² DNREC offered to prepare a cost estimate for that additional production of records. You then responded to the DNREC FOIA Coordinator on the same day, stating that you would like the full data set and specifically noting the absence of key data fields necessary for your research purposes. If the data was entered and not scanned inspection sheets, you requested a cost estimate for the full data set. Between October 21, 2018 and October 26, 2018, you were in communication with other DNREC staff with regard to the available data. On October 31, 2018, the DNREC FOIA Coordinator replied to your October 19, 2018 email, stating that the additional data fields will not "describe exactly what you are looking for," and additionally, the request to create a document in a different format is not a proper FOIA request. She further noted that DTI was in the process of developing datasets related to the type of data you requested, which may be positioned for posting on the Open Data Portal before the end of January.

You sent a Petition to this Office appealing the denial of your FOIA request and alleging that DNREC, or its data holder, the State Department of Technology and Information ("DTI") possesses the full dataset as requested and "mistakenly or intentionally intended to prevent the public from having data records in possession of the State of Delaware." You contended that the data exists in some format and the data is a public record; the fact that you made a "preference request" for a format does not give DNREC authority to deny the request due to the records being in a different format. The Petition alleged that DNREC shirked its responsibility under FOIA to cooperate in your request, as you contend that "DNREC and/or DTI have a responsibility to explain what data format exists and to work with me to decide if that format is acceptable."³ In support of your argument, you also noted that DNREC's project to develop and post the requested datasets was further proof of the data's existence.

On November 5, 2018, DNREC submitted a letter ("Response") arguing that DNREC has provided its only available records responsive to your requests. DNREC asserted that FOIA does

¹ Petition.

² *Id.*

³ *Id.*

not require an agency to create a new records and to respond to your request, DNREC must create a new record by programming a search using criteria that would yield a new dataset in a form not currently maintained by DNREC. DNREC is planning to undertake this project to create these datasets, and when the datasets are created, DNREC anticipates making the datasets publicly available.

By email dated November 9, 2018, DNREC sent a supplement to its Response which attached your two currently pending FOIA requests asking for the hard copies of the inspection reports and for project descriptions and other documents related to the DNREC/DTI development of the database. Both requests relate to the subject of your Petition, and DNREC is currently preparing responses. By email dated November 9, 2018, you submitted a response to this Office (“Reply”) in which you clarify that you sought a cost estimate, but it was not provided. You also alleged that your request for metadata and list of data field descriptors was unanswered.⁴ Finally, you again argued that DNREC’s failure to provide the data as entered on the inspection form as requested and DNREC’s failure to cooperate constitute violations of FOIA. You suspect that DNREC is obfuscating the issue and hiding data records that should have been produced under FOIA. As you believe your project is in the public interest, you had hoped for greater cooperation.

DISCUSSION

One of FOIA’s primary purposes is to grant citizens access to public records to further accountability of government to the citizens of this State.⁵ However, FOIA does not require a public body to create a new document in response to a records request.⁶ FOIA provides that a public body allow access to a document in its available format.⁷ Although this Office has previously concluded that existing data must be exported to a spreadsheet, a public body is not required to convert data into a new format, create programming, or conduct a database search using requested search criteria, as these actions would constitute creation of a new record.⁸ In the

⁴ This Office is unable to address an issue that is not encompassed in the allegations of the Petition, as the responding party has not had an opportunity to reply.

⁵ 29 *Del. C.* § 10001.

⁶ *Del. Op. Att’y Gen.* 02-IB18, 2002 WL 32100328, at *1 (Aug. 19, 2002) (“Under FOIA, a public body is not required to create a document that does not exist.”).

⁷ *Del. Op. Att’y Gen.* 06-IB17, 2006 WL 2630107, at *5 (Aug. 21, 2006) (“Under FOIA, a public body cannot respond to a request for information in electronic form by supplying paper records that contain the same information.”).

⁸ *Del. Op. Att’y Gen.* 17-IB13, 2017 WL 3426251, at *3 (July 6, 2017) (finding that “FOIA does not require a public body to convert existing information into a particular format, thereby creating a new public record, in order to respond to a FOIA request”); *Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1547683, at *2 (June 28, 2004) (citation omitted) (stating that “FOIA does not require an agency to make a summary or compilation of information in public records, or to produce computerized data in a special format requested by a citizen” and that “[i]t is not

Response, DNREC's legal counsel represented that DNREC does not have records responsive to the FOIA requests, because producing the data as requested would require DTI to undertake programming to "yield a new dataset."⁹ Accordingly, we accept these representations and find that DNREC's failure to provide these data records does not violate FOIA.¹⁰

In addition, you argued that FOIA requires DNREC to offer greater cooperation in this instance. Pursuant to 29 *Del. C.* § 10003, FOIA requires public bodies to "provide reasonable assistance to the public in identifying and locating public records to which they are entitled access" and the FOIA Coordinator must "make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records."¹¹ This allegation requires a fact-based examination of reasonableness under these circumstances, and the complexity of your requests here must be taken into account. We believe that in these circumstances, DNREC did not have a responsibility to explain the intricacies of its data and database operation and/or to determine how or if the data can be manipulated for your specific analytical purposes. That type of cooperation is significantly different than exporting existing data into a spreadsheet. DNREC staff here engaged in several communications to assist you and provided responses to your initial FOIA request and your follow-up request on October 19, 2018.¹² DNREC even made you aware of its own plans with respect to the data, which was not

'necessary for a computer operator to create new records through a computer run, i.e., a search of the online database, accomplished by entering the [requesting party's] search criteria.'" or "'develop a program to accomplish this task...'""); *but cf. Del. Op. Att'y Gen.* 17-IB32, 2017 WL 3426272, at *3 (July 25, 2017) (concluding that "we do not view the mere exportation of existing data to a Microsoft Excel spreadsheet as the creation of a new record").

⁹ Response.

¹⁰ See *Del. Op. Att'y Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015); citing *Del. Op. Att'y Gen.* 07-IB21, 2007 WL 4732804, 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.").

¹¹ 29 *Del. C.* § 10003(d)(1); 29 *Del. C.* § 10003(g)(2).

¹² In the Petition, you also provided correspondence in which DNREC staff emailed answers to your specific questions and corrected an Excel spreadsheet at your request. FOIA does not require a public body to answer questions. See *Del. Op. Att'y Gen.* 17-IB04, 2017 WL 1317846, at *2 (Mar. 8, 2017).

required under FOIA.¹³ Upon this record, we cannot find a basis for a FOIA violation due to lack of cooperation under 29 *Del. C.* § 10003.¹⁴

CONCLUSION

Thus, it is our determination that DNREC has not violated FOIA as alleged.

Very truly yours,



Aaron Goldstein
Chief Deputy Attorney General

cc: Ralph K. Durstein, III, Deputy Attorney General
Dorey Cole, Deputy Attorney General

¹³ We also note that your more recent FOIA requests have asked for documents explaining the data project that DNREC is planning, and DNREC has committed to provide responsive documents to the extent such documents exist. *See* DNREC Supplemental Response.

¹⁴ While the law does not require that a public body place electronically stored public records into a different data structure in order to respond to a FOIA request, we encourage DNREC to continue working with you to determine whether a third party vendor might be able to assist with production of the requested records in the desired format.