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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB33

July 26, 2017

VIA U.S. MAIL & EMAIL

Mr. Kenneth Kristl
Widener University Delaware Law School
4601 Concord Pike
Wilmington, DE 19803
ktkristl@widener.edu

RE: June 23, 2017 FOIA Petition Regarding the Department of Natural Resources & Environmental Control

Dear Mr. Kristl:

I write regarding your correspondence, dated June 5, 2017, and received by this Office on June 23, 2017,¹ alleging that the Department of Natural Resources & Environmental Control (“DNREC”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your August 17, 2016 request for records.

In your letter dated June 5, 2017, you argued that DNREC’s failure to provide a response to Mr. Martell’s August 17, 2016 FOIA request following payment consistent with DNREC’s cost estimate amounted to a *de facto* denial of the request. On or about July 3, 2017, DNREC provided a response to your request consisting of three documents. DNREC maintains that any additional responsive documents are exempt from FOIA’s definition of “public record.” Notably, you do not challenge DNREC’s failure to provide certain documents. Rather, you allege that DNREC violated the spirit and letter of FOIA by taking, in essence, more than ten months to provide a response to Mr. Martell’s request.

Here, DNREC has failed to provide evidence of its compliance with 29 *Del. C.* § 10003(h)(1) in connection with Mr. Martell’s August 17, 2016 request. DNREC has indicated that the request was voluminous and required legal advice. DNREC has also provided context for Mr. Martell’s August 17, 2016 request and an explanation as to what DNREC believes contributed to DNREC’s delay in fulfilling

¹ I note that you sent your correspondence to 825 French Street. However, this Office is located at 820 N. French Street.

the request. Notably, however, DNREC has failed to provide evidence that DNREC provided a response within fifteen (15) days of the request “either by providing access to the requested records, denying access to the requested records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.”² Although DNREC stated that “Mr. Martell received a response to this [August 17, 2016] request that was completed in October of 2016,” DNREC has failed to produce a copy of said response. Similarly, to the extent additional time was needed, DNREC has failed to provide evidence that it advised that such additional time was needed, invoked a proper purpose for additional time, and provided Mr. Martell with a good faith estimate of how much additional time DNREC required to fulfill the request.³ It is apparent based upon the parties’ submissions that the parties engaged in a back-and-forth regarding Mr. Martell’s request, as well as at least one other request that Mr. Martell had submitted to DNREC. However, the record is devoid of any evidence of when such communications took place or of the content of those communications.⁴ DNREC bears the burden of proof pursuant to 29 *Del. C.* § 10005(c). Based upon this record, DNREC has failed to satisfy its burden.

Based upon the foregoing, it is my determination that DNREC violated FOIA in connection with your August 17, 2016 request for records. As Mr. Martell has since received the requested information, I do not believe any further remediation to be warranted. However, to the extent you believe additional relief to be warranted for this FOIA violation, you are free to seek redress through the courts.⁵

Very truly yours,



Lakresha S. Roberts

Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)
Ralph Durstein, Deputy Attorney General (via email)
Mr. Mark Martell (via email)

² 29 *Del. C.* § 10003(h)(1).

³ *Id.*

⁴ To the extent DNREC maintains that it kept Mr. Martell verbally apprised, I note that DNREC has failed to provide a record of contacts with Mr. Martell, which DNREC was required to maintain pursuant to 29 *Del. C.* § 10003(g)(1) (“In addition to the foregoing responsibilities [contained in Sections 10003(g)(1) and (2)], the FOIA coordinator shall maintain a document tracking all FOIA requests. For each FOIA request, the document shall include, at a minimum, . . . contact information and dates of *correspondence with individuals contacted in connection with requests . . .*”) (emphasis added).

⁵ See *Del. Op. Att’y Gen.* 16-IB23, 2016 WL 7010495, at *2 (Oct. 28, 2016) (“[T]his Office is not vested with the authority to impose punitive measures for FOIA violations. You are free to seek redress in the courts if you believe that additional relief is warranted.”) (citation omitted).