Atty Gen. Op. No. 11-IB07

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July 1, 2011

Ms. Georgette Williams
210 N. Caesar Rodney Ave.
Camden-Wyoming, DE 19934

RE: Freedom of Information Act Complaint Against Camden Wyoming Sewer & Water Authority

Dear Ms. Williams:

On May 9, 2011, you requested the Camden Wyoming Sewer & Water Authority ("CWSWA") provide you, pursuant to the Freedom of Information Act ("FOIA") as amended by Senate Bill 36, information as to the total compensation paid to employees and providers of consulting, professional or other services, for the calendar year 2010. By letter of May 23, 2011, the CWSWA denied your request, except as to amounts paid for "professional consults," which are disclosed in the CWSWA's 2010 financial statements, available for inspection and copying at the CWSWA's office. On June 2, 2011, you requested an Attorney General's determination whether the CWSWA violated FOIA in denying you access to records that would show employee compensation. By letter of June 15, 2011, the CWSWA provided the Delaware Department of Justice ("DDOJ") a response to your complaint. This is the DDOJ's determination pursuant to 29 *Del. C.* § 10005(e).

FACTS

The CWSWA was created pursuant to chapter 14 of title 16 of the Delaware Code. According to CWSWA, it is funded entirely by user fees, and "none of the CWSWA's employees' salaries or consultants' compensation comes from State funds or taxes." Because of that fact, the DDOJ had previously determined the CWSWA is not a public body for purposes of FOIA. *Att'y Gen. Op. 11-IIB03,* 2011 WL 1428938 (Del. A.G.). The Delaware General Assembly promptly amended 29 *Del. C.* § 10002(c) to add to the definition of a public body the following language: "Public body shall include any authority created under Chapter 14 of Title 16 of this Code." Senate Bill No. 36, 146th General Assembly (2011) (signed by the Governor April 19, 2011). Without discussion, the CWSWA's response to your complaint concludes that Senate Bill 36 is "legally flawed and . . . would not withstand judicial scrutiny unless the Court was inclined to re-define the meaning of 'public body' as contained within 29 Del. C. § 10002(c)."

The CWSWA also asserts that because prior court decisions[1] and Attorney General determinations[2] had found that the salary records of public employees who are paid with public funds are public records within the meaning of FOIA, it follows that salaries ***not*** paid with public funds are not public records. Because the CWSWA's employees are not paid with public funds, it argues that salary information is not a matter of public record.

RELEVANT STATUTES

> "Public body" means, unless specifically excluded, any regulatory, administrative, advisory, executive, appointive or

[1] *Gannet Co., Inc. v. Colonial Sch. Dist.*, 1983 WL 473048 (Del. Super.).
[2] *E.g., Att'y Gen. Op. 95-IB13 (Del. A.G.).*

> legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:
>
> (1) Is supported in whole or in part by any public funds; or
>
> (2) Expends or disburses any public funds, including grants, gifts or other similar disbursals and distributions; or
>
> (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.
>
> "Public body" shall not include any caucus of the House of Representatives or Senate of the State. ***"Public body" shall include any authority created under Chapter 14 of Title 16.***

29 *Del. C.* § 10002(c) (emphasis added).

A "'[p]ublic record' is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, ***relating in any way to public business***, or in any way of public interest, or in any way related to public purposes[.]" 29 *Del. C.* § 10002(g) (emphasis added). "'Public business' means any matter over which the public body has supervision, control, jurisdiction or advisory power." 29 *Del. C.* § 10002(e).

DISCUSSION

Senate Bill 36

The burden is on the public body to "justify the denial of access to records[.]" 29 *Del. C.* § 10005(c). The CWSWA does not provide any explanation or legal or factual support for its contention that Senate Bill 36 is "flawed." The statute as amended could hardly be clearer: authorities that were created by 16 *Del. C.* ch. 14—which includes the CWSWA—are defined as public bodies for purposes of FOIA. Indeed, the synopsis to the bill states, "[t]his Bill clarifies that water and sewer authorities fall within the Freedom of Information Act." The CWSWA's argument that the bill can only survive legal challenge if "the Court was inclined to re-define the meaning of 'public body,'" ignores the black letter rule that the judicial role is to effectuate the intent of the legislature. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). The court does not have to be "inclined to re-define the meaning of 'public body,'" because the General Assembly has re-defined it to include water and sewer authorities. In Senate Bill 36, the General Assembly has clearly expressed its intent that sewer and water authorities be subject to FOIA.

Salaries of Public Employees

The CWSWA has not cited any legal authority for its proposition that salaries of public employees are not public information when the salaries are not paid with public funds. The case it does cite, *Gannett Co., Inc. v. Colonial Sch. Dist., supra,* does not so hold, nor do any of the Attorney General's opinions cited. All of those decisions addressed situations in which the public employee was, in fact, paid with public funds. In the absence of precedent establishing

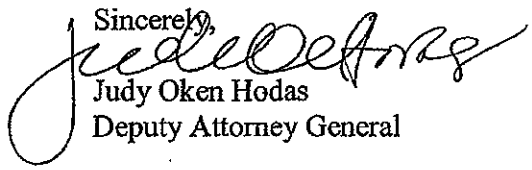
the CWSWA's position, we must look at the statutory definition of "public record" to determine if all public employee compensation, regardless of source, has to be available to the public.

Public records are defined as information "relating in any way to public business, or in any way of public interest, or in any way related to public purposes[.]" 29 *Del. C.* § 10002(g). "Public business" is defined as ***any matter*** over which the public body has supervision, control, jurisdiction or advisory power." 29 *Del. C.* § 10002(e) (emphasis added). The public business of the CWSWA includes the supervision and control of its budget, and its budget, including employee compensation, is a matter that is properly of "public interest." Therefore, the fact that its budget comes solely from user fees is immaterial. Now that the CWSWA is, by enactment of Senate Bill 36, a public body, its business is public business, and the public has a right to information concerning its management.

CONCLUSION

For the reasons stated herein, we find that the CWSWA is subject to FOIA and has violated that act in denying you access to records that would give information on employee compensation.

Sincerely,



Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis by JOH

Lawrence W. Lewis, State Solicitor

cc: Mary E. Sherlock, Esq.