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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB34

July 28, 2017

VIA U.S. MAIL & EMAIL

Dorsey Fiske
26 East Third Street
New Castle, DE 19720
dorseyfiske@gmail.com

RE: April 11, 2017 Correspondence Regarding The Trustees of the New Castle Common

Dear Ms. Fiske:

We write in response to your April 11, 2017 letter alleging that the Trustees of the New Castle Common (the "Trustees") had violated Delaware's Freedom of Information Act both respect to holding open meetings and with respect to disclosing what you allege to be public records. Both you and the Trustees have been afforded and taken multiple opportunities to submit facts and arguments to this Office. After considering those facts and arguments, we find that the Trustees is a public body under FOIA and that it must therefore comply with its provisions.¹

FACTUAL ALLEGATIONS

Your April 11, 2017 letter alleges that until December, 2006 "the Trustees were operating under the Freedom of Information Act," but that "[s]ome years ago the Board made a unilateral decision that it will not adhere to FOIA...." With respect to the Trustees' actual operations, your letter alleges that "[i]n 2017...[the Trustees] contains financial assets of roughly \$7,000,000 in securities, etc. and 600 acres of land, much of which is leased to commercial ventures that provide an annual income of \$1,600,000. In the fiscal year of 2016-17, [its] operating budget was \$1,386,000 and [its] capital budget was \$1,132,000." You further allege that the Trustees

¹ Your letter also suggests in places that the Trustees has violated other provisions of Delaware law, including Title 8 of the Delaware Code. This letter is written pursuant to the Department of Justice's express statutory authority under Title 29, Chapter 100 of the Delaware Code, and does not address the suggestion of violations of corporate law or of state elections law.

“superintend, manage, and control the Battery Park, which is owned by the City of New Castle, and pay all maintenance and upgrade expenses....maintain the buildings of the Good-Will Fire Company and the Public Library [owned by the Trust], and give money toward the operating expenses of these organizations....appoint one of the three Commissioners who sit on the New Castle Municipal Services Commission....[and] are elected by the residents of New Castle (the beneficial owners of the Trust).”² Finally, your letter alleges that “[i]n the past, the Trustees have accepted money from the State of Delaware.” The Trustees’ response, submitted on May 1, 2017, does not specifically dispute any of these factual allegations, though it disputes their legal import.³

A later letter you submitted on May 4, 2017, further alleged that the Trustees also provides funding for the City of New Castle for “street curbs,” has provided funds to build the New Castle Police Department’s current police station and pay for police cars, and funded trash trucks and sewer expenses for the City of New Castle. Finally, your letter alleges that the Trustees have provided an even wider range of public services in the past, including “all the expenses of Town Government” until 1850. Again, the Trustees does not appear to dispute any of these facts.

DETERMINATION

The sole determination sought and made at this time is whether the Trustees is a public body under FOIA. Given that our determination is that the Trustees is a public body, most of the parties’ other disagreements over the Trustees’ existing practices are moot because the Trustees should hereafter be operating under statutory restrictions that will govern many of these practices.

FOIA defines a public body, in relevant part, as:

“unless specifically excluded, any regulatory, administrative, advisory, executive, appointive or legislative body...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 In the Trustees’ May 10, 2017 letter, it alleges that “although the Trustees serve as the Battery Park Commission, they do not expend ‘public funds’ to do so. The City owns the park.” We do not read this as contradicting the statement in your letter.

³ The Trustees’ response does state that the Trustees “is (1) not supported by public funds,” but earlier in its response it concedes that the Trustees has received state funds in the past.

(2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions....”⁴

“Public funds,” in turn, are defined as “those funds derived from the State or any political subdivision of the State.”⁵

There is limited guidance from the Delaware courts on the interpretation of the Delaware Code’s definition of “public body.” In *Delaware Solid Waste Authority v. News Journal Co.*, 480 A.2d 628 (Del. 1984), a decision that was subsequently superseded in part by a statutory amendment, the Delaware Supreme Court warned against “specious *de minimus* arguments” with respect to the provision of the definition of public body relating to entities “supported in whole or in part by any public funds.”⁶ And in *News Journal Co. v. Billingsley*, 1980 WL 10016 (Del. Ch. 1980) (Hartnett, V.C.), the Court of Chancery insisted upon using the plain language (as it existed at the time) of FOIA with respect to defining a public body, rather than considering the arguments of the Delaware Association of Professional Engineers and other defendants with respect to the intention of the legislature regarding whether the defendants would be state agencies when they were created:

Certainly, any statements made in 1972 in the 126th General Assembly, or in 1978 in the 129th General Assembly to the effect that the Association was not to be a State agency—even though it was to perform governmental functions—have no bearing on the intention of the 128th General Assembly in 1976 when it adopted the Freedom of Information Act. A review of the record also fails to show any evidence that the General Assembly even considered whether the Freedom of Information Act applied to the Association when it revised the Professional Engineers Act in 1978.⁷

In the absence of additional instructive case law, this analysis will apply the plain language of FOIA to the Trustees, keeping in mind the following legislative mandate:

It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have

⁴ 29 *Del.C.* § 10002(h)

⁵ 29 *Del.C.* § 10002(k)

⁶ *Del. Solid Waste Auth.*, 480 A.2d at 633.

⁷ *News-Journal Co. v. Billingsley*, 1980 WL 10016, at *4.

easy access to public records in order that the society remain free and democratic.”⁸

The Trustees is a corporation that was created by the General Assembly of Delaware in 1792 to take title to over 1000 acres of land originally owned by William Penn “for the use of the inhabitants of the town of New Castle.”⁹ “The corporation was empowered by the charter to lease, but not to sell, the land, and appropriate the moneys in such manner as the trustees should in their wisdom direct....”¹⁰ As of 1910, “the net income ha[d] been used for the use of the inhabitants of the town of New Castle exclusively in the support of public schools, public improvements and charitable donations and gifts, and for the inhabitants of the town generally.”¹¹ Prior to this enactment by the Delaware General Assembly, the land had been governed by a “combined charter and deed” that had been issued by both the Pennsylvania “Proprietaries” and Delaware’s colonial assembly in 1764.¹²

In 1885, the Delaware General Assembly passed legislation permitting the Trustees to sell the real estate that it held in trust.¹³ The income from such sales was required to be used for the benefit of the same people of New Castle for whom the original transfer was made.¹⁴

With this factual backdrop, FOIA’s two-part test for whether an entity is a “public body” must be applied. First, it must be determined whether the Trustees is a “regulatory, administrative, advisory, executive, appointive or legislative body...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”.¹⁵ The above-referenced history of the Trustees indicates that it was, in fact, established by an act of the General Assembly. The Trustees argues that the General Assembly’s role in its creation was simply an artifact of a period of

⁸ 29 *Del.C.* § 10001.

⁹ *Trustees of New Castle Common v. Megginson*, 77 A. 565, 568 (Del. 1910).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Trustees of New Castle Common v. Gordy*, 93 A.2d 509, 511 (Del. 1952)

¹³ *See id.* at 509.

¹⁴ *Id.*

¹⁵ 29 *Del.C.* § 10002(h) (emphasis added)

Delaware history when the state's private incorporation law did not exist and all corporations had to be created by the General Assembly. But to pretend that the creation of the Trustees was equivalent to the creation of a private corporation to sell goods or provide services is to ignore the specific history as laid out by the Delaware Supreme Court. The Trustees was not only created with the assistance of legislation enacted by the Delaware General Assembly and given specific responsibilities for managing a significant amount of common land for the benefit of surrounding residents, but that responsibility was tailored by the General Assembly almost 100 years later in a manner so significant that it caused the Delaware Supreme Court to have to rule on its legality.¹⁶ The Trustees is a unique entity in Delaware and this interpretation of FOIA is specific to its history, but the facts of the Trustees' creation and modification by the General Assembly and its assigned role satisfy this portion of the two-part test for whether it is a public body, given the legislative mandate as to how FOIA should be interpreted.

The second part of the two-part test is whether the Trustees is supported in whole or in part by any public funds, or expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions. As noted above, public funds are those funds derived from the State or any political subdivision of the State. The Trustees is funded entirely by the proceeds from land that was effectively granted to it by the State. As discussed above, prior to the General Assembly's creation of the Trustees, the land in question had been governed by a "combined charter and deed" that had been issued by both the Pennsylvania "Proprietaries" and Delaware's colonial assembly. For the limited purposes of applying the FOIA statute, we view the Trustees' land holdings and income from those land holdings as resulting from a grant derived, at least in part, from the State.

For the reasons stated above, we conclude that the Trustees is a public body and must comply with FOIA. This is a difficult decision because of the fact that the creation of the Trustees and transfer of what we consider to be the relevant funds occurred at a time when much of the legal architecture that we would use to analyze these issues did not exist. But we believe that it is not only the correct decision based on the plain language of the statute, but also a realistic assessment of the Trustees' ongoing role in the current administration of public business as that term is used by the General Assembly in explaining the intent behind the FOIA statute.

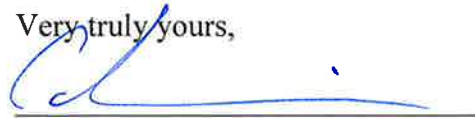
In its submissions to this office, the Trustees identified practical concerns that it claimed would be raised by treating the Trustees as a public body. Notably, however, FOIA recognizes exemptions that are relevant to the concerns raised by the Trustees so that, for example, its status

¹⁶ See *Trustees of New Castle Common v. Gordy*, 93 A.2d at 509. The Trustees attempt to attach some legal import to the fact that the Trustees renewed and revived its Charter in 1989. Despite the Trustees' claim that this act somehow changed the character or legal standing of the Trustees, the face of the document states that it is nothing more than an acceptance of the Delaware Constitution of 1897, which was required of all existing corporations in 1897 if they were to survive the new Constitution but apparently never filed by the Trustees. The document does not purport to change in any way the status of the Trustees as it existed in 1897.

as a public body need not interfere with its ability to conduct complex real estate and other legal negotiations and transactions.¹⁷

The Trustees concedes that it has not been complying with FOIA because it does not consider itself to be a “public body” as defined in that statute. To the extent that the Trustees has not complied with FOIA or may continue to not comply with FOIA, it is this Office’s determination that the Trustees is a public body and is therefore in violation of the Freedom of Information Act.

Very truly yours,



Aaron R. Goldstein
State Solicitor

cc: LaKresha S. Roberts (via email)
Michelle E. Whalen, Deputy Attorney General (via email)
Andrew Taylor, Esq. (via email)

¹⁷ See, e.g., 29 Del. C. §§ 10004(b)(2), (4).