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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB51

October 9, 2017

VIA EMAIL

Ms. Amy Cherry
acherry@wdel.com

RE: September 13, 2017 FOIA Correspondence Regarding New Castle County Council

Dear Ms. Cherry:

We write regarding your correspondence, received on September 13, 2017, alleging that the New Castle County Council (the "Council") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), in connection with your request for records. We treat your correspondence as a petition for determination, pursuant to 29 *Del. C.* § 10005(e), of whether a FOIA violation has occurred ("Petition"). We have reviewed your Petition, the Council's September 20, 2017 response ("Response Letter") and your September 24, 2017 reply ("Reply"). For the reasons set forth below, it is this Office's determination that the Council violated FOIA failing to provide a timely response to your request and by denying your request in its entirety. This Office recommends remediation as set forth more fully herein.

RELEVANT FACTS

On July 12, 2017, you sent the following request for records to the Council:

All emails forwarded from Council President Karen Hartley-Nagle's personal account [XXX],¹ from which she is conducting county business, that were sent or forwarded to David Grimaldi, Vince D'Anna, and Ron Morris from Nov. 8, 2016 through . . . July 12, 2017.

All e-mails Council President Karen Hartley-Nagle sent to her aide Kate Maxwell from her personal account [XXX] to Kate's personal

¹ Though redacted from this opinion, we note that the requests contained full email addresses.

acct [XXX] or Kate's NCC e-mail address . . . from Nov. 8, 2016 through . . . July 12, 2017.

On July 21, 2017, Clerk of the Council Betsy Gardner confirmed receipt of your request via email and stated: "This request may take additional time and I will advise when it has been completed." Then, on August 24, 2017, Ms. Gardner sent you an email apologizing for the delay and stating the following: "I have been advised by the President of Council that after consulting with her attorney, she will not provide her personal emails in response to this request."

POSITIONS OF THE PARTIES

In your Petition, you allege that the Council violated FOIA by denying your request. You attached multiple copies of correspondence to and from Ms. Hartley-Nagle's personal email account, which you state were obtained from previous FOIA request, and which you maintain serves as proof that Ms. Hartley-Nagle is conducting government business from her personal email account. Those emails include: (1) emails sent from Ms. Maxwell's County email address directly to Ms. Hartley-Nagle's personal email account, (2) emails forwarded from Ms. Hartley-Nagle's County email address to her personal email address, and (3) emails sent from Ms. Maxwell's County email address to both Ms. Hartley-Nagle's personal and County email addresses. You also challenge the Council's delay in responding to your request, alleging that it was "a stall tactic."

In its Response Letter, the Council cites to a 2011 opinion, wherein this Office concluded that emails between public officials to and from private computers and private emails accounts are not public records.² Specifically, the Council argues that any emails sent from Ms. Hartley-Nagle's *personal* email account to Mr. Grimaldi, Mr. D'Anna, or Mr. Morris are not public records, as none of those individuals are County employees.³ Similarly, the Council argues that any emails that were sent from Ms. Hartley-Nagle's *personal* email account to Ms. Maxwell's *personal* email account are not public records.⁴ The Council also maintains that it has already fulfilled your request for emails sent from Ms. Hartley-Nagle's personal email account to Ms.

² Response Letter at 2 (citing *Del. Op. Att'y Gen.* 11-IIB02, 2011 WL 1428936 (Mar. 16, 2011)).

³ Response Letter at 2.

⁴ *Id.*

Maxwell's County account, as it provided those emails in response to an earlier FOIA request.⁵ Finally, the Council argues that the request is overly broad and unduly burdensome.⁶

The Council attached an affidavit from Ms. Hartley-Nagle as an exhibit to its Response Letter. In her affidavit, which was sworn to under penalty of perjury, Ms. Hartley-Nagle stated that she is only generally in her office only two days per month.⁷ Ms. Hartley-Nagle also stated that, upon taking office, she was not able to remotely access her official email account.⁸ She then stated that, after conferring with County Information Technology specialists, Ms. Maxwell set up a temporary auto-forward policy so that all emails sent to Ms. Hartley-Nagle's County email account would be automatically forwarded to her personal email account.⁹ Ms. Hartley-Nagle stated:

Because this temporary fix would not allow me to reply directly to the sender of the initial email, I typically would call my legislative aide (who had access to my official email account) and dictate a response for her to send on my behalf using my official email address. To the extent my legislative aide would use my personal email account to ask me a question or provide me with information (whether requested or not), I would typically call her with a response -- if I would respond at all. If I responded to an email from my legislative aide in writing from my personal email account, of which I have no specific recollection if it happened, those emails are part of the Council's public records. Assuming there were any emails from my personal email account to my legislative aide's personal email account, of which I have no personal recollection, FOIA does not apply to those emails.¹⁰

⁵ *Id.* at 3. The Council states that it has already provided a response to your May 9, 2017 request for "[a]ll e-mails to [Ms. Hartley-Nagle's] aide Kate Maxwell forwarded or sent to Karen Hartley-Nagle's personal e-mail address . . . between Nov. 8, 2016 through . . . May 9, 2017." The Council maintains that your May 9, 2017 request was the inverse of your July 12, 2017 request for emails sent from Ms. Hartley-Nagle's personal email account to Ms. Maxwell's County account. The Council also acknowledges that your July 12, 2017 request included dates beyond May 9, 2017, any responsive emails would have ceased by the end of April 2017 and would therefore have been included in its prior production.

⁶ *Id.*

⁷ Hartley-Nagle Aff. at ¶ 2.

⁸ *Id.* at ¶ 3.

⁹ *Id.* at ¶ 4.

¹⁰ *Id.* at ¶ 5.

Next, she stated: “I have no public records in my personal email account other than the emails forwarded to me by the auto-forward or those to/from my legislative aide as described above or the clerks of the Council which emails are a part of the Council’s public records.”¹¹ Finally, Ms. Hartley-Nagle attested to the following: “Upon information and belief, there are no emails from my personal email account to the three individuals identified in the FOIA request: David Grimaldi, Vince D’Anna or Ron Morris in which I am conducting official business as President of Council. Again, assuming such emails ever existed, which I do not believe is the case, FOIA does not apply to those emails.”¹²

In your Reply, you argue that Ms. Hartley-Nagle’s affidavit proves that she is in fact using her personal email account to conduct County business. You also note that, per her affidavit, Ms. Hartley-Nagle used County staff to make this possible.

RELEVANT STATUTES

Delaware’s FOIA defines “public record” as “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, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.”¹³ Certain specific types of information are exempted from this definition.¹⁴

A public body must “respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the 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.”¹⁵ Additionally, “[i]f access cannot be provided within 15 business days, the public body shall cite 1 of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”

DISCUSSION

As an initial matter, this Office concludes that the Council violated FOIA by failing to provide a timely response to your request. As noted above, a public body must respond to a FOIA request within 15 business days of receipt thereof by either providing access to the requested records, denying access thereto, or advising that additional time is needed for one of three limited reasons.¹⁶ That was not done here. While the Council did confirm receipt of your request within

¹¹ *Id.* at ¶ 6.

¹² *Id.* at ¶ 7.

¹³ 29 *Del. C.* § 10002(l).

¹⁴ 29 *Del. C.* §§ 10002(l)(1)-(19).

¹⁵ 29 *Del. C.* § 10003(h)(1).

¹⁶ *Id.*

15 business days, it failed to cite a permissible reason for additional time and failed to provide a good-faith estimate of how much additional time would be required to fulfill your request. As such, it is this Office's determination that the Council violated FOIA by failing to demonstrate compliance with 29 *Del. C.* § 10003(h)(1).¹⁷ We next address whether the Council violated FOIA in denying your request in its entirety.

In its Response Letter, the Council relies heavily upon this Office's decision in *Del. Op. Att'y Gen.* 11-IIB02. In that matter, we considered "whether emails between public officials that concern public business are 'public records' if they were never in the possession of the public body because they were sent from and to private computers on private email accounts."¹⁸ Reasoning that emails between the Mayor and council members were not in the City of Newark's actual or constructive possession, this Office concluded that they were not public records of the City of Newark.¹⁹ We also noted that the City had no right or recourse to compel elected officials to produce emails from their private computers and accounts.²⁰

Naturally, we do not fault the Council for relying on this Office's prior opinion. However, recent guidance from the United States Court of Appeals for the District of Columbia Circuit persuade us that the prior opinion was wrongly decided. Indeed, as the below cases demonstrate, any other conclusion would run contrary to the letter and spirit of Delaware's FOIA.

In *Competitive Enterprise Institute v. Office of Science and Technology Policy*,²¹ the D.C. Circuit held that a federal agency's refusal to undertake a search of agency records that its director maintained in a private email account amounted to an improper withholding of agency records in response to a FOIA request. The appellant in the case, Competitive Enterprise Institute, submitted a FOIA request for "all policy/OSTP-related emails sent to or from" an email address that the appellant had learned was an account used by the Director of the Office of Science and Technology Policy ("OSTP") for some work-related correspondence.²² The OSTP denied the request on the basis that the requested records were beyond the reach of FOIA because they were in an account under the control of a private organization.²³ Writing for a majority of the court, Judge David Sentelle noted that the court had previously rejected the argument that documents are not within

¹⁷ See, e.g., *Del. Op. Att'y Gen.* 16-IB15, 2016 WL 3462346, at *4 (June 10, 2016) (public body's indication that it was reviewing records and would provide a more complete response "as soon as practical" insufficient to satisfy 29 *Del. C.* § 10003(h)(1)).

¹⁸ 2011 WL 1428936, at *2.

¹⁹ *Id.*

²⁰ *Id.* (citing *Del. Op. Att'y Gen.* 00-IB03, 2000 WL 1092972 (Feb. 2, 2000)).

²¹ 827 F.3d 145 (D.C. Cir. 2016).

²² *Id.* at 146.

²³ *Id.* at 146-47.

an agency simply because they were under the exclusive control of an agency official.²⁴ The court observed:

[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency.

The court then offered the following example to demonstrate that the appellee's argument was inconsistent with the purpose of FOIA:

If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming they are under her control.²⁵

The court then remanded for further proceedings consistent with its opinion, noting that it was not ordering the disclosure of any particular document.²⁶

On remand, the D.C. District Court noted that OSTP policy required all employees to forward work-related correspondence to their OSTP accounts and stated that, as a government employee, the Director was entitled to a rebuttable presumption of compliance.²⁷ The court then relied on affidavits from OSTP's General Counsel and its Chief FOIA Officer regarding their understanding of the Director's compliance with the policy, and an affidavit from the Director attesting to his "customary practice" of forwarding or copying emails to his OSTP account.²⁸ The court noted that the Director had complied with the policy on approximately 4,500 occasions and concluded that CEI's pure speculation had failed to rebut that presumption.²⁹ Importantly, the court noted that CEI had "presented absolutely no concrete evidence that [the Director] failed to

²⁴ *Id.* at 149 (citing *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980)).

²⁵ *Id.* at 150.

²⁶ *Id.* The Court noted that valid exemptions may apply or, alternatively, OSTP might find no document among the emails within the definition of "agency record."

²⁷ *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 241 F. Supp. 3d 14, 21 (Dist. D.C. 2017) ("*Competitive Enterprise II*").

²⁸ *Id.*

²⁹ *Id.* at 22.

forward any work-related . . . email to his OSTP account.”³⁰ The court concluded that OSTP “ha[d] established, and CEI ha[d] failed to convincingly challenge, that [the Director] complied with agency policy requiring him to forward all work-related emails from his private email account to his OSTP account.”³¹ Reasoning that any work-related emails in the other email account would therefore be duplicates of the emails in the Director’s OSTP account., the court concluded that OSTP had complied with FOIA by conducting a reasonable search of the Director’s OSTP account.³²

While we recognize that the *Competitive Enterprise* cases involved the federal FOIA, we are persuaded by its reasoning. Here, as in *Competitive Enterprise*, the Council acts through its employees and officials. Karen Hartley-Nagle and Kate Maxwell are – and were at all times relevant to this matter – an official and an employee of the Council. You have provided evidence that, at least on some occasions, Ms. Hartley-Nagle and Ms. Maxwell have has used specifically identified private email addresses to conduct Council business.³³ While we recognize that Ms. Hartley-Nagle has made certain representations regarding when, how, and under what circumstances she used her personal email account, the Council has not presented any written policy regarding the use of outside email accounts with which we are to presume compliance.³⁴ On this record, it would defy logic, and would be inconsistent with purpose of FOIA, for this Office to conclude that a record could be shielded from FOIA’s reach (even inadvertently) where, as appears to be the case here, otherwise public records are in the custody of a public employee or official but not the public body itself. Indeed, the record persuades us that the Council is in constructive possession of at least some emails contained in the private email accounts of its employees and officers.³⁵ As set forth more fully below, it is this Office’s determination that certain records responsive to your request, if indeed they exist, are records of the Council and are “public records” subject to disclosure under FOIA unless specifically exempted.³⁶

³⁰ *Id.* at 24.

³¹ *Id.* at 21.

³² *Id.* at 22-24.

³³ *Cf. Wright v. Administration for Children and Families*, 2016 WL 5922293, at *8-9 (Oct. 11, 2016) (purely speculative claims regarding use of personal emails insufficient to overcome presumption that agency search adequate); *Hunton & Williams LLP v. U.S. Environmental Protection Agency*, 2017 WL 1207410, at *10 (Mar. 31, 2017) (same).

³⁴ *Cf. Competitive Enterprise II*, 241 F. Supp. 3d at 21.

³⁵ While not dispositive to this analysis, we believe this conclusion to be further supported by Ms. Hartley-Nagle’s own affidavit, which demonstrates that the auto-forwarding system was facilitated by County employees. *See Hartley-Nagle Aff.* at ¶ 4.

³⁶ We note that Ms. Hartley-Nagle attempts to draw a fine distinction between “conducting official business as President of the Council” and your use of the language “conducting county business.” *See Hartley-Nagle-Aff.* at ¶ 7. We do not interpret your petition to be so narrow. Rather, we read your request to include emails sent to the identified individuals which in any way

Although the issue of when private emails can constitute public records under the FOIA statute has never been addressed by a Delaware court, the issue was recently addressed by both the California Supreme Court and Washington Supreme Court. Because the public records statutes of those states are similar to Delaware's, and because we find the opinions of those courts to be thoughtful, we largely adopt their reasoning with respect to this issue absent guidance from a Delaware court.³⁷ In *Nissen v. Pierce County*,³⁸ the Washington Supreme Court applied that state's public records statute to the text messages of a county employee on his personal phone. With respect to whether those text messages were public records, the Court stated: "For information to be a public record, an employee must prepare, own, use or retain it *within the scope of employment*. An employee's communication is 'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests."³⁹ In *City of San Jose v. Superior Court*,⁴⁰ the California Supreme Court was asked to require both employees and elected officials of the City of San Jose to disclose messages from their personal devices. Relying upon the definition of public record in California law, the Court stated that "[g]enerally, any record . . . kept by an officer because it is necessary or convenient to the discharge of his official duty . . . is a public record," but "[r]esolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment."⁴¹

relate to county business or purposes, or are in any way of public interest, including emails forwarded to the identified individuals. We also note that Ms. Hartley-Nagle's affidavit contains several legal conclusions regarding the nature of certain types of correspondence and whether or not FOIA applies. *See id.* at ¶¶ 5-7. While we accept the factual representations made in Ms. Hartley-Nagle's affidavit, we give no weight to the legal conclusions contained therein.

³⁷ One difference between Delaware's FOIA statute and those of California and Washington is Delaware's definition of public record as including any document "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(1) (emphasis added). To our knowledge, the emphasized language, added to the Delaware Code in 1985 (years before email was commonly used for government business), does not appear in the statutes of any of the other 49 states, and would have an absurd result if applied literally to the private emails of state employees or officials. We will not apply the Delaware statute in a fashion that would cause an absurd result, and therefore leave to a Delaware court or the General Assembly to determine if this unique language can be applied in a logical way even to traditional government records, much less to the types of records that have come into existence since 1985.

³⁸ 357 P.3d 45 (Wash. 2015).

³⁹ *Id.* at 54 (internal citations omitted).

⁴⁰ 389 P.3d 848 (Cal. 2017).

⁴¹ *Id.* at 854 (internal citations omitted).

Using the guidance from these courts, this Office concludes that emails in the personal email accounts of Ms. Hartley-Nagle and Ms. Maxwell that were (a) required by or in fulfillment of their county jobs or positions, (b) prepared by Ms. Maxwell at the direction of Ms. Hartley-Nagle on behalf of the county, County Council, or County Council President, or (c) necessary to the discharge of the Council's official duties, are public records if they are not subject to a statutory exemption. We do not believe those records lose their status as public records if they are then forwarded to another individual.⁴²

Based upon the available record, including the Council's blanket denial of your FOIA request and its arguments regarding the public nature of certain records, we cannot conclude that the Council engaged in a good faith effort to locate and review records potentially responsive to your request. As such, it is this Office's determination that the Council violated FOIA by denying your request in its entirety. To remediate this violation, we recommend that the Council collect all potentially responsive emails from Ms. Hartley-Nagle's personal email account based on the above guidelines and provide all non-exempt public records responsive to your July 12, 2017 FOIA request, consistent with the analysis above, within 10 business days of this determination.⁴³

CONCLUSION

Based upon the foregoing, it is this Office's determination that the Council violated FOIA by failing to comply with 29 *Del. C.* § 10003(h)(1) and by denying your request in its entirety. This Office recommends remediation as set forth above.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)
Michael Migliore, Counsel to the Council (via email)

⁴² See *id* at 858 (“[W]e conclude a city employee’s communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account.”).

⁴³ We do not address whether or to what extent any individual emails may be exempted from FOIA’s definition of “public record” pursuant to 29 *Del. C.* §§ 10002(l)(1)-(19).