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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB58

November 8, 2017

VIA U.S. MAIL

Mr. Peter Kostyshyn
SBI # [REDACTED]
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Re: FOIA Petition Concerning the New Castle County Register of Wills

Dear Mr. Kostyshyn:

We write in response to your correspondence, which we received on October 18, 2017, alleging that the New Castle County Register of Wills (the "Register of Wills") violated Delaware's Freedom of Information Act ("FOIA"), 29 *Del. C.* §§ 10001-10007, in connection with your July 13, 2017 request for records. We treat your correspondence as a petition ("Petition") for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. We invited the Register of Wills to submit a written response to your Petition. We received the Register of Wills' response ("Response Letter") on October 20, 2017. We have reviewed your Petition and the Response Letter. Our determination is set forth below.

FACTS

On July 13, 2017, the Register of Wills received your request (the "Request") for the following:

- (1) Organizational chart with names, titles, duties of all in R.O.W. office detailing individual breakdown to each

employee/title of employment allotted of Salaries, wages, benefits from current and previous years budgets (2).

(2) Business licenses, State of DE, City of Wilmington, any municipality, Federal permits, licenses, of anyone in NCC Register of Wills Office in any capacity.

(3) Any checks, payments disbursements authorized by Ciro Poppitti from day 1 of taking this elected position to current Date, including any payments to Felon, child sex offender named (LAST) XXXXX¹ and the relationship between the two in the office of R.O.W.

(4) Any contracts initiated by Ciro Poppitti in any matter in R.O.W. from day 1 of taking this elected position (In office) to current date. This is for any contractual Services.

(5) Disclosure of current, & since day 1 of Poppitti taking office, of any training and civic expenses by this office.

(6) Itemizations of current & prior to Day 1 of Poppitti taking office of

- a. Personal Services – Salary & Wages
- b. Personal Services – Employee Benefits of this office

(7) Itemizations of current & prior to day 1 of Poppitti taking office of communications and utilities, materials and supplies of this office and Balance sheets rendered at conclusion of each fiscal year, i.e., what is excess (year to year) from day 1 of Poppitti in elected office to date?²

¹ We have omitted the name as not relevant to this determination and inserted “XXXXXX” in lieu thereof.

² You included four return addresses on the request and stated that it was a “consolidated” request. You requested that the Register of Wills send back a time-stamped copy of your request to each address provided and to “use each page allowance against the 20 copies for each requestor.” Specifically, you requested that the Register of Wills to “when compiled, send total of 20 to #(1), Next 20 to #(2), Next 20 to #(3), Next 20 to #(4).” Presumably, your intent was for the Register of Wills to send the first 80 pages of responsive records free of charge by sending dividing them among various addresses and/or individuals. However, we do not interpret FOIA to permit a requesting party to circumvent FOIA’s fee provisions in such a manner. FOIA permits public bodies to collect certain fees in connection with FOIA requests, including administrative fees for requests taking more than one hour of staff time to process and copying fees for requests for records exceeding 20 pages in length. 29 *Del. C.* §§ 10003(m)(1)-(2). The General Assembly

The return address on the envelope of your request was the James T. Vaughn Correctional Center (“JTVCC”).³ On July 14, 2017, the Register of Wills responded as follows:

In compliance with Section 10003(a), the Register of Wills makes its records open to the public for inspection and copying during the business hours of 8:30 a.m to 4:45 p.m, Monday through Friday. To the extent that your request of July 13 seeks any records that are not in the custody of the Register of Wills, but in the custody of another department or division of New Castle County, you may [sic] are encouraged to visit those departments and divisions during their regular hours of operation, so that you may inspect and copy such records.

If you are not able to come to this office during those times to inspect and copy any and all documents described above, feel free to send a courier to inspect and copy any and all such documents for you. To the extent that your request of July 13 seeks any records that are not in the custody of the Register of Wills, but in the custody of another department or division of New Castle County, please direct your courier to visit those departments and divisions during their regular hours of operation and to copy such records.⁴

The Register of Wills sent its response to the Howard R. Young Correctional Center (“HRYCI”), where you had previously resided.⁵

appears to have anticipated that a requesting party might seek to avoid these fee provisions, as FOIA expressly permits a public body to aggregate staff time in computing fees “[w]hen multiple FOIA requests are submitted by or on behalf of the requesting party in an effort to avoid incurring administrative charges.” 29 Del. C. § 10003(m)(2). Similarly, we do not interpret FOIA to allow a requesting party to avoid photocopying charges by requesting that responsive records be sent in successive batches of 20 pages. Nor do we interpret FOIA to require a public body to send multiple responses to a single FOIA request. Of course, to the extent the Register of Wills chooses to provide you hard copies of certain records, or to send copies to multiple individuals or addresses upon request, we note that, “[p]rior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records.” *Id.* We also note that “[t]he public body may require all or any portion of the fees due . . . to be paid prior to any service being performed.” 29 Del. C. § 10003(m)(5).

³ As noted *supra* note 2, your request contained four return addresses. The first listed address was the JTVCC.

⁴ July 14, 2017 letter from Alex J. Mili, Jr. to Peter Kostyshyn.

⁵ *Id.*

POSITIONS OF THE PARTIES

In your Petition, you allege that the Register of Wills violated FOIA by sending its response to the wrong addresses and by failing to respond in a timely manner.⁶ You request that all copies be sent to the “requestors” and that a time-stamped copy of your “filings as originally requested.”⁷

In its Response Letter, the Register of Wills notes that it sent its response to your July 13, 2017 request on July 14, 2017.⁸ The Register of Wills states that it mailed its response to the HRYCI based on its previous responses to your FOIA requests, which you had submitted from the HRYCI.⁹ The Register of Wills acknowledges that your FOIA request contained a return address at the JTVCC, but notes that JTVCC, like the HYRCI, is a correctional institution within the jurisdiction of the Delaware Department of Correction.¹⁰ The Register of Wills maintains that its variance from its standard practice of sending responses to the return address listed in the mailing envelope “was neither intentional nor performed in bad faith.”¹¹ Finally, the Register of Wills argues that it “is not required to create hard copies” and that it has provided you or your courier access to the records as required by FOIA by making them available for inspection and copying during regular business hours.¹²

RELEVANT STATUTES

Delaware’s FOIA requires public bodies to respond to FOIA requests “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.”¹³ “All public records shall be open to inspection and copying during

⁶ See Petition at 1. Your Petition included a copy of the Register of Wills’ July 14, 2017 response to your request.

⁷ We interpret this to mean that you request a copy of your FOIA request to the Register of Wills. On October 23, 2017, we requested a copy of your request in order to assist with our review of this matter. That same day, the Register of Wills provided us with – and we sent to you via U.S. Mail – a time-stamped copy of your request.

⁸ Response Letter at 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1-2.

¹² *Id.* at 2.

¹³ 29 *Del. C.* § 10003(h)(1).

regular business hours by the custodian of the records for the appropriate body”¹⁴ FOIA mandates that “state agencies and public bodies . . . provide reasonable assistance to the public in identifying and locating public records to which they are entitled access”¹⁵ Additionally, FOIA Coordinators “shall 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.”¹⁶ “Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”¹⁷

LEGAL DISCUSSION

As an initial matter, we determine that the Register of Wills did not violate FOIA by failing to send a timely response to your July 13, 2017 request. Indeed, the record demonstrates that the Register of Wills responded to your FOIA request on July 14, 2017, which is well within the 15 business day deadline for a response.¹⁸

We next determine that the Register of Wills committed, at most, a technical violation by sending its July 14, 2017 response to your prior DOC address. However, no remediation is warranted, as it is clear that you received the Register of Wills’ response.

Finally, to the extent your Petition alleges that the Register of Wills violated FOIA by failing to send hard copies of the requested records, we note that FOIA does not require public bodies to send records in response to a request.¹⁹ Nor does FOIA explicitly afford greater access

¹⁴ 29 Del. C. § 10003(a); *see also* 29 Del. C. § 10003(l) (“The public body shall provide reasonable access for reviewing public records during regular business hours.”).

¹⁵ 29 Del. C. § 10003(d)(1).

¹⁶ 29 Del. C. § 10003(g)(2).

¹⁷ 29 Del. C. § 10003(a).

¹⁸ *See* 29 Del. C. § 10003(h)(1).

¹⁹ *See Owens v. Horn*, 684 A.2d 208, 210 (Pa. Commw. Ct. 1996) (“The Department [of Corrections] is not required to furnish anyone with access to a public record by transporting a record or copy to the individual, but only to make the record available for examination and inspection”). Unlike Delaware and Pennsylvania, some states’ public records law specifically require public bodies to mail copies to requesting parties. *See, e.g., Smith v. State*, 873 N.E. 2d 197 (Ind. Ct. App. 2008) (state public records statute specifically requires public agencies to *either* provide copies or allow the person to make copies); *Sappenfield v. Dep’t of Corrections*, 110 P.3d 808 (Wash. Ct. App. 2005) (noting that Washington’s FOIA explicitly requires agencies to mail copies to members of the public who cannot travel to the location of the records); *Wootton v. Cook*, 590 So. 2d 1039 (Fla. Dist. Ct. App. 1991) (public body required to provide copy of records by mail where statute specifically provided that “[t]he custodian shall furnish a copy or a certified copy of the record upon payment of the fee”).

to incarcerated individuals.²⁰ As such, we determine that the Register of Wills did not violate FOIA by informing you that you or your “courier” could review responsive records during regular business hours.²¹

Notwithstanding the foregoing, we note that the Register of Wills has implied that it may not be the custodian of at least some of the records that you had requested:

To the extent that your request of July 13 seeks any records that are not in the custody of the Register of Wills, but in the custody of another department or division of New Castle County, you may [sic] are encouraged to visit those departments and divisions during their regular hours of operation, so that you may inspect and copy such records.²²

Of course, if the Register of Wills is *not* the custodian of at least some of the records you have requested, we note that FOIA requires that the Register of Wills provide you *reasonable* assistance in identifying and locating public records to which you are entitled access.²³ While we do not here opine on what level of level of specificity FOIA requires in response to a multi-part FOIA request, under these unique circumstances, we believe that the Register of Wills should identify which of the requested records, if any, are *not* in its custody. However, as this determination is limited to the issues raised in your Petition, and we see no evidence that the Register of Wills has denied you access to any of the requested information, we do not believe this issue to be ripe for determination.

²⁰ FOIA only treats incarcerated individuals differently when those individuals seek records in the possession of the Department of Correction. *See* 29 *Del. C.* §10002(l)(13) (providing that such records shall not be deemed public).

²¹ *See Carter v. Pa. Dep’t of Corrections*, 962 A.2d 21, 24 (Pa. Commw. Ct. 2008) (“Here, the [Right to Know Law] Officer informed [the requesting party] that the documents he sought could be viewed at the [right to Know Law] Office at the Department’s Central Office. [The requesting party]’s incarceration and thus inability to access the document at the given location, is of no moment. [The requesting party] still had the option of sending a representative to view the documents or to pay to have the documents duplicated and mailed to him.”). Nor did the Register of Wills violate FOIA by failing to direct its response to multiple individuals and/or addresses as requested. Indeed, we do not interpret FOIA to require a public body to send multiple responses to a single FOIA request.

²² July 14, 2017 letter from Alex J. Mili, Jr. to Peter Kostyshyn.

²³ *See* 29 *Del. C.* §§ 10003(d)(1), (g)(2). To be clear, we do not interpret FOIA to require the Register of Wills to seek out records of another public body, including other departments and divisions within New Castle County that are separate and distinct from the Register of Wills. Of course, to the extent the Register of Wills can easily identify the custodian of certain records, we believe it would be consistent with Sections 10003(d)(1) and (g)(2) and an exercise of good faith for the Register of Wills to identify those public bodies and/or forward your request to them.

CONCLUSION

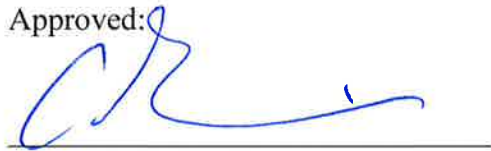
For the reasons set forth above, it is our determination that the Register of Wills did not violate FOIA by failing to provide a timely response to your July 13, 2017 request for records or by inviting you or your courier to review responsive records in lieu of sending a hard copy. However, we determine that the Register of Wills committed, at most, a technical violation of FOIA by sending its response to your FOIA request to your prior Department of Correction address.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein
State Solicitor

cc: Wilson B. Davis, Assistant County Attorney II (via email)