



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB28

June 1, 2018

VIA US MAIL AND EMAIL

Warren Rosenkranz
2315 Woodland Lane
Arden, DE 19810
wrosenk@yahoo.com

RE: FOIA Correspondence Regarding the Arden Trust

Dear Mr. Rosenkranz:

We write regarding your correspondence, received on May 14, 2018¹, alleging that the Arden Trust (“Trust”) and the Trustees of Arden (“Trustees”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”).² We treat your correspondence as a petition (“Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. The material issue in this case is whether the Arden Trust and the Trustees of the Village of Arden are a “public body” within the meaning of FOIA. For the reasons set forth below, we conclude that the Trust is not public body and, therefore, neither the Trust nor its Trustees are subject to FOIA.

PROCEDURAL BACKGROUND

On March 5, 2018, you sent a FOIA request to the Trustees for minutes of their meetings from August 1, 2017 through the date of your request. In a letter dated March 16, 2018, the Trustees sent the following response to your request: “Based on the advise [sic] of our attorney, the Arden Trust is not a public body according to Title 29 of the Delaware Code, and therefore not subject to FOIA.” On April 26, 2018, you mailed your Petition to this Office contesting the Trustees’ position that the Trust is not a public body.

¹ The letter, postmarked April 26, 2018, was addressed to 830 North French Street. Upon information and belief, the Department of Justice, which is located at 820 North French Street, did not receive the letter until May 14, 2018.

² The Trust is administered by three Trustees. The current Trustees are Mike Curtis, Carl Falco, and Elizabeth Varley.

FACTUAL BACKGROUND

The Village of Arden (“the Village”) is a small municipality created by a town charter.³ The charter also establishes a Town Assembly, which is empowered to enact ordinances and adopt resolutions pertaining to the governance of the Village.⁴ The Trust was created by a land grant in 1908; it is comprised of three Trustees.⁵ In 1965, after the Village was incorporated as a municipality, the Trust deeded all of the common land from the original grant to the Village, and the Village owns and maintains those lands.⁶ The Trust currently owns all private land in the Village, comprised of 196 individual lots, and leases those lots to individuals for their homes or businesses. The Trustees collect rent from Village residents annually. The amount of rent owed by each resident each year is determined by a Board of Assessors. Those monies are collected by the Trustees who use the collective funds to pay county and local taxes, as well as to cover administrative expenses for the Village.⁷

DISCUSSION

To determine if an entity is a “public body,” and thus subject to FOIA, a two-part analysis is required. First, we must determine whether the entity is a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State” as further defined by the statute.⁸ If so, we must next determine whether the entity is supported in whole or in part by any public funds, expends or disburses any public funds, or is impliedly or specifically charged to advise or to make reports, investigations, or recommendations. “Public funds,” are defined as “those funds derived from the State or any political subdivision of the State.”⁹ Importantly, both parts of this two-part test must be satisfied in order for an entity to qualify as a “public body” under FOIA.¹⁰

³ See Charter of Arden.

⁴ *Id.* at § 5(c).

⁵ There is a dispute between the parties as to whether the Trustees are “elected.” Whether the Trustees are elected is not material to this analysis, although it appears from the documentation submitted by the parties that the Trustees retain the power to fill vacancies subject to the approval of a majority of residents.

⁶ Response Letter at 2.

⁷ *Id.* See also Charter of Arden at § 7.

⁸ See 29 Del. C. § 10002(h).

⁹ 29 Del. C. § 10002(k).

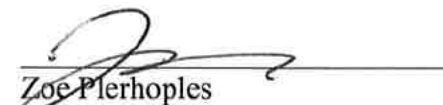
¹⁰ See *Del. Op. Att’y Gen.* 12-IIB05, 2012 WL 1244481, at *2 (Mar. 27, 2012) (noting that an entity is not a public body unless both parts of the two-part test are met). *But cf. State v. Camden-Wyoming Sewer and Water Auth.*, 2012 WL 5431035, at *3-4 (Del. Super. Nov. 7, 2012) (two-part test not applicable if statute specifically designates an entity as a public body for purposes of FOIA).

We have previously determined that, like all municipalities in the State of Delaware, the Village and its governing body, the Town Assembly, are public bodies and therefore subject to FOIA.¹¹ However, the Trust is separate and distinct from the Village and the Town Assembly. Unlike the Village and Town Assembly, the Trust is not a municipality, so it is not a political subdivision of the State. It was not established by an act of the General Assembly or a body established by the General Assembly.¹² Nor was it appointed by any body or public official of the State, or otherwise empowered by any state governmental entity. It was created by a private land grant.¹³ As such, we believe that the first definitional element of a “public body” is not met and the Trust cannot be a public body.

CONCLUSION

For the reasons discussed above, it is our determination that the Trust is not public body and, therefore, neither the Trust nor its Trustees are subject to FOIA.

Very truly yours,


Zoe Plerhoples
Deputy Attorney General

APPROVED BY:


Allison E. Reardon, State Solicitor

cc: Edward Rosenthal, Esq. (via email)

¹¹ *Del. Op. Att’y Gen.* 17-IB09, 2017 WL 2345247, at *3 (Apr. 25, 2017) (citing *Del. Op. Att’y Gen.* 96-IB13, 1996 WL 254932, at *2 (May 6, 1996)).

¹² *Cf. Del. Op. Att’y Gen.* 17-IB34, 2017 WL 3426274 (July 28, 2017). In *Trustees of New Castle Common* opinion, the body at issue was a corporation created by the General Assembly to control and administer the use of public lands. *Id.* at *2. The income derived from the sale of that land, which was effectively granted to it by the State, was to be used “for the benefit of the same people of New Castle for whom the original transfer was made.” *Id.* We noted in that case that the Trust of New Castle Common was specifically created for the purpose of managing public lands for the common good. *Id.*

¹³ You state in your petition that the Act to Reincorporate the Village was “approved” by the General Assembly in 1967. We do not think that this act “created” the Trust.