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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB35

August 7, 2018

VIA US MAIL AND EMAIL

Courtney French
7950 Jones Branch Drive
McLean, Virginia 22107
cofrench@gannett.com

RE: FOIA Petition Regarding the Wilmington Housing Partnership

Dear Mr. French:

We write in response to your correspondence received on July 18, 2018, alleging that the Wilmington Housing Partnership (“WHP”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. Since you have alleged a violation of FOIA against an entity that has not been previously determined to be a “public body” under FOIA, we must first decide whether WHP is a “public body” within the meaning of FOIA. For the reasons set forth below, we conclude that WHP is a public body and should provide a response to your records request.

PROCEDURAL BACKGROUND

On April 11, 2018, Ms. Christina Jedra of the News Journal sent a FOIA records request to the City of Wilmington (“City”) for copies of all emails sent to and from the WHP Executive Director’s email account at stmartin@wilmingtonde.gov from March 1, 2018 to present.¹ By a May 15, 2018 email, the City replied that the FOIA request had been sent to WHP’s counsel, since WHP is a separate entity from the City, and Ms. Jedra was directed to WHP’s counsel for an estimated timeframe for a response.² On June 1, 2018, the City’s counsel emailed Ms. Jedra again and stated that the City had provided the emails to WHP’s counsel, but Ms. Jedra needed to contact WHP’s counsel since WHP had refused authorization to release the emails.³ You and WHP’s

¹ See Petition, p. 1.

² See Petition, Ex. B.

³ See Petition, Ex. C.

counsel then discussed the request, according to your confirmatory email dated June 21, 2018.⁴ On June 29, 2018, WHP’s counsel emailed you directly stating that a FOIA request had not been “directed” to WHP, and therefore, WHP could not deny this request.⁵ However, WHP’s counsel also asserted that WHP is not a public body and the requested emails are not public records, and that given the significant costs of this email production and uncertainty in application of FOIA, it “makes sense to more narrowly tailor the request.”⁶

You sent a Petition to this Office on July 18, 2018 claiming that WHP is a public body, and even if WHP is not considered a public body, the emails of the WHP Executive Director in the City’s possession are still subject to FOIA, as records relating to public business or of public interest. In a letter dated July 23, 2018, WHP’s counsel responded that no FOIA request has been made to or denied by WHP since the request initially was sent to the City; WHP is not a “public body” as that term is defined in FOIA; the City should also not release WHP’s emails under FOIA, since the emails do not pertain to public business, are not of public interest, and do not relate in any way to public purposes; and the request is contrary to FOIA policy (“Response”). On July 25, 2018, you sent a reply to this Office (“Reply”) contesting WHP’s assertion that it did not receive or deny the FOIA records request for purposes of FOIA when WHP clearly received the request, stated its objections, and if found incorrect, suggested that Ms. Jedra narrow the request. Further, you again argue that WHP is a public body, and Mr. Martin’s emails are records of public interest that should be released by the City.

FACTUAL BACKGROUND

“WHP is a non-profit corporation established by the City of Wilmington in 1989.”⁷ The mission of WHP is to “create affordable homeownership opportunities in the City of Wilmington, and in doing so, stabilize neighborhoods, increase housing values, and reduce blight in the City.”⁸ In 2001, WHP merged with the non-profit corporation, Wilmington Housing Development Corporation, and “WHP is the surviving corporation” of that merger.⁹

⁴ See Reply.

⁵ See Petition, Ex. D.

⁶ See *id.*

⁷ See Response, p. 3.

⁸ *Id.*

⁹ *Id.* (“WHP is the immediate result of a merger between WHP and Wilmington Housing Development Corp (WHDC).”).

The Articles of Incorporation for the Wilmington Partnership Corporation¹⁰ indicate the following: 1) the incorporator and signatory on the Articles of Incorporation was the Assistant City Solicitor in her official capacity; 2) WHP's registered office was the Commerce Department of the City of Wilmington located at the City/County Building on 800 North French Street, Wilmington, Delaware; 3) all WHP Board of Director members were members of the corporation and were approved or appointed by the Mayor of Wilmington; and 4) in the event of dissolution, the Board of Directors must direct the remaining assets to a closely aligned entity (including the City) as determined "in the judgment of the City of Wilmington."¹¹ WHP continues to be located at the City/County Building and shares the same phone number with the City's Department of Real Estate and Housing.¹² The City maintains the emails for WHP's executive director through its email system.¹³ In addition, WHP receives funding from the state and local government entities, including the City.¹⁴

DISCUSSION

FOIA mandates that public bodies allow the inspection and copying of their public records.¹⁵ To determine if an entity is a "public body," a two-part analysis is required.¹⁶ 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," which includes a "group, panel, council, or any other entity or body...established by any body established by the General Assembly."¹⁷ If the first part is met, we then must 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.

¹⁰ Although there is a discrepancy in the name of the corporation in the Articles of Incorporation and the business name used by WHP today, we rely upon the parties' submissions in giving evidentiary weight to WHP's Articles of Incorporation, which indicated that WHP was established in 1989 and did not dispute the authenticity of WHP's 1989 Articles of Incorporation provided by the News Journal.

¹¹ See Petition, Ex. D.

¹² "Department of Real Estate and Housing," <https://www.wilmingtonde.gov/government/city-departments/departments-of-real-estate-and-housing> (last visited August 1, 2018).

¹³ See Petition.

¹⁴ See Petition, p. 2.

¹⁵ 29 Del. C. § 10003(a).

¹⁶ See Del. Op. Att'y Gen. 18-IB28, 2018 WL 2994706, at *1 (June 1, 2018).

¹⁷ 29 Del. C. § 10002(h).

“Public funds,” are defined as “those funds derived from the State or any political subdivision of the State.”¹⁸ Both parts of this test must be satisfied in order for an entity to be considered a “public body” under FOIA.¹⁹

The City is a body established by the Delaware General Assembly.²⁰ For the first part of the analysis, the critical question is whether the City “established” WHP for purposes of FOIA. WHP straightforwardly admits in its Response that it was established by the City in 1989²¹ and as described above, the 1989 Articles of Incorporation and WHP’s corporate history support this fact.²² Thus, we determine that the first element of a “public body” is met. With respect to the second prong of the analysis, the parties do not dispute WHP’s acceptance of public funds from the State of Delaware and the City in support of its mission, and therefore, this second prong is satisfied. For purposes of FOIA, we find that WHP meets the definition of “public body.”²³

CONCLUSION

For the reasons discussed above and based on the provided factual record, it is our determination that WHP is a public body and, therefore, we recommend that WHP respond²⁴ to

¹⁸ 29 Del. C. § 10002(k).

¹⁹ See Del. Op. Att’y Gen. 12-IB05, 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).

²⁰ See Wilm. C. (Charter) §1-100; 40 Del. Laws ch. 179 (1935); 46 Del. Laws ch. 236 (1947).

²¹ See Response, p. 3.

²² Based on the factual record, WHP’s merger in 2001 with a non-profit corporation does not subvert this analysis. The record here indicates that the City established WHP, and after the merger, WHP was the surviving corporation. The parties provided no other evidence which would attribute greater significance to the merger in determining WHP’s establishment, and this Office is required to err on the side of transparency. See Del. Op. Att’y Gen. 17-IB52, 2017 WL 4652342, at *2 (Oct. 9, 2017) (“Absent clarity with respect to this important fact, we are required by the FOIA statute to err on the side of requiring transparency and determine that the CJ Advisory Board is a public body.”).

²³ In finding that WHP is a public body and required to respond to the records request, we do not reach the alternative arguments regarding the intent of FOIA policy and the City’s obligation to release the requested records.

²⁴ The Petition included a copy of the News Journal’s records request. WHP did not previously consider itself a public body but must now respond to the News Journal’s records request. With regard to WHP’s argument concerning its failure to receive and deny a FOIA request, WHP waived this argument when WHP’s counsel received a copy of the records request, reviewed it, and then communicated to the News Journal that WHP was not a public body nor were the Executive Director’s emails considered public records. See Petition, Ex. D. Therefore, despite WHP’s conclusory statement that it did not receive or deny the records request for purposes

the News Journal's records request dated April 11, 2018 within fifteen (15) business days of this decision in compliance with FOIA.²⁵

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: Courtney Emerson, Esq. (via email)
Neal J. Levitsky, Esq. (via email)

of FOIA, we consider WHP's argument waived after its June 29, 2018 email, which the News Journal reasonably interpreted as an acceptance and denial of its records request. *See* Petition, Ex. D; Reply; *see also Del. Op. Att'y Gen.* 04-IB04, 2004 WL 335476, at *2 (Feb. 4, 2004) (concluding that a FOIA request was received for purposes of FOIA when outside counsel received and responded to the request with objections).

²⁵ In its response to the FOIA records request, WHP must comply with the FOIA statute in all respects, including the permissible administrative fees. *See* 29 *Del. C.* § 10003(m) ("Administrative fees shall not include any costs associated with the public body's legal review of whether any portion of the requested records is exempt from FOIA.").