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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB38

July 8, 2019

VIA US MAIL

Mr. Peter Kostyshyn



Wilmington, DE 19802

RE: Two FOIA Petitions Regarding the Town of Bellefonte

Dear Mr. Kostyshyn:

We received two separate letters alleging that the Town of Bellefonte violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records request. We treat each letter 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 and issue this combined Opinion to address both Petitions. For the reasons set forth below, it is our determination that the Town has not violated FOIA as alleged in the Petitions.

BACKGROUND

On May 14, 2019, the Town received your request for the following: 1) “time stamped copy of this filing and the envelope mailed in;” 2) “all resulting” letters, notes, emails, and faxes “it” generates; 3) all Town elected and appointed officials “since years 2013 to present of public disclosure’s to financial reports made to Delaware Public Integrity Commission, as all other public disclosure’s of asset’s, debt’s, as various laws of U.S.A., of state, of NCC, of Bellefonte require’s of public officials;” 4) from 2010 to present of any Town “contacts specifically with Mr. Cartier including all texts, e-mails, fax’s, photo’s;” 5) oaths taken by Town Commissioners and appointees.¹ You requested any claim for confidentiality be “blocked out, not whited out.”² In its May 24, 2019 response, the Town replied as follows: 1) the Town does not own a time stamp and

¹ First Petition (quoted in the original format).

² *Id.*

instead, “the postmark, date received, and the response date” were stated in its letter; 2) the request for resulting records “it” generates was not specific and the Town asked you to “resubmit your request with specific detail;” 3) Public Integrity Commission filings or financial record filings are “not available;” 4) the records regarding “contacts with Mr. Cartier” also are “not available;” and 5) the Town enclosed a copy of the Delaware oath of office.³

On May 15, 2019, the Town received your second request for the following: 1) “time stamped copy of this filing and the envelope mailed in,” 2) “all resulting” letters, notes, faxes, and emails “it” generates; and 3) “all NCC registered apartments in Bellefonte,” their inspection records, addresses, owners’ names, occupants’ names, “fees collected and shared between NCC and Bellefonte since years 2010 to present” and all e-mails, faxes, letters, and agreements.⁴ In its May 24, 2019 response, the Town replied as follows: 1) the Town does not own a time stamp and instead, “the postmark, date received, and the response date” were stated in its letter; 2) the request for resulting records “it” generates was not specific and the Town asked you to “resubmit your request with specific detail;” and 3) the Town stated that the documents regarding the New Castle County registered apartments are “not available from the Town of Bellefonte or your request lacks specificity,” and asked you to “resubmit your request with specific detail about the documents you request.”⁵

You then filed two Petitions with this Office. The First Petition addresses the May 14th request, alleging that you did not receive a copy of the envelope your request had been mailed in; that the Town sent its response to the wrong address; that your request for resulting letters and other documents “it” generates is sufficiently specific; that the Town’s assertions that records responsive to the third and fourth items are not available are “not true;” and that you did not receive a copy of the oath of office, even though the May 24th letter indicated that the Town was providing it to you.⁶

The Second Petition addresses the May 15th request, alleging that the Town had mailed its response to the May 15th request to your previous prison address as a delay tactic; that you did not receive a copy of the envelope your request was originally mailed to the Town in; and that you believe your second and third requested items were sufficiently specific.⁷

By letter dated June 24, 2019, the Town’s counsel answered both Petitions (“Response”). The Response included a statement from the Town Secretary explaining that the Town’s responses were mistakenly mailed to your previous address because he had prepared a sheet of mailing labels with your previous address to expedite the Town’s responses to the 26 separate FOIA requests you

³ *Id.*

⁴ Second Petition.

⁵ *Id.*

⁶ First Petition.

⁷ Second Petition.

served on the Town, believing the address you provided on the return envelope to be incorrect. The Town attached a copy of your envelope from the May 15th request but again noted that the Town does not possess a time stamp and cannot therefore give you a time-stamped copy of your own two FOIA requests back to you and thus was unable to provide a record that does not exist. Although the Town committed to look for copies of the envelope for the May 14th request,⁸ the Town contends that FOIA does not require the retention of any specific record. As to your requests for records generated by “it,” the Town states that you had not specified what “it” was referring to, and if you meant “it” to indicate each of your FOIA requests, the only resulting records would be the response letters you were sent.⁹

In addition, the Town’s counsel reaffirms that it does not have the documents you believe that the Town must have. The Town Charter does not require public financial disclosures, and that to the extent any other body requires them, the Town is not required to secure them from another public body. The Town repeats that it does not have any records regarding contacts with Mr. Cartier and attached another copy of the oath of office that you allege you had not received. Finally, the Town refines its initial response to the request for records regarding New Castle County registered apartments. The Town explains it initially requested more specificity in an attempt to understand the request for this information but is now confirming that the Town does not have the records you requested and does not share the inspection fees with New Castle County.

DISCUSSION

We address the following issues raised in your Petitions: 1) whether the Town committed a FOIA violation by not providing the records that the Town’s counsel represents are not in the Town’s custody; 2) whether your requests for resulting records “it generates” were sufficiently specific under FOIA; 3) whether the Town’s failure to send its response to the correct address was a violation of FOIA; and 4) whether the Town violated FOIA by allegedly not providing the oath of office.

First, we conclude that the Town has adequately demonstrated that it does not have the following records: the Public Integrity Commission filings or other public financial records, the documents requested in connection with New Castle County registered apartments in Bellefonte, and time-stamped copies of your FOIA requests and the envelopes you mailed them in.¹⁰ It is

⁸ The Town’s counsel located this envelope for the May 14th request and provided a copy to you via a letter dated June 25, 2019. Therefore, you have now been sent both envelopes in which your requests were enclosed.

⁹ Response.

¹⁰ The Town indicates that it does not own a time stamp; thus, it cannot produce time-stamped filings or envelopes. The Town is not required to produce a document that does not exist, and FOIA does not require a public body to maintain specific records within its files. Moreover,

well-settled that the Town is not required to create documents that do not exist, and the Town's counsel has affirmed that the Town does not have these requested records.¹¹ On this record, we find no violation.

Second, you challenge the Town's assertion that your requests for "resulting" letters, notes, emails, and faxes that "it" generates lacks specificity. FOIA requires a requesting party to "adequately describe the records sought in sufficient detail to enable the public body to locate such records with reasonable effort" and to be "as specific as possible when requesting records."¹² As this Office has recently found, your request is not sufficiently descriptive, and we find that the Town has not violated FOIA by requesting more specificity.¹³

Third, you argue that the Town's failure to address the responses to these requests to your current address constitutes a delay tactic in violation of FOIA. The Town explains that the Secretary created a labels sheet to address the 26 separate FOIA requests they received from you in May alone and concedes that these labels inadvertently included the address you previously used when making FOIA requests to the Town. On this record, we find no evidence of an intentional delay tactic and note that you did receive the Town's responses.¹⁴

Finally, you claim that the Town did not include a copy of the oath, as indicated in its May 24, 2019 response letter. The Town's counsel represented that the oath was in fact sent to you with the May 24, 2019 letter, and another copy was sent to you in the Town's Response to this

although we find no compliance issues, the Town voluntarily provided you copies of both your envelopes.

¹¹ *Del. Op. Att'y Gen.* 18-IB34, 2018 WL 3947262, at *2 (July 20, 2018) ("FOIA does not require a public body to create a new document in response to a records request."); *Del. Op. Att'y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005) ("It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'") (quoting *Del. Op. Att'y Gen.* 97-IB01 (Jan. 14, 1997)).

¹² 29 *Del. C.* § 10003(f).

¹³ *Del. Op. Att'y Gen.* 19-IB33 (July 1, 2019) (finding that all "resulting" records "it" generates is not sufficiently specific and stating "[t]his request is unclear as to what 'it' is referring, and on that basis, we find [the public body] did not violate FOIA by requesting clarification.").

¹⁴ *Del. Op. Att'y Gen.* 17-IB58, 2017 WL 5649344, at *3 (Nov. 8, 2017) ("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.").

Petition. Our Office recently addressed almost identical circumstances and consistent with that opinion, we find no violation here.¹⁵

CONCLUSION

Therefore, we conclude that the Town has not violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

cc: Seth L. Thompson, Counsel for the Town of Bellefonte

¹⁵ *Del. Op. Att’y Gen.* 19-IB35 (July 2, 2019) (concluding that no FOIA violation occurs where the public body’s counsel represents that it provided a copy of the requested record in its initial response to the FOIA request and provided it again with its Response to the Petition).