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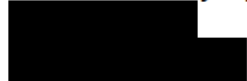
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB42

July 18, 2019

VIA US MAIL

Mr. Peter Kostyshyn



Wilmington, DE 19802

RE: FOIA Petition Regarding New Castle County

Dear Mr. Kostyshyn:

We write in response to your correspondence alleging that New Castle County violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records request. 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. For the reasons set forth below, it is our determination that the County violated FOIA by failing to respond specifically to your request for “time stamped copies” of your FOIA requests and recommend that the County make a reasonable search for those records and provide you with a supplemental response. With respect to the remaining allegations, we agree with the County’s assessment and find no FOIA violation has occurred.

BACKGROUND

In June 2019, you made the following requests for records to the County: 1) “all records generated by Al Washington on any Kostyshyn matter from years 2003 to present” and “[r]esume, reference’s, salaries, duties of Al Washington;” 2) all “contacts by Matthew Frawley with any NCC office’s, official’s, employee’s, on any Kostyshyn matter from years 2006 to present;” and 3) all “e-mails from John Cartier to any NCC dept., office, employee, on any Kostyshyn matter of any subject from years 2001 to present.”¹ For each of these requests, you also requested the County

¹ Response (quoted in original format).

provide “time stamped copies of this filing and envelope mailed in” and all “resulting” letters, notes, faxes, and emails “it” generates.²

The County responded to the three requests in one letter, referencing a chart of standardized responses that it developed due to the volume of the requests it receives from you. The County first asserts that “[t]o the extent you have requested documents that do not exist, your requests exceed the scope of FOIA and will not be addressed.”³ The County enclosed a redacted resume and job application for Mr. Washington. The County advised that your requests for records generated by Mr. Washington, contacts between Deputy Attorney General Frawley and the County, and e-mails between Mr. Cartier and the County on “any Kostyshyn matter” for periods of thirteen to eighteen years were “overly broad and vague,” requested that you clarify your requests, and advised that administrative fees would be charged if fulfilling the requests required more than one hour of staff time to process.⁴

In the Petition, you allege that you did not receive time-stamped copies of your requests or the corresponding envelopes and dispute the County’s characterization of your requests as unclear.

The County answered your Petition through counsel on July 11, 2019 (“Response”). The County argues that it did not respond to your requests for all “resulting” records that your FOIA requests generated, as those documents cannot and did not exist at the time the requests were received and therefore “the County could not and did not address those Requests.”⁵ The County also contends that the physical request and envelope are not public records because they are not owned, made, used, retained, produced, composed, or drafted by the County, but once compiled and collected, may become public records. The County gives the example of junk mail to illustrate that not all records that come into the possession of the County are retained long enough to become public records.

Regarding the first request for the County employee’s job records, the County alleges it produced a copy of the redacted version of resume and job application in its initial response and later supplemented it under separate cover with a copy of his “job description and most recent salary.”⁶ Regarding the request for all records generated by the employee, the County claims that the request spans sixteen years of records, requiring significant resources to even produce an estimate and the terms “all records,” “generated by,” and “Kostyshyn matter” are overly broad and vague. As noted in its initial response, the County again invited you to clarify this request.

² *Id.*

³ Petition.

⁴ *Id.*

⁵ Response.

⁶ *Id.*

Regarding the second request, the County again asserts that the request for all contacts by Matthew Frawley with any County office, official, or employee on “any Kostyshyn matter” since 2006 is overly broad and vague. Specifically, the County contends that “all contacts” is overly broad and vague, as it does not identify the type of record sought and that “Kostyshyn matter” is also overly broad and vague, as the County does not have a county-wide database of matters nor understands what matters you are referring to; again, you were invited to provide more specificity. The County observes that the request spans thirteen years, requiring significant administrative cost to even prepare an estimate. Regarding your third request for all County emails with John Cartier regarding “any Kostyshyn matter,” the County reiterates its position that this term is insufficiently vague and broad. The County submits that determining the scope of this request which spans nineteen years would be “nearly impossible without more information.”⁷ Again, you were invited to clarify the request.

The County explains that you have failed to provide requests that are specific as FOIA requires and notes that the vagueness prevents the County from being able to produce an accurate cost estimate. Citing past Attorney General Opinions, the County opines that a public body is not required to impose its own judgment or conduct additional research to determine where the records you might be asking for may be located, and here, the County asserts it “would have to make more than a few educated guesses before it could determine where the requested records may be located.”⁸ Further, the County contends that these three requests create an “unreasonable administrative burden” which exceeds the limits of FOIA’s mandate to provide reasonable access to records.⁹ The County declares that it remains ready to fulfill its obligations under FOIA once it has enough information to produce a cost estimate, but unless and until you provide more specificity, the County states that the Petition should be dismissed.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

DISCUSSION

The public body carries the burden of proof to justify a denial of records.¹⁰ The two central issues of your Petition are as follows: 1) whether the County was required to provide time-stamped copies of your requests, the envelopes they were mailed in, or all records resulting from your filing; and 2) whether the County properly asserted that the three requests were too broad and vague to require a response under FOIA.

Time-stamped copies of your FOIA request, the envelope you mailed it in and the resulting records generated by your FOIA requests.

The County asserts that it has no obligation to produce back to you a time-stamped copy of your FOIA request and the envelope you mailed it in as those are not public records which have been collected or maintained in the County's files. FOIA does not require that a public body preserve and maintain every record that comes into its possession, and simply because a record is sent to a public body, FOIA does not compel the public body to maintain that record within its files.¹¹ The County aptly points to "junk mail" as an example of mailed documents that are received by a public body but are not retained for any meaningful period of time and therefore do not become public records. The envelopes you mail your FOIA requests in clearly fall within this category. The County represents that it does not retain these envelopes in its files, and therefore it has no obligation under FOIA to produce them.

Your request for a time-stamped copy of your FOIA request back is another matter. The County cannot assert that it has not collected and retained at least some of the FOIA requests it receives from you, as three copies are attached to its Response. The County asserts that if your FOIA requests are indeed construed as public records, the County must retain them and cannot be required to send them back to you. This argument also misses its mark, as FOIA does not require original records be provided; FOIA merely requires access to public records by permitting inspection and copying of those records.¹² You seek "time stamped" copies of your FOIA requests back, and we are not persuaded that the County has no obligation to search for such records. Here, the County did not specify in its initial response to your FOIA requests or its Response to your Petition whether it searched and produced the records responsive to your requests. The County is under no obligation to create a document in response to a FOIA request, but we have insufficient information to determine whether the County has searched and produced responsive documents, or properly denied this request. As the County has not met its burden of proof, we find a violation of FOIA in this regard and recommend that the County search its records for responsive records and send you a supplemental response specifically addressing your requests for time-stamped copies of your FOIA requests.

¹⁰ 29 Del. C. § 10005(c).

¹¹ See 29 Del. C. §§ 10001-10007.

¹² 29 Del. C. § 10003(a).

FOIA does not require a public body to create a document in response to a request.¹³ Your request for any records that your FOIA requests generate is akin to a request that the County create records and provide them to you, as the FOIA request you submit is the triggering event for the public body to search for such records. Here, the County indicates it has no responsive records to your requests when it searched upon receipt of these requests, and it is not obligated to create any such records. Accordingly, we find no violation.

Three requests deemed overly broad and vague.

The County asserts that three of your FOIA requests are overly broad and vague and as such, FOIA does not require a response. FOIA provides that all requests “shall adequately describe the records sought in sufficient detail to enable the public body to locate such records with reasonable effort.”¹⁴ “The requesting party shall be as specific as possible when requesting records.”¹⁵ Further, “the public body may request that the requesting party provide additional information known to the requesting party, such as the types of records, dates, parties to correspondence, and subject matter of the requested records.”¹⁶

Your three requests refer to “all records generated by” a certain employee on any “Kostyshyn matter,” “all contacts by Matthew Frawley” on any “Kostyshyn matter,” and all emails from John Cartier to any County department, employee or office on any “Kostyshyn matter.” These terms are very broad and offer no clues as to the types of matters, timeframes, full party names, or other identifying features of the documents you seek. Overall, we do not believe that the term, “any Kostyshyn matter,” is sufficiently specific to allow the County to locate responsive documents with reasonable effort and that the County appropriately asked for clarification of these requests in this case, especially because FOIA expressly permits a public body to ask for additional information “known” to the requesting party. You are asking for matters involving yourself or other Kostyshyn family members, and the County reasonably asked you to provide more specificity about these “Kostyshyn matters.” We find no violation with regard to the County’s request for clarification; you may wish to provide additional detail in future FOIA requests to facilitate the production of responsive public records that may exist.

¹³ *Del. Op. Att’y Gen.* 18-IB34, 2018 WL 3947262, at *2 (July 20, 2018); *Del. Op. Att’y Gen.* 02-IB18, 2002 WL 32100328, at *1 (Aug. 19, 2002) (“[u]nder FOIA, a public body is not required to create a document that does not exist.”).

¹⁴ 29 *Del. C.* § 10003(f).

¹⁵ *Id.*

¹⁶ *Id.*

CONCLUSION

We find that the County violated FOIA by failing to respond specifically to your request for “time stamped copies” of your FOIA requests and recommend that the County make a reasonable search for responsive records and provide you with a supplemental response. With respect to the remaining allegations, we find no violation.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Randolph M. Vesprey, Assistant County Attorney