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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB43

July 22, 2019

VIA EMAIL

Commissioner David Moskowitz
Town of Dewey Beach
davidm@townofdeweybeach.com

RE: FOIA Petition Regarding the Town of Dewey Beach

Dear Mr. Moskowitz:

We write in response to your July 2, 2019 petition alleging that the Town of Dewey Beach 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 Town has not violated FOIA as alleged.

BACKGROUND

The Town of Dewey Beach received a FOIA request from you on June 12, 2019, seeking “[a] copy of the Town Manager’s and Police Chief’s Schedule from April 1, 2019 to Sept[.] 2, 2019 or the latest date available.”¹ On July 2, 2019, the Town provided you with a statement from the Town Manager that his schedule is generally defined in his employment agreement as follows:

6. Koenig is expected to attend to his duties and responsibilities during the regular work week of the Town and to be available during normal business hours of the Town as well as hours outside normal office hours. Koenig will be expected to attend all Town Commission meetings and some or most Committee meetings.²

¹ Petition.

² *Id.*

The Town provided a similar statement from the Police Chief on the same date, who provided an excerpt from his contract that reads “Employee shall propose his own full-time schedule, which shall be submitted to the Town Manager for approval.”³

This Petition followed, in which you allege that “[n]o schedule was provided instead generalities were sent which are not responsive in any manner to what I specifically requested.”⁴ You then quote extensively from Attorney General Opinion 06-IB11 and this Office’s prior holding that Delaware courts will likely not find that the personnel file exemption applies to the “attendance records or time sheets” of public employees and that an invasion of personal privacy will likely not be found where a public employee is asked to disclose generic classifications such as “vacation,” “sick day,” or “personal day.”⁵

The Town responded through counsel on July 9, 2019 (“Response”). The Town responds that “the information supplied was responsive to [the] vague request – a request that was not accompanied by additional verbal or written instructions or preceded by a request for information that the town ignored or denied. After receipt of the town’s response, Commissioner Moskowitz did not offer a clarification or supplement his request.”⁶ The Town asserts that “[f]rom the request it is unclear whether attendance records are sought or evidence of meetings noted on an electronic calendar or simply an indication whether the employee has planned to be in the office or otherwise on duty.”⁷ The Town concludes that if you wish to clarify your request, it will provide copies of any and all public records responsive thereto.⁸

On July 12, 2019 you provided a Reply, in which you recount an example of difficulty you encountered obtaining records in the past, explain your understanding of your role as a Commissioner, point to language in the Police Chief’s contract that references overtime pay, and state for the first time “[f]or clarification purposes, the Town Manager and Police Chief are entitled to vacation, sick, training and comp hours. I want to understand what hours each day from April 1, 2019 to September 2, 2019 were and/or will be spent performing their duties or using those vacation, sick, training, or comp hours.”⁹

³ Petition.

⁴ *Id.*

⁵ *Id.*

⁶ Response.

⁷ *Id.*

⁸ *Id.*

⁹ Reply.

DISCUSSION

The Petition alleges that the documents provided by the Town were “not responsive in any manner to what” the FOIA request sought.¹⁰ However, the FOIA request originally directed to the Town asked for “[a] copy of the Town Manager’s and Police Chief’s Schedule from April 1, 2019 to Sept[.] 2, 2019 or the latest date available.”¹¹ In response, the Town provided excerpts of public documents that address how the schedules of both individuals are determined or set. We cannot on this record conclude that a violation of FOIA has occurred.

When the Petition was filed with this Office, additional information was included regarding the right of the public to “attendance records or time sheets” of public employees. After receiving a Response from the Town, a Reply was filed, further refining the request to include documents for both officials that address “what hours each day from April 1, 2019 to September 2, 2019 were and/or will be spent performing their duties or using those vacation, sick, training, or comp hours.”¹²

FOIA requires public bodies to “provide reasonable assistance to the public in identifying and locating public records to which they are entitled access,” and the FOIA Coordinator must “work to foster cooperation between the public body and the requesting party.”¹³ Cooperation requires both parties to participate in good faith. Our analysis necessitates a “fact-based examination” of the circumstances.¹⁴ Here, there is no indication that the Town required clarification from you to complete the request; exceptions were not raised, and documents were provided. However, it is also clear that your original request did not reflect the level of detail you clarified in your Reply that you were seeking. This Office has made clear that it will not opine on matters raised for the first time in the Reply to a FOIA Petition.¹⁵ The Town has expressed its willingness to provide additional public documents responsive to a more detailed request.¹⁶ We encourage you to work cooperatively with the agency, providing additional detail directly to the agency, in order to expedite the production of responsive public records that may exist. In the event that such information exists and is not provided in response to your request, you may file a subsequent Petition invoking our authority to review the Town of Dewey Beach’s response.

¹⁰ Petition.

¹¹ *Id.*

¹² Reply.

¹³ 29 *Del. C.* § 10003(g).

¹⁴ *Del. Op. Att’y Gen.* 18-IB51, 2018 WL 6591816, at *FN 4 (Nov. 20, 2018).

¹⁵ *See, e.g., Del. Op. Atty. Gen.* 19-IB37 (July 5, 2019); *Del. Op. Atty. Gen.* 18-IB51, 2018 WL 6591816, at *FN 4 (Nov. 20, 2018); *Del. Op. Atty. Gen.* 12-IIB11, 2012 WL 5894039, *4 (Nov. 7, 2012).

¹⁶ Response.

CONCLUSION

For the reasons set forth above, we conclude that the Town of Dewey Beach has not violated FOIA as alleged.

Very truly yours,

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

Approved:



Aaron R. Goldstein
State Solicitor

cc: Fred A. Townsend, III, Esquire, Counsel to the Town