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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB45

August 26, 2019

VIA EMAIL

Shawn Tucker, Esq.
Drinker Biddle & Reath, LLP
Shawn.Tucker@dbr.com

RE: FOIA Petition Regarding the City of Lewes

Dear Mr. Tucker:

We write in response to your correspondence alleging that the City of Lewes (“City”) 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. As set forth below, we conclude that the City has not violated FOIA with respect to your records request.

BACKGROUND

On May 8, 2019, you filed a FOIA request with the City on your client’s behalf seeking the following records:

We request all “public records” as defined in Title 29, § 100 of the Delaware Code, related directly or indirectly to all Burke & Rutecki, LLC Fisher’s Cove land use applications submitted to the City of Lewes for the property located off of Rodney Ave. and Pilottown Road, being approximately 11.08 acres and also known as tax parcel nos. 335-4.00-15.00, 335-4.14-100.00, and 335-4.14-103.00 (624 Pilottown Road).¹

Additionally, the request states that the “courts have construed ‘public record’ to be inclusive of all e-mails and texts sent through personal accounts or devices where the communications pertain to public business.”² The City produced an initial set of documents on

¹ Petition (emphasis in original).

² *Id.*

June 12, 2019 and a second set on June 26, 2019, which the City confirmed completed its response. On July 12, 2019, you sent a follow-up letter reiterating that FOIA requires production of emails and texts sent through personal accounts and devices and requesting confirmation that the City has produced all non-exempt records including personal account records of public officials and that “every reasonable effort” was made to provide the requested documents. By letter dated July 15, 2019, the City Solicitor stated that the “City has concluded its response to your May 8, 2019 request” and pointed out that the City does not have to produce records which are the subject of pending or potential litigation which are not records of any court. By letter dated July 23, 2019, you again requested this same confirmation, noting that an email from Planning Commissioner Thomas Panetta was supplied from Councilperson Bonnie Osler, but no duplicate email from Commissioner Panetta’s inbox was produced. On July 23, 2019, the City Solicitor sent a final response, reiterating the City’s position that FOIA does not require multiple copies of an identical record be produced from every source and stating that the City has no interest in continuing this dialogue “when there is no substantive merit.”³ The City Solicitor stated our Office is the proper forum to adjudicate the issue in dispute. However, the City noted it had since undertaken a further search and identified additional records, which were attached.

You then sent a Petition to this Office, contending that the City’s refusal to confirm that it produced all non-exempt public records in response to your request and that the City made every reasonable effort to provide responsive public records are violations of FOIA. You argue it is apparent from the City’s delayed production of emails that its first response was incomplete, causing reasonable doubt about the completeness of the final response. The Petition requests that the City be required to provide your client with all responsive documents and confirm that the City has taken all reasonable efforts to produce responsive documents.

On August 12, 2019, the City’s counsel provided a responsive letter (“Response”). First, the City argues that FOIA does not require a public body to produce multiple copies of the same record from every source where it exists within the public body. The City acknowledges that Councilperson Osler’s inbox contains the email which was produced and Commissioner Panetta’s inbox also contains a duplicate email but states that like a memorandum distributed to an entire office, “the City need only produce the record one time, from one of the various sources.”⁴ The City asserts that it did not violate FOIA by producing the email from Councilperson Osler’s account but not Commissioner Panetta’s account. Second, the City Solicitor argues that the City had no obligation to confirm to you that it complied with FOIA outside of an adjudicative context. Nonetheless, the City Solicitor states that “[o]bviously, the City *did* make all reasonable efforts to produce responsive records, as the law requires.”⁵ Finally, responding to the Petition’s suggestion that its response was not timely, the City outlined its reasoning why it believes its response met FOIA’s time requirements.

³ *Id.*

⁴ Response.

⁵ *Id.* (emphasis in original).

By letter dated August 15, 2019, you responded to the City (“Reply”). As the City now confirmed that it “had made all reasonable efforts to locate documents responsive to [your] request,” you assert that this issue is now moot.⁶ The Reply further affirms that the issue of timeliness was not raised in the Petition. However, the Reply alleges the City must confirm “that all public records have been made available,” including the allegedly duplicate email in Commissioner Panetta’s email account.⁷ Contending that FOIA does not exempt duplicate documents, the Reply notes that it defies logic to assert it would be less onerous to identify and sort duplicates than simply producing all non-exempt responsive documents. You note that emails from separate accounts are not identical in the same way a print-out of a memorandum would be identical, as “[f]orwarding information, from/sent information, and copied e-mail accounts can vary in relevant ways even on otherwise ‘identical’ e-mail chains,” and “[e]-mail chains can also be easily altered and even deleted” by the forwarding party.⁸ Thus, the Reply requests that this Office “require the City to acknowledge that similar or allegedly identical emails found in different accounts are not exempt, to require the disclosure of Commissioner Panetta’s original e-mail, and to confirm that it has otherwise provided [your] client with reasonable access to all documents responsive to the [r]equest.”⁹

DISCUSSION

The parties dispute two issues: whether the City is obligated to confirm to a requestor that the City has provided access to all responsive public records and whether a public body is obligated to produce duplicate records when identical records are maintained in more than one location within the public body’s records. We address each issue below.

First, the Petition alleges that FOIA requires the City to provide confirmation that it has provided access to all responsive public records. The City completed its response to the request but refused to make this certification. FOIA requires the City to provide a response to a requesting party.¹⁰ However, the FOIA statute does not require a public body granting access to records to certify that all responsive public documents have been provided to the requesting party, and the City’s refusal to do so here is not a violation of FOIA.

Second, the Petition alleges that the City is obligated to provide all duplicate emails from Commissioner Panetta’s email account, even if the City previously produced the emails. We do not find any support in the statute for this expansive view; FOIA merely requires that the public

⁶ Reply.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ 29 *Del. C.* § 10003.

bodies produce public records for inspection and copying, not produce multiple copies of the same public record. The City acknowledges that it possesses an email sent from Commissioner Panetta's email account and the duplicate email received by Councilperson Osler's account. The City Solicitor represents that the City received copies of all emails from Commissioner Panetta's account, reviewed them, and provided the responsive records, but he acknowledges he did not provide the email from Commissioner Panetta's account sent to Councilperson Osler's account because it is a "duplicate record" of the one produced to you.¹¹ As such, we find that the City is not obligated by FOIA to produce more than one copy of this email or any other identical public record already produced.

CONCLUSION

For the above reasons, this Office concludes that the City has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

cc: Glenn Mandalas, City Solicitor, City of Lewes

¹¹ Response.