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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB18

May 22, 2020

VIA EMAIL

Jeremy Rothwell
rothwell@udel.edu

RE: FOIA Petition Regarding the City of Harrington

Dear Mr. Rothwell:

We write in response to your correspondence alleging that the City of Harrington (“City”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that that the allegation regarding timeliness is now moot.

BACKGROUND

On January 2, 2020, you submitted a request for seven items to the City, including the following: 1) copies of a certain check and receipt for reimbursement; 2) copies of certain “NJ EZ Pass violation letters/invoices” and related email correspondence regarding payment; 3) all information related to the private appointments on the City Manager’s calendar from October 2017 to March 2019; 4) all correspondence between the City Manager and the Delaware State Fair manager or anyone else at the Delaware State Fair, including its solicitor and all correspondence related to a certain Delaware State Fair meeting; 5) “utility (sewer) statements . . . by the Delaware State Fair from January 2013 to present,” including any waivers of late fines or fees, including the names of the person who authorized such waivers and the written correspondence related thereto; 6) all correspondence and documentation between the City Manager and City legal counsel about a specific case; and 7) a list of all City employees who received pay raises between February 2017

and October 2019 and related information, in addition to the authorizing parties and related correspondence.¹ In reference to the third item, you stated “[i]f you cannot find any information related to these appointments, please contact [the City’s IT provider] to find out whether these appointments were altered to private at anytime in the recent past.”²

In response to the request, the City provided a cost estimate of \$81.82 in administrative charges and stated the correspondence requested in the sixth item were exempt under attorney-client privilege. You provided payment and on February 3, 2020, you followed up regarding the status of the production, noting the City deposited your check. Two days later, the City replied: “[d]ue to the large amount of documents requested, please allow another week.”³ You followed up on your requests two more times thereafter, and on February 19, 2020, the City stated the request is for a large volume of documents that are not readily available. The City provided responses to the first, second, fifth (in part), and seventh item the next day. Neither party alleged any correspondence was exchanged in March. This Petition followed in late April.

In the Petition, you argue that the City has not timely replied to your request, noting that you received no response to the third and fourth items in your request nor did you receive any of the emails requested in the fifth item. Additionally, as the records provided on February 20, 2020 were date-stamped February 5 and 7, 2020, you allege that the FOIA Coordinator deliberately withheld these items to prevent you from using them in the February 18, 2020 City Manager public hearing, as it was “additional damaging information” relevant to the hearing.⁴

On April 30, 2020, the City answered the Petition through counsel (“Response”) responding to the remaining items in your FOIA request. For the third item, the City informed you that it does not possess any documents relating to the fifty-four private appointments depicted on the former City Manager’s calendar and it had contacted its IT provider about your inquiry related to these private appointments. The City commits to provide this information when received. For the fourth item, the City states that it provided all responsive records with its Response. For the fifth item, the City states that responsive documents were previously produced and that the City does not have any documents pertaining to the waiver of fines or late fees with the Delaware State Fair. Finally, the City’s counsel stated the City recognizes its delay in producing the initial set of documents on February 20, 2020, but the FOIA coordinator “denies maliciously withholding the documents” until after the City Manager’s hearing.⁵

¹ Petition.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Response.

DISCUSSION

The Petition presents two issues for consideration: 1) whether the City violated FOIA by intentionally withholding documents related to the City Manager's hearing; and 2) whether the City timely responded to your request. We address each issue below.

First, the parties present competing factual allegations regarding whether the documents produced on February 20, 2020 were intentionally withheld until after a February 18, 2020 hearing. The Petition claims that the delay was intentional, but the Response states that the "FOIA coordinator denies maliciously withholding the documents until after a specific date, namely the former City Manager's public hearing."⁶ Based on this record, we are unable to make a finding regarding this issue, as this Office does not operate as an independent factfinding body and cannot resolve the parties' competing factual claims.⁷

Second, FOIA requires a public body to respond to a request within fifteen business days or advise of the need for additional time in compliance with the statutory requirements.⁸ Since the filing of your Petition, the City provided you with a response to the remaining items identified in your Petition and agreed to consult with its technology provider about your question. As such, we find that your claim disputing the timeliness of the City's response is moot.⁹ However, the City is cautioned to provide timely communications in the future.

⁶ *Id.*

⁷ *Del. Op. Att'y Gen.* 15-IB06, 2015 WL 5014135, n. 2 (Aug. 19, 2015) ("Please note that we do not, in the context of evaluating petitions for determination under FOIA, operate as an independent fact-finding body."); *Del. Op. Att'y Gen.* 18-IB05, 2018 WL 1061276, at *6 (Jan. 30, 2018) ("Under the circumstances, we are not able to make a determination in this case of whether a FOIA violation has occurred because the record reflects competing, irreconcilable statements of fact that cannot be resolved on this record."); *see also Office of the Pub. Def. v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003) ("And the legislature has made it clear that [FOIA] is not intended to supplant, nor even to augment, the courts' rules of discovery."); *Del. Op. Att'y Gen.* 19-IB65, 2019 WL 6839916, at *3 (Nov. 25, 2019).

⁸ A public body must "respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived." 29 *Del. C.* § 10003(h)(1). "If access cannot be provided within 15 business days, the public body shall cite [one] of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request." *Id.*

⁹ *See, e.g., Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) ("[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them."); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (in response to plaintiffs' request for a

CONCLUSION

For the foregoing reasons, we conclude that the allegation regarding timeliness is now moot.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Dianna E. Louder, Attorney for the City of Harrington

declaration that the Board wrongfully denied them timely access, stating “[b]ecause the documents that are the subject of [plaintiffs’] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot”); *Del. Op. Att’y Gen.* 19-IB25, 2019 WL 4538311, at *3 (May 10, 2019) (“Based on this record, it is my determination that the allegations in your Petition are now moot, as DOC has completed its final response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, *2 (Jun. 7, 2018) (“Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB25, 2018 WL 2994703, *1 (May 15, 2018) (“Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request.”); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, *1 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998) (citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter “is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter’s determination.”).