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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 20-IB22**

**October 6, 2020**

**VIA EMAIL**

Ms. Jeanne Kuang  
[Jeanne.kuang@delawareonline.com](mailto:Jeanne.kuang@delawareonline.com)

**RE: FOIA Petition Regarding the City of Wilmington**

Dear Ms. Kuang:

We write in response to your correspondence alleging that the City of Wilmington (“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. As discussed more fully herein, we determine that the City violated FOIA by denying your request.

**BACKGROUND**

On June 26, 2020, you sent a FOIA request to the City for “all applications submitted by the Wilmington Police Department to any federal agency for a grant or other funding in the years 2017, 2018, 2019, and 2020 so far, and any and all communications from the federal agency in response.”<sup>1</sup> The City denied both items in your request, stating that the grant applications are owned and maintained by the federal agencies who received the grant applications and your request for emails must be directed to the State of Delaware, as the City police department is not in possession of any correspondence responsive to your request.

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<sup>1</sup> Petition.

This Petition followed, in which you make two arguments. First, you argue the application that the City created is a public record of the City, regardless of whether a copy was sent to the federal agency. You surmise that the City has kept a copy of this application for its records, and even if it has not, you contend that the City is obligated to promptly request this noncustodial record and provide it to you under FOIA. Second, you argue that the City's denial of the possession of any correspondence relating to the grant application in the past three and a half years is not plausible, especially in light of City staff's statements at a public meeting that its application was rejected. For these reasons, you ask our Office to direct the City to produce these records to you.

The City's counsel replied to your Petition on September 21, 2020 ("Response"). The City maintains that its completed grant applications are under the exclusive control of the federal agencies who receive them, pointing to an example in which the US Department of Justice's application parameters stated that all grant applications "submitted to [Office of Justice Programs] (including all attachments to applications) are subject to the federal Freedom of Information Act (FOIA) and to the Privacy Act."<sup>2</sup> Although the US Department of Justice would allow the City to provide its position regarding whether any material is exempt, the Department remained the sole determiner of whether any information is withheld. The City contends that substantially similar language is common in federal grants and gives the federal agency exclusive authority and control over the completed grant applications. Regarding your second request for all emails with the federal agency, the City states that the City police department stores all of its emails on the servers of the State of Delaware. Arguing it would be an unreasonable burden for the City to manually search three and half years of emails, the City asserts that its referral of the request to the State of Delaware Department of Technology and Information ("DTI") is appropriate. The City maintains that its regular practice is to send any FOIA request for police department emails to DTI.

## DISCUSSION

FOIA requires the City to provide reasonable access to its public records.<sup>3</sup> The City's completed grant application is subject to FOIA, even if a federal agency is provided this same record.<sup>4</sup> The federal grant language cited by the City merely notifies applicants of the federal agency's responsibilities and the process to comply with its own federal FOIA requirements. This language does not relieve a grant applicant from complying with its own state FOIA obligations. As such, it is recommended that the City search its records for responsive grant applications and provide the records, as appropriate under FOIA.

The second request seeks certain emails of the City police department. The City argues that this request cannot be handled by the City and must be directed to DTI, the state agency that

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<sup>2</sup> Response.

<sup>3</sup> 29 *Del. C.* § 10003(a).

<sup>4</sup> *Del. Op. Att'y Gen.* 05-IB16, 2005 WL 2334345, at \*6 (Jun. 22, 2005) (determining that more than one public body may be a custodian of a record and the public body that originated the record is the appropriate public body to respond to the request for that record).

hosts the server storing the emails. However, the City is obligated to respond to FOIA requests for its public records.<sup>5</sup> There is simply no basis to assert that the City police department's own emails are not records of the City, notwithstanding that the City uses a state entity's server to store such emails. As such, the City is recommended to respond to this second item in conformance with FOIA as well. Consistent with the practice for many State entities, the City may contact DTI for assistance in responding to FOIA requests for emails when appropriate.

### CONCLUSION

For the reasons set forth above, we determine that the City violated FOIA by denying your records request. We recommend that the City process and respond to both items in your request in accordance with FOIA within the fifteen business days from the date of this Opinion.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

<sup>5</sup> 29 *Del. C.* §§ 10002, 10003.