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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 20-IB25

October 28, 2020

VIA EMAIL

Bruce Vivari
brucevivari@gmail.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear Mr. Vivari:

We write in response to your correspondence alleging that the City of Rehoboth Beach violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your requests for records. We treat your correspondence as a Petition to determine whether a violation of FOIA has occurred. As explained herein, we find that the City violated FOIA by not providing a timely response to several requests.

BACKGROUND

Over the course of almost seven months, you submitted five FOIA requests to the City, numbered below chronologically by date submitted:

1. December 10, 2019: "Results of the inspection and any other correspondence with the property owner at [property] regarding the use of carriage house in violation of court order and the installation of fixtures in the carriage house without first obtaining the appropriate plumbing and other permits. What actions has the City taken in this matter?"
2. February 18, 2020: "I want to examine all business licenses and applications issued to [individual] or [individual] for [property] for the period January 1, 2010 through February 18, 2020. In addition, I would like to examine all building permits issued for improvements to [property] for the period January 1, 1991 through February 18, 2020. Finally, do your records contain any correspondence regarding satisfaction of the court

order dated July 2, 1991 that mandated the removal of all improvements to the 3rd floor of the accessory house.”

3. March 9, 2020: “Any and all correspondence regarding the sale of the house from [individual] to [individual] in 2012. I understand the city was well aware of the restrictions on use of the property. I want to review all correspondence between city officials, the selling and buying realtor, [individual] and [individual] and their legal representatives and settlement agency.”
4. March 15, 2020: “I am requesting to review the property file for [a property]. And, in specific, the application for amnesty that the city received and approved back in 1992 regarding the registration of the accessory house as a garage apartment.”
5. July 1, 2020: “System access and audit log records for the City's Permits and Inspection computer-based tracking system. These are required in order to determine who deleted and when they deleted inspection results that were previously entered for [a property].”¹

You filed a Petition with this Office on August 12, 2020. For Request 1, you allege the City responded after you filed your request, denying access to the records based on the investigatory file exemption, and although you do not like the City’s denial of records under this exemption, you agree to accept the City’s decision. For Requests 2, 3, 4, and 5, you allege the City never responded. By email dated August 20, 2020, you withdrew your complaint regarding Request 5, as the City provided you with a response.

The City, through its counsel, replied to your Petition (“Response”). The City first notes again that you accepted the City’s response to Request 1, as noted in the Petition. Request 2 has three parts. Regarding the first part, the City’s counsel asserts that certain applications do not exist and due to a miscommunication among City staff, a response with the licensing records was delayed until August 25, 2020. Also, the City asserts that licensing information is available online and you viewed information there in October 2019. The City states that you visited City Hall on February 26, 2020 and were given access to the property file which contained all records that would be responsive to the second and third part of Request 2. Therefore, the City argues its response to Request 2 is complete. Request 3 sought records related to a certain real estate transaction. The City’s counsel states that the City does not have any responsive records, but if it did, those would have been in the property file that you viewed on February 26, 2020. To ensure you have received all records, the City alleges it gave you a copy of the City’s property card showing the sale price and parties to the transaction. The City states Request 3 is now satisfied. Request 4 sought the property file, including the amnesty application. The City explains the record responsive to this request would be the “garage apartment registration form,” which was in the file you reviewed in February and that file you reviewed was the “property file.” Consequently, the City argues Request 4 has been fulfilled. The City states Request 5 was previously fulfilled and points to your email acknowledging that this request is satisfied.

¹ Petition.

DISCUSSION

FOIA requires a public body to respond to a request “as soon as possible, but in any event within 15 business days after the receipt thereof, by providing access to the requested records, denying access to the records or parts of them, or by advising additional time is needed” for one of the delineated reasons.² If access is denied to a record in whole or in part, the public body is required to provide a reason for the denial.³

Request 2 has three parts: 1) all business licenses and applications issued to a property owner for the period January 1, 2010 through February 18, 2020; 2) all building permits issued for improvements to a property for the period January 1, 1991 through February 18, 2020; and 3) any correspondence regarding satisfaction of the court order dated July 2, 1991. For the first part, the City acknowledges it supplied a late response due to a staff miscommunication, providing licensing records to you in August via email and confirming in its Response the applications do not exist.⁴ This delayed response constitutes a violation under FOIA, as it does not meet the time limitations set forth in FOIA. You acknowledge you were granted access to the building permit file, timely fulfilling the second part of this request. For the third part, the City states in its Response that any court order correspondence would have been in the file when you conducted the file review in February. The problem is that the City has produced nothing to show that it advised you of this specific response to the third part in February, and you dispute being provided any records in response to this third part.⁵ The City bears the burden of proving compliance and has not demonstrated compliance with FOIA with respect to the third part.⁶ Accordingly, we find

² 29 Del. C. § 10003(h). “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.*

³ *Id.*

⁴ This response was due prior to the institution of the *Fourth Modification of the Declaration of a State Of Emergency for the State of Delaware due to a Public Health Threat*, signed by Governor Carney on March 22, 2020, which expanded the time in which public bodies may respond to FOIA requests to fifteen business days following the termination of any active Declaration of a State of Emergency. <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fourth-Modification-to-State-of-Emergency-03222020.pdf> (last visited Oct. 23, 2020).

⁵ The City offered no evidence into the record of a written response to the third part of Request 2 in February. The City’s apparent decision to not provide a specific response at that time hamstrings our analysis now, as a response to your request in February stating that the City is providing access to the file in response to this third part would have been sufficient to meet its obligation under FOIA.

⁶ 29 Del. C. § 10005(c).

the City violated FOIA in this regard. In sum, we find that the City violated FOIA by impermissibly delaying its response to the first and third parts of Request 2. We recommend the City provide a specific response to the third part of Request 2 denying or granting access to the requested record, and as the City's counsel now represents the first part of Request 2 is complete, we do not recommend any remediation for that violation.⁷

Requests 3 and 4 were both filed in March, after your visit to the City Hall on February 26, 2020. The City claims the records for Request 3 do not exist and even if they did, they would have been in the file you accessed in February. As the City's counsel has now provided a final response stating that the records do not exist,⁸ we find that this delayed response complies with FOIA under the extension permitted by the *Fourth Modification of the Declaration of a State Of Emergency for the State of Delaware due to a Public Health Threat*, signed by Governor Carney on March 22, 2020, which expanded the time in which public bodies may respond to FOIA requests to fifteen business days following the termination of any active Declaration of a State of Emergency.⁹ This order was in place during the months the City did not respond to Request 3, and thus, we find no violation as alleged.¹⁰

The City explains the record responsive to the request for an amnesty application in Request 4 was actually the "garage apartment registration form" and it also was located in the file you reviewed in February, which the City asserts is the "property file." Thus, it asserts Request 4 is satisfied. We disagree; the City's position is that permitting your review of this file in February constitutes a sufficient response to your later-submitted FOIA request for any record maintained in that file. FOIA requires the City to respond to a FOIA request by denying or granting access to the requested records. Pointing back to a requesting party's previous file review months ago on an unrelated request does not satisfy FOIA. Accordingly, we find the City violated FOIA in its response to Request 4 and recommend the City provide a specific response to Request 4 within fifteen days of the date of this determination.

CONCLUSION

Based on the foregoing, we determine that the City violated FOIA by failing to timely respond to the first and third parts of Request 2 and to Request 4, and we recommend that the City

⁷ We acknowledge that many Delaware governmental entities, such as the City, have had significant and unanticipated operational impacts caused by the coronavirus pandemic. These impacts, however real, do not permit non-compliance with FOIA.

⁸ "It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'" *Del. Op. Att'y Gen.* 06-IB10, 2006 WL 1779491, at *2 (May 4, 2006) (citations omitted).

⁹ <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fourth-Modification-to-State-of-Emergency-03222020.pdf> (last visited Oct. 27, 2020).

¹⁰ <https://governor.delaware.gov/health-soe/> (last visited Oct. 27, 2020).

provide a specific response to the third part of Request 2 and Request 4 in accordance with FOIA within fifteen business days of this determination.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Glenn C. Mandalas, Attorney for the City of Rehoboth Beach