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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB20

May 17, 2022

VIA EMAIL

John D. Morgan, III
Jdmorgan33@hotmail.com

RE: FOIA Petition Regarding the City of Newark

Dear Mr. Morgan:

We write in response to your correspondence alleging that the City of Newark violated Delaware's 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 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the City violated FOIA by failing to meet its burden of proof to justify its denial of access to the redacted information.

BACKGROUND

The City of Newark has several boards and commissions, whose members serve as volunteers. The members are nominated by the Mayor or councilmembers and their nominations are subject to vote by the City Council. The City previously required applicants for these positions to submit an application and resume and posted both on the City website prior to the meeting where the Council would consider the applicants.¹ At a June 2017 meeting, the City considered changing this practice to make the application materials available by FOIA request only, and you expressed concern that a response to a FOIA request may take too long, and applications might not be

¹ Petition, p. 1-2.

available at the public meeting in which the appointment was considered.² The City's FOIA coordinator stated that any request for an application would be answered the same day the request was submitted.³ The City then decided to continue posting the applications materials online but with the references' contact information redacted. However, after harassment of members occurred in 2021, the City voted to discontinue the practice of posting application materials online and instead made the applications available only by FOIA request.⁴ On February 9, 2022 at 8:09 p.m., you filed a FOIA request for three nominees scheduled for discussion at the February 14, 2022 Council meeting, but you did not receive a response to that request until March 3, 2022, "fully 15 working days after the submission of [your] FOIA request."⁵ The City's response included the application materials of the three nominees, consisting of an application form with a few redactions and the individual's resume with substantial redactions. After this production of records, the City Council voted to allow only the nominating councilmember to assess the appointees' qualifications and vet the appointees to the City's boards and commissions.⁶

This Petition followed. You summarize three issues for this Office's consideration: 1) whether the City's response to your February 9, 2022 was timely, in light of the fact that the City did not provide you the applicants' materials before the meeting at which the applicants would be discussed and in light of the previous statement from the City staff that FOIA requests for applicants' information would be answered the same day; 2) whether the City appropriately redacted the application materials produced; and 3) whether the City's new practice of allowing the nominating councilmember sole access to the appointees' qualifications to vet the appointees to the City's boards and commissions violates FOIA. In support of your argument that the redactions are inappropriate, you point to the Superior Court case of *Grimaldi v. New Castle Cnty.*, which determined that the disclosure of a resume of a certain government employee would not invade the employee's personal privacy, as the public interest in information about the candidate who is awarded a government job outweighs the privacy interest of the successful applicant.⁷ Consistent with this case, you argue that the application materials requested here are also subject to disclosure. You contend that the fact that the members of the boards and commissions are unsalaried should have no impact on this analysis; the public has a right to know about the officials empowered with making legally binding decisions and recommendations about significant matters, such as large development projects. Although you argue the redactions are improper, you state that you have no objection to the redaction of home addresses and personal phone numbers

² *Id.*, p. 2.

³ *Id.*

⁴ *Id.*, p. 7.

⁵ *Id.*, p. 4.

⁶ *Id.*, Seventh Attachment.

⁷ *Id.*, p. 5 (citing *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329 (Del. Super. Aug. 18, 2016) (holding that although the release of the County Risk Manager's resume would not invade her personal privacy, the resume was properly withheld under the pending litigation exemption)).

and email addresses, as long as the City provides a means to contact the members. Finally, you assert that the City’s plan to not collect resumes from applicants going forward violates FOIA.

On April 27, 2022, the City, through its legal counsel, answered the Petition (“Response”). The City reiterates that the board and commission members are unpaid volunteers. The City alleges that the recent harassment that spurred the rule change involved negative comments to employers of these volunteers. Regarding the issue of timeliness, the City points out that the Petition concedes that the response was timely received within fifteen business days, so a violation of FOIA did not occur. The City also notes that the FOIA coordinator position was “in transition” at this time.⁸ Regarding your second claim, the City asserts that its redaction of the applicants’ resumes is now moot, as the City no longer collects resumes from applicants. The City also asserts that the *Grimaldi* case is inapplicable because the City board and commission members are unpaid volunteers. Additionally, the City contends that because the individuals whose applications you requested were merely candidates and not selected for the position at the time that your request was received, their resumes should be withheld under the higher standard for privacy applied to job applicants under FOIA precedent. The City notes that you did not submit a revised request to seek application materials for the candidates after they were chosen. Finally, the City states that your last argument is not appropriately considered, as there is no FOIA requirement to collect resumes from commission or board appointees.

DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to public records for inspection and copying, but certain records and information are excluded from the definition of “public record.”⁹ If a public body denies a FOIA request, the public body carries the burden of proof to justify the denial of access to its records.¹⁰ In certain circumstances, a sworn affidavit may be required to meet that burden.¹¹ We address each of the Petition’s three claims in turn below.

First, you allege that the response to your request was untimely. FOIA requires that a “public body . . . 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.”¹² Accounting

⁸ Response, p. 2.

⁹ 29 Del. C. §§ 10002, 10003(a).

¹⁰ 29 Del. C. § 10005(c).

¹¹ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

¹² 29 Del. C. § 10003(h)(1).

for the intervening holiday, the parties agree that the response to your request was provided within fifteen business days. As such, we find no violation in this regard.

Second, you allege that the redactions in the produced records, except those protecting home addresses and personal phone numbers and email addresses, were improper under FOIA. The City first argues that it no longer collects resumes so this change in practice moots the need to address this issue. FOIA requires a public body to provide access to existing public records, regardless of the City's current practices for collecting those records, and as copies were provided with the Response, responsive records exist in this case. Thus, we do not believe that this issue is moot.

Alternatively, the City argues that its redaction of certain information should be upheld; the *Grimaldi* case does not apply to this request, as the board and commission members are not employees. Instead, the City contends that the request asked for the applications for three candidates for board or commission appointments, and at the time of the request, these candidates were merely applicants, who have a greater expectation of privacy under law. Section 10002(o)(6) exempts any "records specifically exempted from public disclosure by statute or common law," including the common law right of privacy recognized in Delaware.¹³ We agree that job applicants, as opposed to employees selected for the job, have a greater privacy interest in the records they submit seeking employment, but the individuals referenced in your FOIA request are not candidates for a City job; they are more akin to a candidate for public office.¹⁴ In addition, these volunteer members were approved for appointment several days after the request was made and several weeks before the City's response to the request. Thus, analyzing the withheld information in this case under the standard for job applicants is not proper, and now that the candidates have been selected for the City boards and commissions, the public interest in their qualifications to hold these positions is significantly greater.¹⁵

As the City has provided no further rationale or basis to support its redaction of the provided records nor any basis to conclude that the records were properly reviewed in accordance with that rationale, we find that the City has failed to satisfy its burden of proof in this case. Accordingly, we recommend that the City, in accordance with the allowable timeframe in Section 10003(h), produce the requested records to you without redaction, with the exception of home

¹³ *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963) (citation omitted).

¹⁴ See, e.g., *Del. Op. Att'y Gen.* 10-IB17, 2010 WL 5186152, *2 (Dec. 15, 2010) ("This office has extended the right of privacy to 'records relating to the job qualifications of applicants for public employment[.]'"); *Del. Op. Att'y Gen.* 05-IB20, 2005 WL 2334348, *2 (July 27, 2005).

¹⁵ We note that each applicant for a City board or commission member initialed an acknowledgment in the application that the application is subject to disclosure under FOIA. See Petition, Seventh Attachment.

addresses, personal phone numbers or email addresses, references, and any other redactions appropriate under FOIA.¹⁶

Finally, you allege that the City's new procedures for soliciting application materials and appointing members to its boards and commissions are not appropriate under FOIA. There is no requirement in FOIA requiring a public body to collect any certain materials from its nominees for boards and commissions or to undertake any certain process for vetting nominees.¹⁷ Thus, we find no violation under FOIA in this regard.

¹⁶ Without clarification from the City regarding the underlying information that has been redacted, we note that the above items cannot be a comprehensive list, but certain information that is likely in the application materials is not subject to disclosure in these circumstances. *See, e.g., Del. Op. Att'y Gen. 18-IB34*, 2018 WL 3947262, *3, n. 19 (July 20, 2018) (stating "DOI appropriately denied your requests for the background checks and references in the Deputy Commissioner's personnel file" and "[a]lthough *Grimaldi* supports disclosure of the resume in these specific circumstances, we do not interpret this decision to create a bright line rule for the release of all public employee resumes in unredacted form. Resumes can vary significantly in the type, level, and amount of information provided, and another FOIA exemption may preclude disclosure. For example, personal identifying information may be redacted. In addition, a detailed description of a duty or project may be a trade secret, confidential commercial information, a security risk, or other exemption under FOIA, especially in certain industries.") (internal citations omitted); *Del. Op. Att'y Gen. 09-IB01*, 2009 WL 1433466, at *2 (Feb. 5, 2009) (finding that home addresses and social security numbers in fire school records may be redacted before release, as "there is no legitimate public interest in personal information such as home addresses and social security numbers"); *Del. Op. Att'y Gen. 06-IB17*, 2006 WL 2630107, at *7 (Aug. 21, 2006) (in considering redaction of public officials' financial disclosures, noted that "[w]e agree that disclosure of personal identifiers like home address and telephone number, e-mail address, user ID number, or password would invade personal privacy and is not essential for government accountability"); *Del. Op. Att'y Gen. 01-IB17*, 2001 WL 1593117, at *2 (Nov. 19, 2001) ("Disclosing the names and addresses of retirees 'would not appreciably further the citizens' right to be informed about what their government is up to. Indeed, such disclosure would reveal little or nothing about the employing agencies or their activities.'") (citation omitted).

¹⁷ 29 Del. C. §§ 10001-10007.

CONCLUSION

For the foregoing reasons, we conclude that the City violated FOIA by failing to meet its burden of proof to justify its denial of access to the redacted information.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Paul E. Bilodeau, City Solicitor