



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB23

July 7, 2022

VIA EMAIL

John Reiss
Jreiss@comcast.net

RE: FOIA Petition Regarding the Town of Blades

Dear Mr. Reiss:

We write in response to your correspondence alleging that the Town of Blades violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). You first submitted correspondence alleging that the Town violated FOIA with regard to your FOIA request for records ("Request Petition"), and several days later, you submitted correspondence alleging that the Town Council violated FOIA with respect to its June 13, 2022 meeting ("Meeting Petition") (collectively, "Petitions"). We treat both communications as Petitions for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur and issue this combined opinion to address both Petitions. For the reasons set forth below, we find that the Town violated FOIA with respect to your requests for records. However, no violation is found with regard to the Meeting Petition.

BACKGROUND

The Request Petition alleges that you submitted a FOIA request for records on May 21, 2022.¹ The request sought copies of all town employees' attendance records for the previous five

¹ The Request Petition alleges that a request was submitted on May 23, 2022, but the document attached to the Town's Response indicated that this request was submitted on May 21, 2022. The Request Petition also asserts that two additional requests were submitted to the Town

months. The Town admits that it received your May 21, 2022 request, although it was initially misdirected to the Town police through the Town’s online portal for FOIA requests. The Town denied this request based on the personnel file exemption, but nonetheless invoiced you for \$50.00 for an “Additional Labor Fee – FOIA - Research and Response.”² The Town also indicated that it would bill you for the legal fees after the attorney’s invoice was received. After you immediately canceled your request, the Town stated that, as a “one-time courtesy,” it would not charge you the \$50.00 invoiced.³ In the Petition, you allege that the Town improperly charged you for the request, noting that the Town did not give advance notice you would be charged these fees, nor did the Town first contact you that the fees would exceed the amount of \$15.00, as you requested on the submitted FOIA form. Additionally, you argue that the Town cannot charge for an attorney’s research.

On June 9, 2022, the Town responded to the Request Petition, noting that it denied the request in reliance on the Town Solicitor’s legal opinion. The Town further acknowledged its error in charging the fees and stated that it would not charge attorneys’ fees in the future, and that search fees would be billed at the actual time expended at the rate of the lowest-paid employee. The Town also noted that it only received the May 21, 2022 request and its portal was inadvertently sending the requests to the Town police. The Town states that the error has been corrected and the requests would now reach the appropriate staff.

The Meeting Petition alleged that the Town failed to timely post the notice and agenda for the June 13, 2022 meeting on its website. On June 10, 2022, the Town responded to the Meeting Petition by stating it was not required to post the agenda online, but it did, in fact, post the agenda on its bulletin board in the lobby on June 6, 2022. Despite experiencing technical issues with the website earlier in the week, the Town states that it posted the agenda to its website on June 10, 2022.

DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.⁴ The public body carries the burden of proving compliance

on May 3, 2022 and May 5, 2022, but the provided information was not sufficient to evaluate this matter.

² Request Petition.

³ *Id.*

⁴ 29 *Del. C.* § 10003(a).

with the FOIA statute.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ We address each Petition in turn below.

With regard to the Request Petition, FOIA permits public bodies to charge certain fees to fulfill a request for records and provides that “[p]rior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records.”⁷ In determining fees, the statute provides that “[c]harges for administrative fees may include staff time associated with processing FOIA requests, including, without limitation: identifying records; monitoring file reviews; and generating computer records (electronic or print-outs).”⁸ However, administrative fees may not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA. Further, the public body is obliged to “make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonable[y] required to process FOIA requests” and must “minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.”⁹ Administrative fees must be billed at the hourly pay grade, prorated for quarter hour increments, of the lowest-paid employee capable of performing the service. “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”¹⁰

The Town concedes that it improperly charged a \$50.00 labor fee and a legal research fee for your May 21, 2022 request. As FOIA requires that administrative fees be charged at an hourly rate for the lowest-paid staff capable of processing the request, and that any fees associated with a legal review of the documents be excluded, we find that the Town violated FOIA by charging you these fees. To be clear, the Town cannot charge administrative fees for this request that it denied. However, even if the charges were properly assessed, the Town also violated FOIA in these circumstances by failing to provide you with a written cost estimate before the administrative fees were incurred. As the Town voided the improper invoice, we do not recommend additional remediation for these violations. Due to the multiple issues present here, we recommend the Town undertake FOIA training to review its obligations for responding to FOIA requests under the statute.

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 Del. C. § 10003(m)(2).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The Meeting Petition alleges that the Town failed to timely post its meeting notice and agenda to its website prior to the June 13, 2022 Council meeting. However, the Town Council has no obligation under FOIA to post any meeting notices and agendas online.¹¹ Thus, we determine that the Town Council did not violate FOIA by failing to post its June 13, 2022 meeting notice and agenda on its website until three days before the meeting.

CONCLUSION

For the reasons set forth above, we find that the Town violated FOIA with respect to your request for records. However, the Town Council did not violate FOIA by failing to post its notice and agenda for the June 13, 2022 meeting on its website until three days before the meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

cc: Craig T. Eliassen, Attorney for the Town of Blades

¹¹ 29 *Del. C.* § 10004(f).