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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB48

December 12, 2022

VIA EMAIL

Erica Lindsey
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RE: FOIA Petitions Regarding the Fort DuPont Redevelopment and Preservation Corporation

Dear Ms. Lindsey:

We write in response to your petitions, filed November 8, 2022, pursuant to Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). The petitions allege that the Fort DuPont Redevelopment and Preservation Corporation ("FDRPC") violated FOIA by not responding to two FOIA requests seeking records relating to financial audits of the FDRPC. This correspondence serves as 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 FDRPC violated FOIA.

BACKGROUND

The FDRPC was established by statute, which specifies that the FDRPC and its Board are "public bodies" for purposes of FOIA.¹ On October 11, 2022, you sent two FOIA requests to the FDRPC, one for "all preliminary and final reports, along with any correspondence including attachments, from the auditing firm and/or its associates to the [FDRPC] [] and/or FDRPC associates, employees, and board members, regarding the financial audit of [FDRPC's] fiscal year ending June 30, 2022." The second FOIA request sought the same records, this time pertaining to

¹ 7 *Del. C.* § 4739.

an audit of FDRPC’s “residential properties which was underway as of September 29, 2022.” Your petitions allege that the FDRPC violated FOIA because it did not timely respond to your two FOIA requests.

On November 18, 2022, the FDRPC submitted its response to your petitions (the “Response”). FDRPC’s Response simply states: “The short answer is that both audits are currently conducted by the corporation’s outside auditing firm. Neither audit is complete, although both are expected to be completed sometime soon and certainly before year end. Once completed, we will provide copies of both audits and all related documents to Ms. Lindsay per her request.” The Response does not deny that the FDRPC failed to respond to your FOIA requests. It also does not provide any explanation as to why FDRPC failed to provide this response to you within fifteen days of your requests.

DISCUSSION

FOIA requires a public body to respond to a citizen’s FOIA request as soon as possible, but in any event within 15 business days after receiving a request. 29 *Del. C.* § 10003(h). The response can provide access to the requested records, deny access to some or all requested records, or advise that additional time is needed to respond. *Id.* Thus, public bodies subject to FOIA have several options when responding to FOIA requests. But some response is required. And it must be provided within fifteen business days of the request. Here, the record indicates that the FDRPC ignored your two FOIA requests. The FDRPC’s Response ignores this failure by not addressing the petitions’ allegation that you did not receive responses and by not explaining why it did not provide you any response. Rather, the Response merely states that the audits are not completed. Accordingly, we find that the FDRPC violated FOIA by not timely responding to both FOIA requests. Moreover, consistent with FOIA, the FDRPC must, within ten days of receipt of this determination, provide you with an estimate timeframe as to when the requested records will be provided. 29 *Del. C.* § 10003(h).

The above violation is not an isolated incident, but rather appears to be a continuation of a concerning pattern of the FDRPC of ignoring FOIA requests and responding only after the requestor has filed a petition with this office. On May 5, 2022, July 18, 2022, and October 10, 2022, this office closed three separate FOIA petitions where documents or responses were provided to the requestor only after the requestor sought relief by filing a petition. In the October 10, 2022 correspondence, this office strongly cautioned FDRPC to produce timely responses to citizens’ FOIA requests, and encouraged FDRPC’s FOIA coordinator to attend FOIA training.² This office has gone as far as to provide information regarding upcoming training provided by the Department of Justice. That guidance appears to have gone ignored, as FDRPC has violated FOIA within just weeks of this Office’s direction. Under these circumstances, it is regrettably apparent that FDRPC is disregarding its FOIA obligations.

² See also *Del. Op. Att’y Gen. 22-IB33*, 2022 WL 4263288 (Sept. 9, 2022) (finding that FDRPC’s counsel’s unsworn statements indicating that responsive records (meeting minutes) might not exist failed to meet its burden under *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996 (Del. 2021)). That determination also recommended that the FDRPC engage in FOIA training.

As with guidance we've provided to other requestors who have been forced to file petitions in order to receive a response from FDRPC, we note that if you believe that FDRPC violates FOIA again in failing to provide the requested documents, you are free to file a new Petition with our Office in accordance with FOIA and the DOJ's Rules of Procedure for FOIA Petitions and Determinations, which are both available at the DOJ website: <https://attorneygeneral.delaware.gov/executive/open-government/>. We note further that timeframes and other restrictions apply to the filing of a petition or a lawsuit under these rules of procedure and 29 *Del. C.* § 10005. You may wish to consult private legal counsel about any questions regarding your rights and other options under FOIA, which could include various forms of potential injunctive and declaratory relief and the possible recovery of attorneys' fees and costs. 29 *Del. C.* § 10005(d).

CONCLUSION

Based on the foregoing, we conclude that the FDRPC violated FOIA by failing to timely respond to the two FOIA petitions discussed above.

Very truly yours,

/s/ Joseph C. Handlon

Joseph C. Handlon
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Richard A. Forsten, Counsel to the Fort DuPont Redevelopment and Preservation Corporation
Joseph C. Handlon, Deputy Attorney General