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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB02

January 19, 2023

VIA EMAIL

Donald Burdick
dtburdick@gmail.com

RE: FOIA Petition Regarding Sussex County

Dear Mr. Burdick:

We write in response to your correspondence alleging that Sussex County 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 County has not violated FOIA by failing to provide you with responsive records to your two requests.

BACKGROUND

You submitted two FOIA requests to the County. The first request, submitted on October 7, 2022, sought "a copy of the contracts and/or work orders for excavation of that dirt and also for the transportation of that dirt to Inland Bays Regional Wastewater Facility."¹ On October 27, 2022, the County made records available to you in response to this request. You followed up with additional questions about the response, stating that these documents were not what you requested; instead, they were design documents for upgrades to the South Coastal Regional Wastewater Facility and the Rehoboth Beach Regional Wastewater Facility. On October 28, 2022, the County

¹ Response, Ex. B.

responded that “[y]our comments notwithstanding, the County stands by its response and the provided documentation.”²

On October 27, 2022, you submitted a second FOIA request for “a copy of the contracts and/or work orders for the transportation of that non-permitted sludge to Inland Bays Regional Wastewater Facility.”³ In addition, you requested “a copy of the sludge storage and disposal plan.”⁴ On November 2, 2022, the County denied this request, stating that it had reviewed its files and determined that “there are either no responsive documents to your request, or the records requested are not within Sussex County’s custody.”⁵

This Petition followed, challenging the County’s responses to your requests and making other allegations and requests related to non-FOIA matters that are not within this Office’s authority to consider.⁶ You assert that the wastewater facility improvement plans the County provided have nothing to do with your first request for documents related to dirt placed at the Inland Bays Regional Wastewater Facility. You also contend that the County has failed to provide you with the documents responsive to your second request related to nonpermitted sludge.

On December 8, 2022, the County, through its legal counsel, answered the Petition (“Response”) and provided the affidavit of the Sussex County Engineer, who is familiar with the Inland Bays Regional Wastewater Facility. The County Engineer attests that the records provided contain the information responsive to your first request.⁷ In addition, the County Engineer swears that there are no records that are responsive to your second request for contracts or work orders for the transportation of nonpermitted sludge or a sludge storage and disposal plan.⁸

The County provided a supplemental affidavit from the County Engineer on January 5, 2023. This affidavit states that “there are no records of any type, public or nonpublic, that are responsive to” either request, other than those four records already provided in response to the first request.⁹

² *Id.*, Ex. C.

³ Petition.

⁴ *Id.*

⁵ *Id.*

⁶ The FOIA Office’s authority is limited to addressing allegations that a violation of FOIA has been committed. 29 *Del. C.* § 10005(e).

⁷ Response, Ex. A.

⁸ *Id.*

⁹ Supp. Aff. of Sussex County Engineer dated Jan. 5, 2023.

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.¹⁰ The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”¹¹ “[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”¹² Proceedings in *Judicial Watch* are still pending.¹³

The County provided sworn affidavits from the Sussex County Engineer who attests that he has the knowledge and authority to execute the affidavits. He swears that he is familiar with the Inland Bays Wastewater Facility and was the contact person for the purpose of responding to both requests. The County Engineer attests that the records provided to you contain information responsive to your first request. Further, he swears that there are no other records responsive to this request.

In response to your second request related to nonpermitted sludge, the County Engineer attests that there are no responsive records, as there are “no contracts or work orders for the transportation of that nonpermitted sludge to Inland Bays Regional Wastewater Facility” and “no ‘sludge storage and disposal plan’ for the Inland Bays Regional Wastewater Facility.”¹⁴ The County Engineer states under oath that the sludge referenced in your request “was transported with proper license . . . and stored under roof at the Inland Bays Regional Wastewater Facility”; after receipt of DNREC’s letter, “the material was transported with permit to the Delaware Solid Waste Authority (“DSWA”) and disposed of under DSWA special waste approval numbers.”¹⁵ As a result of these sworn statements, the County met its burden of demonstrating that it did not violate FOIA by failing to provide you with responsive records to these requests.

¹⁰ 29 *Del. C.* § 10005(c).

¹¹ 267 A.3d 996, 1010 (Del. 2021).

¹² *Id.* at 1012.

¹³ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923 (Del. Super. Jun. 7, 2022); *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 10788530 (Del. Super. Oct. 19, 2022) (appeal to Delaware Supreme Court filed).

¹⁴ Response, Ex. A.

¹⁵ *Id.*

CONCLUSION

For the foregoing reasons, we conclude that the County has met its burden of proof to demonstrate that it has not violated FOIA by failing to provide you with responsive records to your two requests.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: J. Everett Moore, Jr., Sussex County Attorney