



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB06

February 7, 2023

VIA EMAIL

Jack Guerin
Jackguerin7@gmail.com

RE: FOIA Petitions Regarding the Trustees of the New Castle Common

Dear Mr. Guerin:

We write in response to your correspondence alleging that the Trustees of the New Castle Common violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with two requests for records. We treat each 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, and this Opinion addresses both Petitions. For the reasons set forth below, we determine that the Trustees violated FOIA by failing to meet its burden to show that the records you requested were exempt under FOIA.

BACKGROUND

You submitted a request on December 9, 2022 to the Trustees for "a copy of the contract between the Trustees of the New Castle Common and Antonio Lawn and Landscape."¹ You submitted a second request three days later for "a copy of the agreement between the Trustees of the New Castle Common and the New Castle Weekly."² The Trustees did not respond to either request. These Petitions followed, in which you claim the Trustees' responses are overdue.

¹ Petition.

² *Id.*

On January 18, 2023, the Trustees, through its legal counsel, answered the Petitions (“Response”). The Trustees first dispute their status as a public body, stating that the Trustees are a corporation that is not a public body within the meaning of the statute. In addition, the Trustees contend that the contracts contain trade secrets and confidential commercial or financial information, and thus, the contracts fall within 29 *Del. C.* § 10002(o)(2), which exempts “trade secrets and commercial or financial information obtained from a person which is of a privileged and confidential nature.” The Trustees argue that disclosing these records would not only reveal confidential information about the Trustees, but also confidential information about the two private businesses that are parties to these contracts. In addition, the Trustees state that revealing this information would jeopardize negotiations for similar contracts in the future.

DISCUSSION

This Office has previously determined that the Trustees are a public body.³ FOIA requires a public body to provide citizens with reasonable access to public records for copying and inspection in accordance with the statute.⁴ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ In the *Judicial Watch v. University of Delaware* case, the Supreme Court of Delaware found that the factual representations on which a public body relies to meet its burden of proof must be submitted under oath; counsel’s unsworn statements describing the factual basis are insufficient.⁷

The Trustees contend the two contracts are not public records pursuant to 29 *Del. C.* § 10002(o)(2), which exempts “[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” However, the Trustees have not presented a sworn factual basis to allow this Office to evaluate whether the contracts meet this

³ *Del. Op. Att’y Gen.* 17-IB34, 2017 WL 3426274, at *4 (July 28, 2017) (“[W]e conclude that the Trustees [are] a public body and must comply with FOIA.”).

⁴ 29 *Del. C.* § 10003.

⁵ 29 *Del. C.* § 10005(c).

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

⁷ *Id.* at 1010-11 (“Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court’s determination regarding the public body’s satisfaction of the burden of proof is based on competent evidence.”).

exemption. Moreover, a claim that an entire contract is exempt from disclosure does not align with FOIA's core purpose of allowing citizens to monitor "what their government is up to."⁸ Thus, we find that the Trustees have failed to meet their burden to justify denying access to the contracts and recommend that the Trustees review their records and supplement their response to you within the timeframe set forth in Section 10003.

CONCLUSION

For the foregoing reasons, we determine that the Trustees violated FOIA by failing to meet their burden of demonstrating that the requested records are exempt.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Andrew P. Taylor, Counsel to the Trustees of the New Castle Common

⁸ *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) ("[I]ndeed, the total contract price paid by the Government 'is routinely made public,' because that disclosure informs citizens about 'what their government is up to.'") (internal citations omitted); *see also* 29 *Del. C.* § 10001.