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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB19

July 3, 2023

VIA EMAIL

Tamara Skis
tamara.mskis@gmail.com

RE: FOIA Petition Regarding the Town of Ellendale

Dear Ms. Skis:

We write in response to your correspondence, alleging that the Town of Ellendale violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat this 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. As discussed more fully herein, we determine that the Town violated FOIA by failing to justify its denial of access to the meeting minutes and decorum policy you requested.

BACKGROUND

In this Petition, you allege that on April 26, 2023 you submitted two requests: one through the online portal for the minutes of the "January, February, and March meetings" and one via email to the Town Clerk for the "most current version of the decorum policy."¹ Prior to this Petition, you submitted an initial petition on May 15, 2023, claiming you had submitted requests for these January, February, and March meeting minutes and another unnamed record, and the Town did not respond. This Office dismissed the initial petition as untimely, and a copy of your May 15, 2023 initial petition was enclosed with this Office's dismissal letter to both parties. This most recent Petition alleges that the Town failed to respond to the two records requests you submitted,

¹ Petition.

clarifying that the second request was for the decorum policy and attaching a copy of your April 26, 2023 email with this request.

The Town, through its Town Clerk, replied to the Petition (“Response”). In its June 13, 2023 Response, the Town stated that a copy of its May 25, 2023 letter addressed to you was mailed to this Office. In the letter, the Town acknowledges it received your May 15, 2023 petition regarding its failure to provide the specified meeting minutes you requested, but as the Town’s email system “has been compromised,” the Town never received your FOIA request for meeting minutes.² The Town asserts that you must fill out a specific form in order to make a FOIA request and further asserts that fees will be assessed for the administrative time to process your request as well as other expenses, such as postage.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying public records.³ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵ According to the statute, “[a]ll FOIA requests shall be made in writing to the public body in person, by U.S. mail, by e-mail, by fax, or online in accordance with the provisions hereunder.”⁶ “FOIA requests may be submitted using the FOIA Request Form promulgated by the Office of the Attorney General provided, however, that any FOIA request that otherwise conforms with the policy hereunder shall not be denied solely because the request is not on the promulgated form.”⁷ Meeting minutes, subject to the limitations noted in Section 10004, must be made “available for public inspection and copying.”⁸

By email dated April 26, 2023 to the Town Clerk, you requested a copy of the Town’s most current decorum policy.⁹ You allege you submitted your request for meeting minutes through the Town’s portal also on April 26, 2023, and the Town provided unsworn statements that its email

² Response.

³ 29 *Del. C.* § 10003(a).

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁶ 29 *Del. C.* § 10003(f)(1).

⁷ *Id.*

⁸ 29 *Del. C.* § 10004(f).

⁹ Petition. This June 1, 2023 Petition also included a copy of your request for the current decorum policy.

system was “compromised,” and it did not receive your request for meeting minutes. Unsworn statements are not sufficient to carry the Town’s burden,¹⁰ and it must be noted that your May 15, 2023 petition was sent to the Town by this Office, making the Town aware at that time that you seek copies of the specified meeting minutes.¹¹

Rather than responding to your two requests, the Town insists that you must first resubmit your requests on the Town’s FOIA request form, which is based on the Attorney General’s FOIA form. FOIA does not require that any specific request form be used when the request otherwise conforms to the public body’s FOIA policy, and the Town has not demonstrated how your repeated correspondence, that the Town has received to date, fails to constitute FOIA requests. As such, we find that the Town has violated FOIA by failing to meet its burden to justify its denial of access to these requested records. As remediation, it is recommended that the Town process these requests in accordance with FOIA, including the timeframes in Section 10003.

CONCLUSION

For the reasons set forth above, we conclude that the Town violated FOIA by failing to justify its denial of access to the records you requested.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Karen E. Brittingham, Town Clerk

¹⁰ *Judicial Watch*, 267 A.3d 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.”).

¹¹ Response.