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## OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

### Attorney General Opinion No. 23-IB21

July 25, 2023

#### VIA EMAIL

Randall Chase  
[rchase@ap.org](mailto:rchase@ap.org)

#### **RE: FOIA Petition Regarding the Indian River School District**

Dear Mr. Chase:

We write in response to your correspondence alleging that the Indian River School District 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 District violated FOIA by failing to justify its denial of access to the request for employment information. In addition, we find that the District did not violate FOIA with respect to the Petition's claims about the online portal or the requested policies.

#### **BACKGROUND**

You submitted a FOIA request on May 26, 2023 asking the District to "provide [you] the employment hiring/suspension/resignation dates, job titles, salaries and current employment or leave status" of nine administrators at Sussex Central High School.<sup>1</sup> In addition, you sought copies of the District's policies for "access by school administrators and staff to security camera surveillance footage, and restrictions, if any, on capturing and sharing images from school surveillance footage on personal electronic communication devices" and for "conflicts of interests involving [District] school board members who have family members employed by the

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<sup>1</sup> Petition.

[District].”<sup>2</sup> Also, your request noted that the District appears to be in violation of FOIA, as it does not have an online portal for accepting requests.

The District replied to your request, denying access to the employment items and producing various District policies. The District stated that this request for employment information is an interrogatory, as it does not specifically seek records, and FOIA does not require the District to answer questions or create a new record by pulling together information from various sources and arranging it in a requested format. Even if your request is construed to seek records, the District asserted that those documents concerning suspension and leave would not be disclosable under 29 *Del. C.* § 10002(o)(1). Regarding the request for the security camera footage policies, the District stated that depending on how your request is interpreted and the particular circumstances, “policies AC, CHD, GBA, GBCB (6), and GBCB (7)” and the State of Delaware Acceptable Use Policy, among others, may be applicable, which are available on their website, with a couple of exceptions. For the request for the conflicts of interest policies, the District stated that school board members are subject to State law and that “policies BBF and GBS” are located on the District website. This Petition followed.

In your Petition, you argue that the District’s response is improper and that the District’s failure to maintain an online portal for accepting FOIA requests violates FOIA. You contend that the District’s assertion that you merely posed questions is a quibble over semantics and an invalid basis to deny the request. Further, you contend that a public body cannot plausibly argue that it does not track work hours, compensation, and time away from work and this Office has previously determined that such employment records are public. Moreover, you claim that the District has tried to obfuscate your request for policies by providing nonresponsive policies that the District indicated “may” be applicable.

The District, through its counsel, replied to this Petition (“Response”). The District’s counsel argues that the District complied with FOIA by producing all the records responsive to your request in existence. You requested the hiring, suspension, and resignation dates, job titles, salaries, and current employment or leave status of certain administrators, and the District states that it does not “maintain records containing the requested information” and is not obligated to compile this information to create a new record.<sup>3</sup> The District acknowledges that if you had merely sought salary information, it would not be problematic to respond, but your request seeks more, and the District does not even maintain records about exempt employees’ time away from work. The District’s counsel asserts that the produced policies are the only existing policies that “could be responsive” to your request.<sup>4</sup> Finally, the District notes that your last claim is moot, as the District recently launched its new FOIA online portal with a request form.

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<sup>2</sup> *Id.*

<sup>3</sup> Response.

<sup>4</sup> *Id.*

## DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.<sup>5</sup> The public body has the burden of proof to justify its denial of access to records.<sup>6</sup> As a preliminary matter, we conclude that the Petition’s claim that the District failed to maintain an online FOIA request portal is moot, as the District provided a link to its online portal for accepting FOIA requests.<sup>7</sup>

For a public body to meet its burden of proof, factual representations on which a public body relies must be submitted under oath; counsel’s unsworn statements, describing the factual basis for determining that the requested records were not subject to FOIA, are insufficient.<sup>8</sup> Further, the Supreme Court of Delaware has determined that “unless 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.”<sup>9</sup>

Here, you made a request for various employment information, and the District interpreted your request as seeking a single record containing all this requested information. In response to this Petition, the District’s counsel made unsworn representations that the District does not maintain this information in a single record, and to respond to your request, it would have to compile the requested information into a new document. Counsel’s unsworn representations do not satisfy the District’s burden of proof to establish under oath its efforts to identify responsive

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<sup>5</sup> 29 Del. C. § 10003(a).

<sup>6</sup> 29 Del. C. § 10005(c).

<sup>7</sup> Del. Op. Att’y Gen. 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at \*2 (Del. Ch. July 27, 1998)) (“A matter is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter’s determination.”).

<sup>8</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1010-11 (Del. 2021) (“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.”).

<sup>9</sup> *Id.* at 1012; see also *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at \*3 (Jun. 7, 2022) (finding “that the generalized statements in the Affidavit do not meet ‘the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents’” and asking the University who (identified at least by position) provided the relevant information, when such inquiries were made, and what, if any, documents were reviewed).

records. Accordingly, we find that the District has not met its burden to justify its denial of access to the employment information and is in violation of FOIA. As remediation, we recommend that the District review its records and supplement its response to your request, in accordance with this Opinion and the FOIA statute, including the timeframes set forth in Section 10003.<sup>10</sup>

In addition, the Petition claims that providing policies that may be applicable obfuscates the District's response in violation of FOIA. FOIA does not preclude a public body from providing records that are potentially responsive, especially when the request does not identify the records with precision, such as by name or other specific designation. The request in this matter sought policies pertaining to certain issues, requiring the District to review its records to determine which policies were applicable. In these circumstances, we do not believe that the District's provision of potentially applicable policies constitutes a violation of FOIA.

### **CONCLUSION**

For the reasons set forth above, we conclude that the District violated FOIA by failing to meet its burden to justify its denial of access to the employment information requested. We find no violations with respect to the Petition's claims about the online portal or the requested policies.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

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<sup>10</sup> In reviewing this factual record, we do not see a basis for the District to limit its review of responsive records to employment information compiled in a single record. The request merely seeks various types of information; it does not specify that the information must be arranged in a particular format. The Petition also indicates that your intent was to seek any record with this employment information, as you believe that the District's response to your request, that no such employment information exists, is implausible. Thus, it is further recommended that the District consider the request as intended and review its files for any records containing the requested employment information that are appropriate for public disclosure under the FOIA statute. *See State ex rel. Biden v. Camden-Wyoming Sewer & Water Auth.*, 2012 WL 5431035, at \*5 (Del. Super. Nov. 7, 2012) ("CWSWA argues that it should not be ordered to produce documents in response to the FOIA request filed by Ms. Williams, because she requested only 'salary information,' not documents. This is no more than a quibble over semantics, which is ineffective.").

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: James H. McMackin, III, Counsel to the Indian River School District