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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB23

August 8, 2023

VIA EMAIL

Excellent Asare
Easare5628@gmail.com

RE: FOIA Petition Regarding the City of Dover

Dear Excellent Asare:

We write in response to your correspondence alleging that the City of Dover 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 City did not violate FOIA by denying access to the requested record.

BACKGROUND

You submitted a FOIA request on June 10, 2023 asking for "a list of properties with their water shutoff."¹ The City denied access to these records, asserting that 29 *Del. C.* § 10002(o)(6) applies and "all information regarding utility customer accounts including property address, and consumption history is considered private, and not for public information."² This Petition followed.

¹ Petition.

² *Id.*

In your Petition, you argue that the City has improperly denied access to this list of properties with their water shut off. You note that your intent was not to obtain any names, payment information or history, or other personal information about the account holder. You state that you simply wish to receive a list of the property addresses, and public utilities are not exempt from FOIA nor are their records confidential. Further, you assert that the requested information is not “medical or pupil” information that invades personal privacy.

The City, through its counsel, replied to this Petition (“Response”). The City attached the affidavit of the Customer Service Director, who attests for the first time that the “City does not keep a specific list of when water utilities to properties are shut off.”³ The Customer Service Director explains in the affidavit that there are numerous reasons why a property’s water could be shut off, such as nonpayment of bill, making repairs, or transferring property ownership. Specifically, the Director attests that “it would be impossible to respond to this request without searching every water user to find out if cut-offs have been made for that specific property.”⁴

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.⁵ The public body has the burden of proof to justify its denial of access to records.⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷

In this instance, the City asserts for the first time in its Response to this Petition that it does not have the list you requested. The City’s Customer Service Director swore that the City does not maintain a list of properties with water utilities shut off, noting that a property’s water could be shut off for numerous reasons. The Director attests that it would be impossible to respond to your request without searching every water user’s account to determine if water had been shut off for that property. As the City does not have the requested list and FOIA does not require a public body to compile information from different sources to create a new record in response to a request, we find that the City adequately supported its denial of access to this list.⁸ However, the City is

³ Response, Aff. of Customer Service Director dated July 14, 2023.

⁴ *Id.*

⁵ 29 *Del. C.* § 10003(a).

⁶ 29 *Del. C.* § 10005(c).

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁸ See *Del. Op. Atty. Gen.* 17-IB02, 2017 WL 955566, at *6 (Feb. 8, 2017) (“This Office has further stated that ‘FOIA does not require a public body to compile the requested data from other public records that may exist.’”) (quoting *Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1547683, at *2 (Jun. 28, 2004)); *Del. Op. Att’y Gen.* 15-IB02, 2015 WL 3919061, at *2 (Jun. 17, 2015) (“FOIA does not require a public body to create records that do not exist”) (citing *Del. Op. Att’y Gen.*

strongly cautioned to assert its rationale for denying the request in its response to the requesting party, and not wait for a petition.⁹

CONCLUSION

For the reasons set forth above, we conclude that the City has not violated FOIA by denying access to the requested record.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Nicholas H. Rodriguez, City Solicitor

06-IB17, 2006 WL 2630107, at *6 (Aug. 21, 2006)); *Del. Op. Att’y Gen.* 08-IB05, 2008 WL 1727613 at *1 (Feb. 22, 2008) (“There are no existing documents that provide the information [the requesting party] seeks, and he has no right under FOIA to anything other than existing documents.”).

⁹ *See, e.g., Del. Op. Att’y Gen.* 22-IB16, 2022 WL 1547876, at *3 (Apr. 29, 2022); *Del. Op. Att’y Gen.* 19-IB44, 2019 WL 4538330, n. 19 (Aug. 12, 2019); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, n. 37 (Mar. 10, 2017) (“While, in this instance, we have determined that DNREC’s denial of your request was indeed authorized by FOIA, we nevertheless caution DNREC to give careful consideration to the reason(s) provided, pursuant to 29 *Del. C.* § 10003(h)(2), for any FOIA denial.”).