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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 24-IB17**

**May 1, 2024**

**VIA EMAIL**

Warren Rosenkranz  
[wrosenk@yahoo.com](mailto:wrosenk@yahoo.com)

**RE: FOIA Petition Regarding the Village of Arden**

Dear Mr. Rosenkranz:

We write in response to your correspondence alleging that the Village of Arden violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“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 find that the Petition’s claims are not appropriate for this Office’s determination.

**BACKGROUND**

The Village of Arden is a small municipality with a governing body, known as the Town Assembly, that consists of all residents of the Village.<sup>1</sup> The Town Assembly formed a Governance Task Force for the purpose of reviewing and suggesting possible changes to Arden’s governing documents.<sup>2</sup> On February 14, 2024, you submitted a FOIA request to the Village seeking all communications since February 2022 of the Chair of the Town Assembly and the Chair of the “Government Task Force” with the selected law firm regarding work with the Task Force. The Village denied your FOIA request on February 27, 2024, asserting that the requested communications are not public records, as they are covered by the attorney-client privilege.

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<sup>1</sup> Arden, Del., C. (Charter) § 4.

<sup>2</sup> Petition.

Realizing your error in naming the “Governance Task Force” in your initial request, you then resubmitted this request on March 7, 2024 with the correct name for the task force. You did not receive a response to this second, corrected request. This Petition followed.

In the Petition, you allege that as the Town Assembly is comprised of all Village residents as a “direct democracy,” Village residents are entitled to the records you requested.<sup>3</sup> Other than a January 18, 2024 email from legal counsel, you state you have not received any other information requested, nor did you receive a response to your second request. You argue that the Charter does not permit the Chair to unilaterally engage counsel or spend Village funds, and the Town Assembly’s approval was not sought or granted by the Chair. You claim that “in order for significant public business to be conducted, it is necessary that [you] and other residents of the Village be permitted access to any and all communication between counsel and ‘select’ members of Town Assembly as we are all on equal footing in the eyes of our governing documents.”<sup>4</sup> You believe that every resident of the Village is a client of the firm, and as such, every member of the Town Assembly has a right to all the information now currently available to only a small minority.

On April 11, 2024, legal counsel from the law firm engaged to assist the Governance Task Force replied to the Petition on the Village’s behalf and attached the affidavits of the Chair of the Governance Task Force and legal counsel (“Response”). The Village asserts that the records are exempt from disclosure under the attorney-client privilege. The Village acknowledges it did not respond to the second request, as it was a duplicate and the misstated name did not affect the substance of the response. In addition, the Village disputes that this firm represents every resident of the Village through the firm’s engagement with the Task Force on a narrow set of legal issues, and even if the records must be available to you as a “client,” the FOIA request process would not be the appropriate mechanism to make such a request. The Village contends that under FOIA, either a record is public, or it is not; your alleged status as a “client” pursuant to the Village’s unique governmental structure would not alter what is available through FOIA.

## DISCUSSION

As a preliminary matter, the issue of the Village’s lack of response to the second request is no longer in controversy, as the Village clarified in its Response that the error in the name of the Task Force did not alter the substance of the Village’s response to the initial request. Thus, this claim regarding the lack of response is moot.<sup>5</sup>

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<sup>3</sup> *Id.*

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

<sup>5</sup> *See, e.g., Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at \*2 (Jun. 7, 2018); *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)).

Regarding the remaining issue, the FOIA statute permits our Office “to determine whether a violation of this chapter has occurred or is about to occur.”<sup>6</sup> In this case, the Petition alleges that your status as a Village resident and member of the Town Assembly requires these requested records to be produced. In addition, you dispute that the Chair had the authority to expend Village funds or engage this law firm. These matters, including your standing as a member of the Town Assembly, the Town Assembly Chair’s authority to expend funds or engage a firm, and your right to receive records because of your standing in the Town Assembly, are matters of municipal law, which are outside the scope of this Office’s authority to decide.

**CONCLUSION**

Based on the foregoing, we conclude that the Petition’s claims are not appropriate for this Office’s determination.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: Erica K. Sefton, Attorney for the Village of Arden

<sup>6</sup> 29 *Del. C.* § 10005(e); *see also Del. Op. Att’y Gen.* 20-IB28, 2020 WL 7663557, at \*2 (Nov. 9, 2020) (“The gravamen of the Petition’s remaining allegations is that the Mayor and City Council President lacked authority to take certain actions – forfeit a councilmember’s seat, preemptively bar him from public meetings, or refuse to provide a paycheck or copies of certain materials. These matters of municipal law, concerning the authority of the Council President or Mayor, are outside the scope of the FOIA statute, and thus, we make no determination regarding these issues.”).