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

### Attorney General Opinion No. 24-IB30

August 9, 2024

#### VIA EMAIL

Jonathan Hamburg  
[dnj1203@comcast.net](mailto:dnj1203@comcast.net)

#### **RE: FOIA Petition Regarding the Cape Henlopen School District**

Dear Mr. Hamburg:

We write in response to your correspondence, alleging that the Cape Henlopen School District 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 determine that the District did not violate FOIA by denying access to the records you requested.

#### **BACKGROUND**

After not being selected for a position with the Cape Henlopen School District, you filed a FOIA request with the District for "all emails and/or correspondence regarding the selections" for eight positions you applied for, including those containing your name.<sup>1</sup> The District denied your request, asserting that like a personnel file, "the documents you request may reflect individual assessments and judgments about your qualifications, competencies and/or abilities to hold a position."<sup>2</sup> The District further stated that "according to the Attorney General (Del. Op. Atty. Gen. 18-IB13 (2018)), a public records request for one's own personnel file is exempt from FOIA"

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<sup>1</sup> Petition.

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

because “the personnel file is the property of the employer, and even current employees cannot obtain a copy of their personnel file unless the employer permits it. 19 Del. C. §733.”<sup>3</sup>

This Petition followed, alleging that the District inappropriately denied this request. You argue that you are not an employee of the District and the personnel file exemption does not bar the disclosure of the records you have requested.

The District, through its legal counsel, replied to the Petition and enclosed the affidavit of the Supervisor of Human Resources (“Response”). The Supervisor attests, based on personal knowledge, that it is the District’s practice to store all documents and communications produced through the hiring process for vacant positions “in individual files belonging to each potential candidate.”<sup>4</sup> The documents “assess judgment, scores and ranking as to how evaluators assessed each candidate’s competencies and abilities.”<sup>5</sup> Noting that you would object to the public having access to your application, the District contends that “the disclosure of [your] requested documents and communications in response to a FOIA request would constitute an invasion of personal privacy” and the District’s denial of access to these records does not violate FOIA.<sup>6</sup>

### **DISCUSSION**

The public body has the burden of proof to demonstrate its compliance with the FOIA statute.<sup>7</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>8</sup> In this case, you sought all correspondence about the District’s selections for eight positions, including those communications with your name. The District provided statements under oath that the requested communications are part of each individual candidate’s confidential file and address the evaluators’ assessment of each candidate’s competencies and abilities.

FOIA does not apply to records “specifically exempted from public disclosure by statute or common law.”<sup>9</sup> Delaware recognizes a common law right of privacy which includes protecting an individual from public disclosure of “one’s affairs with which the public has no legitimate concern” or “the wrongful intrusion into one’s private activities in such manner as to . . . cause

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

<sup>4</sup> Response.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 29 Del. C. § 10005(c).

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

<sup>9</sup> 29 Del. C. § 10002(o)(6).

mental suffering, shame or humiliation to a person of ordinary sensibility.”<sup>10</sup> “[I]n the context of FOIA, we have determined that legitimate privacy claims under Delaware common law must be balanced against the competing need for access to information to further the accountability of government.”<sup>11</sup> Discussions of qualifications and competencies of applicants are subject to a significant privacy interest.<sup>12</sup> As this significant privacy interest outweighs any minimal public interest in such records, we believe that the common law right of privacy protects the communications you requested regarding selecting candidates.<sup>13</sup> Accordingly, we find that the District did not violate FOIA in denying access to these records.<sup>14</sup>

## CONCLUSION

For the reasons set forth above, we conclude that the District did not violate FOIA in denying access to the requested records.

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<sup>10</sup> *Reardon v. New-Journal Co.*, 164 A.2d 263, 266 (Del. 1960); *see also Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963) (citation omitted).

<sup>11</sup> *Del. Op. Att’y Gen.* 13-IB03, 2013 WL 4239232, at \*3 (July 12, 2013) (citation omitted).

<sup>12</sup> *See, e.g., Del. Op. Att’y Gen.* 10-IB17, 2010 WL 5186152, \*2 (Dec. 15, 2010) (“This office has extended the right of privacy to ‘records relating to the job qualifications of applicants for public employment.’”) (citing *Del. Op. Att’y Gen.* 05-IB20, 2005 WL 2334348, \*2 (July 27, 2005)).

<sup>13</sup> *Del. Op. Att’y Gen.* 05-IB20, 2005 WL 233434, at \*4 (“For the foregoing reasons, we determine that the School District did not violate the public records requirements of FOIA by denying you access to the scoring sheets of interview panel members compiled during the applicant selection process for a new driver education instructor. We believe that information is exempt from disclosure under FOIA to protect individual privacy for the same reasons that the statute expressly authorizes a public body to meet in private to discuss . . . an individual's qualifications for public employment.”); *see also 29 Del. C. § 10004(b)(1)* (permitting in executive session “[d]iscussion of an individual citizen’s qualifications to hold a job”).

<sup>14</sup> The fact that some of the requested records concern you does not have a bearing on the disclosure of these records. The Superior Court of Delaware has stated “that ‘the identity of the requesting party has no bearing on the merits of his/her FOIA request.’” *State v. Camden-Wyoming Sewer & Water Auth.*, 2012 WL 5431035, at \*7 (Del. Super. Nov. 7, 2012) (citation omitted). “Under FOIA, a record is public, or it is not.” *Id.* If any other authority permits your access to these records, such a matter is outside the scope of this petition process, which is limited to FOIA claims.

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: Michelle G. Bounds, Attorney for the Cape Henlopen School District