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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB37

September 17, 2024

VIA EMAIL

Jeremy Goldman
jeremy.y.goldman@gmail.com

RE: FOIA Petition Regarding New Castle County

Dear Mr. Goldman:

We write in response to your correspondence, alleging that New Castle County 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 County did not violate FOIA by denying access to the records you requested.

BACKGROUND

On July 24, 2024, you submitted a FOIA request to New Castle County Department of Land Use for the lines and grades plan, inspection reports, and any written complaints and correspondence between the County and two individuals regarding a property's grading. The County provided a response on August 14, 2024, enclosing the lines and grades plan and inspection reports and stated that a further response would be provided regarding the written correspondence. On the following day, the County replied "[a]fter review with staff[,] there does not appear to be any written correspondence between NCC and/or [the individuals]."¹ You then followed up, stating the inspection reports suggest written complaints exist, as the comments in the inspection reports reference an email on file; you asked whether a complaint from the individual was

¹ Petition.

submitted in writing. A few days later, the County replied that the sentence “HAS EMAIL ON FILE” in the report “is only referencing that the individual scheduling the inspection has an email address on file in the permit records; it is not referencing any specific email received.”²

This Petition followed, alleging that the County violated FOIA by denying access to the written complaint by one of the two identified individuals. You contend that the County’s answer to your question was evasive and that it is customary for the complaints to be submitted to the Department of Land Use in writing.

The County, through its legal counsel, replied to the Petition and enclosed the affidavit of the Assistant Land Use Administrator who serves as the FOIA Coordinator for the Department (“Response”). The Administrator attests that she conducted a review of the Department’s electronic repository where complaints would be kept and the permit files and found no responsive documents pertaining to the portion of the request for written complaints and correspondence. In addition, the Administrator attests that she corresponded with the Building Inspections supervisor who would have been made aware of any complaints, and this supervisor also confirmed that Building Inspections did not possess any responsive records.

DISCUSSION

In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ The County provided sworn statements supporting that the County conducted an adequate search and that no responsive records were located.⁵ We find that the County sufficiently supported that its denial of access to the requested records was appropriate.

CONCLUSION

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

² *Id.*

³ 29 *Del. C.* § 10005(c).

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁵ *Id.* at 1012 (“[U]nless 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.”).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Wilson B. Davis, County Attorney