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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB45

October 23, 2024

VIA EMAIL

Sarah Mueller
Reporter, WHYY
smueller@whyy.org

RE: FOIA Petition Regarding the Christina School District

Dear Ms. Mueller:

We write regarding your correspondence alleging that the Christina School District violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“FOIA”). We treat your 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. For the reasons set forth below, we find that the District did not violate FOIA in responding to your request.

BACKGROUND

On August 27, 2024, you submitted a request to the Christina School District for “all records that discuss the hiring [of] Robert Andrzejewski, including any employment contracts created between 1/1/2024 and 8/26/2014” and “all emails and text messages to and from any and all current and past board members about the hiring of any person for the position of superintendent sent or received between 1/1/2024 and 8/26/2024.”¹ The District responded on September 24, 2024, enclosing responsive records. The District redacted the records, in order to “ensure compliance with [the District’s] policies on confidentiality and privacy.”² The District further asserted that the redactions were “necessary to protect sensitive data, including but not limited to personal information, proprietary content, and other data that must be safeguarded in accordance with legal and regulatory requirements,” and that it “made every effort to ensure the remaining

¹ Petition.

² *Id.*

information is clear and comprehensible, allowing you to fully understand the content of the documents without compromising confidentiality.”³ This Petition followed.

In the Petition, you claim that it does not appear that you received any documents within the timeframe you designated, and you believe, based on an attorney-client privileged email from the former attorney for the Board of Education, that discussions actually did occur. You state that one produced email may fall within the timeframe you requested, but the entirety of the email, including the date, “to,” and “from,” is redacted, which does not comply with the District’s statement in its response that it would ensure the remaining information is comprehensible.

The District, through its legal counsel, replied to your Petition on October 2, 2024 (“Response”) and attached the affidavit of the District’s Manager of Technology who performed the records search. This search included the District email accounts of all Board members and a past Board member, their documents folders and Google drives, and their District devices, including laptops. The Manager attests, through conducting these searches to identify responsive records, the contract and email chain provided were only the responsive records resulting from the search. In addition, the District’s counsel provided an affidavit, attesting that he reviewed the email chain provided to you and that the “redacted confidential communications between [him] and the District . . . are protected by the attorney-client privilege.”⁴ The District’s counsel also states under oath that the email involving the District’s former counsel that was submitted with the Petition is “a confidential communication protected from disclosure by the attorney-client privilege that was, upon information and belief, leaked by an unknown individual, without permission.”⁵

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁶ The public body has the burden of proof to justify its denial of access to records.⁷ In certain circumstances, a sworn affidavit may be required to meet that burden.⁸

³ *Id.*

⁴ Response.

⁵ *Id.*

⁶ 29 *Del. C.* § 10003(a).

⁷ 29 *Del. C.* § 10005(c).

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

The Petition contends that the District has responsive records that it did not produce and that the redactions were not appropriate. The *Judicial Watch, Inc. v. University of Delaware* case states that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”⁹ “[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.”¹⁰ Generalized assertions in the affidavit will not meet the burden.¹¹ For example, the Superior Court of Delaware determined that an affidavit outlining that legal counsel inquired about several issues, without indicating who was consulted, when the inquiries were made, and what, if any documents, were reviewed, was not sufficient to meet this standard.¹²

In this case, the District provides specific sworn statements from the Manager of Technology who conducted the searches. The Manager’s affidavit describes the locations searched, including the email accounts, document folders, and devices of the Board members, and attests that the records that were uncovered in the search were provided, subject to redactions. The District’s counsel states under oath that he reviewed and confirmed that the redactions made to his communications with his client were appropriate under attorney-client privilege. It is well-established that attorney-client privileged records are protected from disclosure under FOIA.¹³

Based on these sworn statements, we find that the District demonstrated that the District sufficiently searched for responsive records and that no other responsive public records were found as a result of this search.¹⁴

⁹ *Id.* at 1010.

¹⁰ *Id.* at 1012.

¹¹ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022) (“The Court finds 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.’”).

¹² *Id.*

¹³ *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826, at *3 (Feb. 20, 2018) (“We have expressly recognized in the past that the FOIA exemption for ‘records specifically exempted from public disclosure by statute or common law’ applies to the attorney work product doctrine and the attorney-client privilege.”); *Del. Op. Att’y Gen.* 16-IB11, 2016 WL 3462342, at *8 (Jun. 6, 2016) (stating that attorney-client privilege “is a well-established basis for withholding records requested under FOIA”).

¹⁴ Although we find that these redactions were made for an authorized purpose, we note that the District asserted attorney-client privilege for the first time in its Response to your Petition and respectfully caution the District to give due consideration to the reasons asserted in its denials in the future. *See, e.g., Del. Op. Att’y Gen.* 22-IB16, 2022 WL 1547876, at *3 (Apr. 29, 2022); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, n. 37 (Mar. 10, 2017) (“While, in this instance, we

CONCLUSION

For the foregoing reasons, we determine that the District did not violate FOIA in responding to your request, as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Michael P. Stafford, Attorney for the Christina School District

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.”).