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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB06

January 21, 2025

VIA EMAIL

Randall Chase
chaserk1@verizon.net

RE: FOIA Petition Regarding Division of Legislative Services, Delaware General Assembly

Dear Mr. Chase:

We write in response to your correspondence alleging that the Division of Legislative Services of the Delaware General Assembly violated Delaware's 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 determine that the Division did not violate FOIA by failing to provide an affidavit with its response to your request or by redacting the employee names from the documents provided to you.

BACKGROUND

You submitted a FOIA request to the Division on November 21, 2024, seeking the following records from January 1, 2022 to the present:

1. all non-disclosure agreement forms created and developed for presentation to House staff members for their signatures;
2. all non-disclosure agreement forms containing the signatures of House staff members;

3. all letters, memoranda and other documents explaining the terms of, conditions to, and reasons for the creation of non-disclosure agreements provided to House staff members;
4. all legal opinions regarding the non-disclosure agreements provided to House staff members;
5. all contracts, agreements, invoices, purchase orders, checks, billing records and payment records regarding any professional or legal service provided by any law firm or any member of the Delaware bar regarding the creation, distribution, submission and retention of the nondisclosure agreements provided to House staff members;
6. the current employee handbook for House employees; and
7. the previous version of the employee handbook for House employees.¹

On December 13, 2024, the Division responded. The Division replied to the first and second items by enclosing a “unsigned copy of the confidentiality policy that has previously been provided to the media by the Speaker” and “copies of the [five] signed confidentiality policies.”² These policies were entitled “House of Representatives – Democratic Caucus Non-Disclosure and Confidentiality Policy.” The Division noted that the name, signature, and date were redacted from the signed policies, because this information would constitute an invasion of privacy. The Division states that the .pdf files attached to the response were labeled with the date of each of the signed policies. For the third, fourth, and fifth items, the Division replied that no such documents exist. The Division provided the current and previous versions of the employee handbook in response to the sixth and seventh items. This Petition followed.

In the Petition, you allege that the Division inappropriately withheld the names of the staff members who signed these policies in December 2023. The Petition asserts that the Division “improperly redacted copies of the signed and dated forms those staff members submitted, claiming with no legal basis whatsoever, and no sworn affidavit, that the release of that information ‘would constitute an invasion of privacy.’”³ You argue that there is no express exemption for withholding nondisclosure agreements and that records of a personnel file may only be withheld if there is an invasion of personal privacy. In addition, you argue that the Division determined no records existed responsive to the third, fourth, or fifth items, but did not provide a sworn affidavit with its response.

On December 20, 2024, the Division’s Director replied to the Petition. While the Division claims it might ordinarily argue that the five policies were themselves personnel files, the text of the policy had been issued with a press release by the Speaker-elect in November 2024 and the redacted, signed policies were disclosed therefore in response to your request. Disclosure of the

¹ Petition.

² *Id.*

³ *Id.*

House Majority Caucus staff names, the Division alleges, is not necessary to further the accountability of government. The Division asserts that the staff members have a privacy interest in their identities, and the information provided in the December 13, 2024 response was sufficient “to balance accountability with the right of these staff members to be not made the subject of press reports or to deal with attempts at contact by the press, especially given that these staff members did nothing more than comply with a request from a supervisor and have not willingly brought themselves into the public eye.”⁴ The Division also explained that an affidavit is not required to be provided at the time of the response to the request, and an affidavit was submitted with its Response to this Petition.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the 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

The Petition first alleges that the Division, to meet its burden of proof, should have submitted an affidavit accompanying its response to your request. This is an incorrect statement of the law. A public body’s burden under Section 10005(c) is triggered by the actions in Section 10005, namely, a FOIA lawsuit or petition.⁸ As a public body does not have an obligation to meet its burden by providing an affidavit with its response to a FOIA request, we find that the Division did not violate FOIA in this regard.

The Petition’s second claim is that the Division improperly redacted the employees’ identities from the produced policies. FOIA excludes from the definition of “public record” any records that are “specifically exempted from public disclosure by statute or common law.”⁹

⁴ Response, p. 2.

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 29 *Del. C.* § 10005(c) (“In any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.”); *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1012 (Del. 2021) (“[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.”) (emphasis added).

⁹ 29 *Del. C.* § 10002(o)(6).

Delaware recognizes a common law right of privacy, *i.e.* “the right to be let alone.”¹⁰ “[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.”¹¹

The Division provided you with the nondisclosure policies that revealed the text of the policy, in addition to the handwritten notes of the public officials who wrote on the document. The identity of the General Assembly staffers who signed these documents is not a matter of compelling public interest such that it should overcome their individual privacy interest. These employees are not elected officials and while their identities may be discoverable through other means, that is not enough of a compelling interest to overcome the staff’s privacy interest in the context of FOIA. Here, the Division provided you with as much information as it could, while still protecting the important privacy rights of General Assembly staff.

CONCLUSION

For the foregoing reasons, we conclude that the Division did not violate FOIA by failing to provide an affidavit with its response to your request or by redacting the employee names from the documents provided to you.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Mark J. Cutrona, Esq., Director, Division of Legislative Services

¹⁰ *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963) (recognizing a common law right of privacy and creating standards for the tort of invasion of privacy); *Reardon v. News-Journal Co.*, 164 A.2d 263, 266 (Del. 1960).

¹¹ *Del. Op. Atty. Gen.* 13-IB03, 2013 WL 4239232, at *3 (July 12, 2013) (citation omitted).