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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB34

July 2, 2025

VIA EMAIL

Douglas Stewart
douglanestewart@yahoo.com

RE: FOIA Petition Regarding the Smyrna School District

Dear Mr. Stewart:

We write in response to your correspondence, alleging that the Smyrna 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 of 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 in responding to the first FOIA request. However, the District's affidavit failed to carry the burden of demonstrating that it conducted a sufficient search for records in response to the second request. This Office lacks the authority to provide oversight of the District's processing of the third request, and accordingly, this oversight request is declined.

BACKGROUND

Over the past few months, you submitted three FOIA requests to the Smyrna School District related to an incident involving your child. On March 23, 2025, you submitted your first request, expressing your concern with an encounter your child had with an employee and seeking to "formally request the name, position/title and salary of the employee who confronted [your child] regarding . . . parking at the middle school."¹ Additionally, you asked when the District was notified of the encounter and requested clarification on why your child was confronted. The

¹ Petition.

District replied a few days later, stating that “FOIA does not require a public body to answer questions” and that students are not permitted to park at the middle school. On May 29, 2025, you wrote the District again, requesting reconsideration of your request and clarifying that you seek “existing public records” with the name, position/title, and salary of the employee who confronted your child about parking in the middle school lot. On June 3, 2025, the District responded to your second, renewed request, stating that there “are no records who identify the name of the individual who allegedly confronted your [child]” and that there “is no incident report or write up of anyone having interacted with your [child] in regard to the occasion you reference.”² On June 4, 2025, you filed another request seeking “all written communications (*e.g.*, emails, text messages, memos, letters) between Principal Stacy Cook of Smyrna High School and . . . Superintendent Deborah Judy, regarding the incident between the employee who confronted my [child] . . . , as well as my March 23, 2025 FOIA request for the name, position/title, and salary of the employee who confronted my [child] or the related parking incident at the middle school in March 2025,” to include communications from March 1, 2025, to June 4, 2025.³ Two days later, you filed this Petition.

The Petition alleges multiple claims against the District with respect to its processing of these requests. You first argue that the District’s response to your March request was improper, as your request sought existing public records. You believe that the reference to Attorney General Opinion No. 19-IB05 was misplaced, because that opinion only applies to explanations or new records; it does not apply to a request for existing public records. You further allege this response failed to cite a specific exemption for withholding records and did not notify you of your appeal rights under the FOIA statute. In addition, you contend that the District’s June 3, 2025 response to your renewed request from the District did not reasonably interpret your request, as the District did not search the personnel records, and the District’s response does not substantiate that a reasonable search for personnel records occurred in response to your second request. You argue that you have a legitimate “parental interest” in receiving these records. You request that this Office provide oversight of the processing of your new request filed on June 4, 2025, because you believe that the District denied your previous requests improperly and likely will deny your request again.

The District, through its legal counsel, replied to this Petition (“Response”). The District enclosed the affidavit of its Superintendent, who serves as the District’s FOIA coordinator. The District argues that its response to the initial request in March was appropriate, as your request for the name, position/title, and salary of the employee who confronted your child is not a request for records but seeks the identity of an employee. The District contends that even if this were a records request, there were no responsive records to provide. Without the employee’s name, the District’s attorney states that the District could not search personnel records. In the affidavit, the Superintendent attests that she and the principal “conducted a search of the office and electronic records to see if there was a record of an incident with the student,” and the “search confirmed there was no report, incident report, code of conduct violation, infraction, or otherwise, any

² *Id.*

³ *Id.*

documentation that something happened.”⁴ The Superintendent states under oath that no responsive documents were withheld. When your second request was received, the District then informed you that no responsive documents existed. The District also points out that there is no basis in the FOIA statute to allow this Office’s oversight over the new request filed days before this Petition, nor is there a requirement that the responses include notice of your right to appeal.

DISCUSSION

In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to its records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ As a preliminary matter, this Office’s authority under the FOIA statute is limited to determining alleged violations of the FOIA statute.⁷ There is no basis in the FOIA law permitting this Office to oversee the District’s processing of the third, new request.⁸

The Petition alleges that the March 26, 2025 response from the District was deficient, because it improperly denied your request using inapplicable legal precedent, failed to cite an exemption to deny records, and failed to inform you of your appeal rights. We find that the District appropriately denied your request, as on its face, the communication did not ask for any records, but rather sought the identification of an employee and other information related to this incident and employee.⁹ While we find that the District’s reply was technically proper, we encourage the District to seek additional information when the requesting party’s intent is unclear. Nevertheless, we determine that the District’s response, that the request did not seek records, is sufficient grounds on its own to deny the request; public bodies are not required to cite an exemption when denying a request under this rationale. Your third claim, that the response did not give you notice of your appeal rights, is also without merit. The FOIA statute does not contain such a requirement.

⁴ Response, Ex. B.

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 *Del. C.* § 10005(e) (“Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur.”).

⁸ If you believe that that the District violates FOIA in processing and responding to this new request, you are free to file a new petition with this Office in accordance with the applicable requirements.

⁹ *Del. Op. Att’y Gen.* 19-IB05, 2019 WL 1511360, at *3 (Fe. 12, 2019) (denying a request that asked the public body to identify individuals who undertook certain actions, as a “request to identify individuals is not a request to inspect or copy records, and FOIA does not require a public body to answer questions or create documents that do not exist”).

With respect to the District’s response to your second, renewed request submitted on May 29, 2025, the Petition alleges that the District failed to reasonably interpret your request by focusing on incident-specific reports instead of searching its personnel records, and thus, the District did not comply with FOIA’s requirement for a diligent search. *Judicial Watch, Inc. v. University of Delaware* provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”¹⁰ “[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.”¹¹ However, generalized assertions in the affidavit will not meet the burden.¹² 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 too generalized to meet this standard.¹³

In this case, although the District pointed out that it did not have the employee’s name to conduct a search of personnel records, the Superintendent attests that she and the principal “conducted a search of the office and electronic records to see if there was a record of an incident with the student,” and the “search confirmed there was no report, incident report, code of conduct violation, infraction, or otherwise, any documentation that something happened.”¹⁴ The standard established in *Judicial Watch* requires specific, sworn statements detailing how the public body searched to determine whether it has responsive records. In this case, the general attestation that the superintendent and principal conducted searches of unspecified office and electronic records and found nothing does not demonstrate that the locations likely to contain such responsive materials were searched.¹⁵ Accordingly, we find a violation, as the District did not provide a sufficiently detailed affidavit to meet its burden of proof and recommend that the District, in compliance with the timeframes set forth in Section 10003, supplement its response to the second, renewed request in light of this Opinion, with an additional attestation, records, responses, or information if appropriate under FOIA.

¹⁰ 267 A.3d 996, 1010 (Del. 2021).

¹¹ *Id.* at 1012.

¹² *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Del. Super. 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.’”).

¹³ *Id.*

¹⁴ Response, Ex. B.

¹⁵ *See Del. Op. Att’y Gen.* 24-IB37, 2024 WL 4495804, at *1 (Sept. 17, 2024) (finding that the affidavit was sufficient when the affiant attested to searching where the type of records requested would be kept).

CONCLUSION

We conclude that the District did not violate FOIA in responding to the first FOIA request. However, the District's affidavit failed to carry the burden of demonstrating that it conducted a sufficient search for records in response to the second, renewed request. This Office lacks the authority to provide oversight of the District's processing of the third request, and accordingly, this request is declined.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Michelle G. Bounds, Attorney for the Smyrna School District