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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB48

August 10, 2026

Via Email

Ken Grant
ken.grant7@gmail.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. Grant:

We write in response to your correspondence alleging that the City of Wilmington 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 of whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the City violated FOIA by failing to meet Section 10003's requirements when the City needed additional time to fulfill your request. The remaining claims regarding the City's failure to meet its burden of proof in its response to your request are without merit.

Background

On June 12, 2026, you submitted a FOIA request to the City seeking all documents, including emails with attachments, memoranda, and other records with one of the listed keywords, including "SSAM," "Episcopal Church of Saints Andrew and Matthew," "Saints Andrew and Matthew," "Rev. Burke," "Patrick Burke," "8th and Orange," "8th and Shipley," and "100 block of 8th street."¹ On July 8, 2026, the City responded that it had reviewed its files and located responsive records; it produced two documents. In addition, the City stated that some responsive documents have been withheld pursuant to attorney-client privilege as permitted by Section 10002(o)(6). In addition, the City stated that it "may provide further records as staff members

¹ Petition.

return from leaves of absence and are able to conduct searches of their correspondence for the period of your request.”² This Petition followed.

In the Petition, you argue that the City failed to comply with Section 10003(h)(1) by not providing an appropriate notice that additional time would be needed. You contend that FOIA does not allow a delay in providing records due to staff leaves of absence, and a good faith estimate of time was required to be provided. You also allege that the City failed to demonstrate it conducted an adequate search for records, stating that the response “does not describe which custodians, mailboxes, or repositories were searched; which terms were applied; who conducted the searches; or when,” and “the response affirmatively concedes that searches of certain custodians’ correspondence have not yet been conducted at all.”³ You contend that because some searches are outstanding, the City is not able to demonstrate an adequate search. Finally, you claim that in this response, the City did not meet its burden to justify withholding records under the attorney-client privilege. Because only two emails were produced, you believe there is reasonable concern that the privilege was applied in an overly broad manner.

On July 21, 2026, the City, through its legal counsel, replied to the Petition, asserting it did not violate FOIA (“Response”). The City argues that because it was able to search for emails internally with reasonable effort, it was required by FOIA to do so, rather than providing a cost estimate for information technology staff to search the emails. The City states that these internal searches minimized any potential administrative fees for responding to the request. Further, the City argues that its correspondence fostered cooperation with you, as FOIA requires, by advising additional searches may occur, due to the staff on vacation or leave during this time. The City believes that responding to you with a cost estimate for information technology searches would have violated FOIA. The City states that its handling of this request met the spirit and letter of FOIA. Regarding the two remaining claims, the City argues that your claims conflate the City’s duties in responding to FOIA requests with its duties in responding to FOIA petitions. Responses to FOIA requests only require the public body to give a reason for the denial. The City states that the burden to justify its denial of access to records, including providing sworn statements, attaches upon receipt of a petition; there is no duty to meet this burden in its response to the FOIA request.

Discussion

Delaware’s FOIA law “was enacted to ensure governmental accountability by providing Delaware’s citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities.”⁴ FOIA requires that public records be open to inspection and copying by the custodian of the records for the appropriate public body and citizens be provided reasonable access to and reasonable facilities for the copying of public

² *Id.*

³ *Id.*

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

records.⁵ The public body carries the burden of proof to justify its denial of access to its records.⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷

The first claim is that the City violated FOIA by failing to provide appropriate notice that it needed additional time to fulfill the request. We agree. A public body is required to “respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof.”⁸ Section 10003(h)(1) permits a public body to inform a requestor that a response will take more than the requisite fifteen days if the request is for voluminous records, requires legal advice, or a record is in storage or archived.⁹ The public body must inform the requesting party of the authorized reason for the extension and give a good faith estimate of how much additional time is needed to fulfill the request.¹⁰ Here, the City provided a partial response to this request and indicated searches for emails were ongoing. As the City needed additional time to complete its search, it was required to cite one of three reasons under the statute and give a good faith estimate of the remaining time needed to fulfill the request. As the City failed to do so in this instance, we find a violation and recommend that the City, within fifteen business days, either complete its response to this request or give a good faith estimate of the time needed to fulfill the request, citing one of the authorized reasons for the delay.

For the remaining two claims, you allege that the City must produce, with its initial response, evidence of an adequate search and justification for denying records under the attorney-client privilege. When denying access to records in whole or part, a public body must provide the reasons for the denial but a “public body shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.”¹¹ Upon receipt of a petition or lawsuit, the public body then must satisfy its burden of proof.¹² An affidavit or other evidence establishing an adequate search or an appropriate denial is not required to be included in the public body’s

⁵ 29 Del. C. § 10003(a).

⁶ 29 Del. C. § 10005(c).

⁷ *Judicial Watch, Inc.*, 267 A.3d 996 at 1008-12.

⁸ 29 Del. C. § 10003(h)(1).

⁹ *Id.*; see Del. Op. Att’y Gen. 20-IB09, 2020 WL 1234452, at *3 (Feb. 27, 2020).

¹⁰ *Id.*

¹¹ 29 Del. C. § 10003(h)(2).

¹² 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.”).

response.¹³ As such, we find the City did not violate FOIA by failing to prove in its initial response that it conducted an adequate search for the partial set of records provided or by failing to justify its denial of records under the attorney-client privilege.

Conclusion

For the foregoing reasons, we conclude that the City violated FOIA by failing to meet Section 10003's requirements when the City needed additional time to fulfill your request. The remaining claims regarding the City's failure to meet its burden of proof in its response to your request are without merit.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

¹³ See, e.g., *Del. Op. Att'y Gen.* 25-IB06, 2025 WL 503941, at *2 (Jan. 21, 2025) ("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 public body did not violate FOIA.").