



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION: (302) 577-8400
CRIMINAL DIVISION: (302) 577-8500
FAMILY DIVISION: (302) 577-8400
FRAUD DIVISION: (302) 577-8600
DIVISION OF CIVIL RIGHTS & PUBLIC TRUST: (302) 577-5400
FAX: (302) 577-2610

Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB49

August 10, 2026

Via Email

Maureen Nagle
monaglemo@gmail.com

RE: FOIA Petition Regarding the Delaware State Housing Authority

Dear Ms. Nagle:

We write in response to your correspondence alleging that Delaware State Housing Authority 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 Authority violated FOIA by failing to meet its burden of proof to demonstrate that it performed an adequate search for responsive records. The remaining claims do not constitute violations of FOIA.

Background

On May 21, 2026, you submitted a FOIA request to the Authority, seeking the historical documentation of the Low Income Housing Tax Credit ("LIHTC") program for a specific residence, including the historical area median income percentage reported to the U.S. Department of Housing and Urban Development ("HUD") or the Delaware State Housing Authority from 1990 to 2026. You also requested the "reporting process requirement, submission process, verification of accuracy[,] and correspondence regarding the area median income percentage for [this residence]." ¹ You sought any correspondence from two identified companies regarding the details of the area median income designation, changes made, dates of designation change, and reason for the change in percentage designation. On June 15, 2026, the Authority advised it needed an additional fifteen days to process the request. On July 9, 2026, the Authority replied, stating that

¹ Petition.

this residential community is not a LIHTC site and the Authority does “not have responsive documents for the information you are requesting.”² The Authority stated that you should contact two companies for information about the details of the area median income designation and calculation, yearly historical area median income percentage, and the reasons for percentage changes. This Petition followed.

In the Petition, you contend that the Authority did not properly search for records responsive to this request. You state that the Authority’s statement that the residence is not a LIHTC property is inaccurate, noting that the confusion may have resulted from a name change to the community. You also note that the Authority’s response exceeded the statute’s timeframes for providing a response. Finally, you allege that if it is possible that the Authority does not have a file on this community, you question the basis for this, as your research indicates the Authority “is responsible to HUD for [m]aintenance of LIHTC file integrity [and] compliance.”³

On July 21, 2026, the Authority, through its legal counsel, replied to the Petition (“Response”). The Authority states that it conducted a search for responsive records upon receipt of this request and received an extension for processing from you. The Authority reiterates that it does not possess the requested information and states you should request the information from the management company or property owner. The Authority included the affidavit of its Director who attests to having knowledge of the Authority’s recordkeeping and request process, including the relevant facts of this matter. The Director states under oath that upon receipt of the request, the Authority consulted the appropriate affordable housing program divisions to determine they had no responsive records and asserts that the Authority reviewed records and information maintained by the divisions reasonably expected to possess LIHTC property documentation and program records. As a part of the search, the Director attests that the Authority confirmed that the residential community is not a LIHTC property; because of this, the Authority does not maintain the historical documentation requested.

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 citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁵ The

² *Id.*

³ *Id.*

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

⁵ 29 Del. C. § 10003(a).

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 first claim is that the Authority did not properly search for responsive records because the Authority should possess the requested records due to this community's designation as a LIHTC property. In order for the Authority to satisfy its burden of demonstrating its search for records was complete, the applicable standard was established in *Judicial Watch, Inc. v. University of Delaware*; in this case, the Supreme Court of Delaware determines that Section 10005(c) "requires a public body to establish facts on the record that justify its denial of a FOIA request."⁸ "[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."⁹

Judicial Watch's subsequent case history makes clear that generalized assertions in the affidavit will not be sufficient.¹⁰ Following the Supreme Court's decision that an affidavit was required, the University of Delaware, on remand to the Superior Court, initially submitted an affidavit stating that legal counsel, acting in the role of FOIA coordinator, inquired with unidentified University staff, including staff of the relevant offices - the budget office and library; the affidavit also indicated the inquiries made and response. The Superior Court determined that this affidavit was too generalized as it did not indicate who, at a minimum identified by position in the University, was consulted and provided information; when the inquiries were made; and what, if any documents, were reviewed.¹¹ After the University submitted a supplemented affidavit with these specifics, the Court found that this updated affidavit "demonstrates that the University

⁶ 29 Del. C. § 10005(c).

⁷ See *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

⁸ *Id.* at 1010.

⁹ *Id.* at 1012.

¹⁰ *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.' The University of Delaware must articulate who (identified at least by position within the University) provided the information: that no State funds were spent by the University; that no salaries of any University personnel involved in the custody and curation of the papers were paid with State funds; that no State funds were spent on the University's email system for communications between University personnel and Biden representatives; when such inquiries were made; and what, if any, documents (other [than] the gift agreement) were reviewed.").

¹¹ *Id.*

has met its burden of creating a record from which the Court can determine that the University performed an adequate search for responsive documents.”¹²

The Authority, in this matter, did not meet the *Judicial Watch* standard. While the affidavit addressed the timing of the search and internal divisions contacted, the Authority’s affidavit does not include who, by position in the Authority, was contacted and provided information and what documents, if any, were reviewed, potentially to include any files reviewed to determine that this residence was not a LIHTC property. As the affidavit is not sufficient to demonstrate an adequate search for responsive records, we find that the Authority violated FOIA by failing to meet its burden of proof and recommend that the Authority, within the timeframes of Section 10003, supplement its response to you with additional information about the Authority’s search, including who, by position, was consulted and provided information and the records reviewed, if any, in the course of the search, including the staff or records consulted to determine that this residence was not a LIHTC property.

Regarding the Petition’s second claim related to the delayed response, this issue is moot, now that the Authority has responded.¹³ For the third claim questioning why the Authority may potentially not have the LIHTC files, the FOIA statute limits this Office’s consideration to alleged FOIA violations.¹⁴ FOIA does not address a public body’s recordkeeping obligations under other legal authority, including HUD laws. Thus, the inquiry in the Petition regarding the type of records the Authority is required to maintain may not be addressed in this Opinion.

Conclusion

For the foregoing reasons, we conclude that the Authority violated FOIA by failing to meet its burden of proof to demonstrate that it performed an adequate search for responsive records. The remaining claims do not constitute violations of FOIA.

¹² *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 10788530 (Del. Super. Oct. 19, 2022), *aff’d*, 300 A.3d 1270 (Del. 2023).

¹³ *See, e.g., Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at *2 (Jun. 7, 2018); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998)).

¹⁴ 29 Del. C. § 10005(e).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Bryce A. Gates, Esq., General Counsel