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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 16-IB07**

**March 18, 2016**

**VIA EMAIL and FIRST CLASS MAIL**

Norma Lee Derrickson  
34821 Derrickson Drive  
Rehoboth Beach, DE 19971

**Re: FOIA Complaint Concerning the City of Rehoboth Beach**

Dear Ms. Derrickson:

On November 25, 2014, the Delaware Department of Justice (“DOJ”) received your petition (“Petition”) requesting our determination pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), of whether the City of Rehoboth Beach violated FOIA’s public records laws concerning your request for information about certain properties in the City.

By letter dated January 13, 2015, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the City to submit a written response to your Petition. We received the City’s response (“Response Letter”) on January 21, 2015. We have reviewed your correspondence and the City’s Response Letter. For the reasons stated herein, we find that the City committed a technical FOIA violation, but conclude that such violation does not warrant remedial action under the circumstances.

On October 7, 2014, you submitted a letter to the City, which was received on October 10, 2014, requesting “comparable sales for which fair market value was established” for certain properties. *See* Letter from Norma Lee Burton Derrickson to City of Rehoboth Beach, dated October 7, 2014 (via certified mail) (“Initial Request”). In the Initial Request, you also indicate that you had “personally appeared before the assessor, the mayor and the commissioner for three times in May, June and July 2014 requesting verification of how value was established,” but had not been “given any information to support the decision.” You then requested “the land value comparable and improvements and any circumstances that would affect the selling price” of the properties.

On November 24, 2014, you submitted a FOIA request form to this office, which was received on November 25, 2014. In the description line for “records requested,” the FOIA request form contained a verbatim recitation of the language in your Initial Request to the City.

By letter dated January 13, 2015, this office indicated that it was treating your November 24, 2014 correspondence as a petition for a determination by this office as to whether the City violated FOIA. By separate correspondence, also dated January 13, 2015, this office informed the City of the petition and requested that the City provide a response within fifteen business days. We received the City’s Response Letter on January 21, 2015.

As an initial matter, the City concedes that it has “no recollection” of having received your Initial Request and could not identify the initials of the person who signed for it. *See* Response Letter at ¶ 2. The City states that, to the extent it received your Initial Request, it was likely viewed as further inquiry by you regarding the methodology used during the property assessment, “and not as a request under FOIA.” *See id.*

We note that your Initial Request, while framed as a “formal request,” does not specifically identify FOIA. However, FOIA does not require that a request for records be made in a specific format. Rather, the statute specifically states that “any FOIA request that otherwise conforms . . . shall not be denied because the request is not on the promulgated form.” 29 *Del. C.* § 10003(f)(1). FOIA simply requires that FOIA requests be made “in writing” and “adequately describe the records sought in sufficient detail to enable the public body to locate such records with reasonable effort.” 29 *Del. C.* § 10003(f). Here, we find that your Initial Request satisfied the requirements of Section 10003(f). As such, the City was required to provide a response within fifteen business days of its receipt on October 10, 2014. *See* 29 *Del. C.* § 10003(h)(1). However, given the unique circumstances of this case, we find that this error was a technical violation of FOIA for which no remediation is required. While we note that the City may reasonably have interpreted your Initial Request as being related to the assessment appeals process, we also find, as discussed below, that no substantial rights were affected by the error.

Notwithstanding the City’s failure to treat your Initial Request as an official request for public records, the City does acknowledge that it received a FOIA request from you dated November 19, 2014 (“Second Request”), on November 24, 2014. *See* Response Letter at ¶ 3. Much like the November 24, 2014 FOIA request form received by this office, your Second Request contained a verbatim recitation of the language in your Initial Request. *See* Response Letter at Ex. A. The City alleges – and has provided documentation demonstrating – that, upon receiving your request, it immediately began to search for responsive documents. *See* Response Letter at ¶ 3; Response Letter at Ex. B. By letter dated December 1, 2014, the City informed you that it would review its files and would request that the independent assessment firm also review its files in connection with your request. *See* Response Letter at Ex. C. The City also informed you that “the reassessment process ha[d] concluded, and that the City c[ould not] reopen the assessment of any individual property or group of properties.” Response Letter at Ex. C. By the next day, the City had obtained responsive documents from the independent assessment firm and completed its collection of documents responsive to your request. *See* Response Letter at ¶ 3; Response Letter at Ex. 4. The City alleges that its representative, Ms. Donna Moore, left a message for you with an individual at your office “that the documents were prepared and that [you] could review them

at the City offices at a time convenient for [you].”<sup>1</sup> Response Letter at ¶ 3; *see also* Response Letter at Ex. D-E. The Response Letter noted that you could make arrangements to review the records by telephone or by visiting during regular business hours. *See* Response Letter at ¶ 6.

On February 25, 2015, you informed this office that you “met with Donna Moore and Ann Womack at Rehoboth Beach City Hall on February 2, 2015 to review the exact comparable sales used to establish value of the land for the parcels in question.” Letter from Norma Lee Burton Derrickson to Attorney General Matt Denn, dated February 25, 2015. You stated that “[n]o comparable sales were listed, only all sales from 2008 until 2013.” On July 1, 2015, you again wrote that you had not yet received comparable sales from the City and stated: “These deceptive practices should be evident with the lack of documentation.” Letter from Norma Lee Burton Derrickson to Attorney General Matt Denn, dated July 1, 2015.

Based upon the record presented to us, the City has not denied you access to public records. Rather, the City provided you with an opportunity to inspect all responsive documents in its possession, custody or control and you acknowledge that you did review documents on February 2, 2015. *See* 29 *Del. C.* § 10003(a) (“All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body.”); 29 *Del. C.* § 10003(h)(1) (“The public body shall respond to a FOIA request . . . either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed . . . .”); *Del. Op. Att’y Gen.* 15-IB02 (June 17, 2015) (no FOIA violation where Kent County Recorder informed requesting party that records were available for inspection and copying during normal business hours or via subscription service). To the extent you are seeking specific comparable sales, the City has represented that these were not created as part of the reassessment process and FOIA does not require a public body to create records that do not exist or to provide records in the specific format requested.<sup>2</sup> *See, e.g., Del. Op. Att’y Gen.* 06-IB17 (Aug. 21, 2006) (“There is no requirement on the part of public agencies to create records that are not already in their possession, or to store records in a particular medium in order to provide greater public access to the records.”) (quoting *State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665, 559 (Ohio 1992)).

Based upon the forgoing, we find that the City violated FOIA by failing to treat your October 7, 2014 correspondence as an official request for records under FOIA. However, we conclude that this constituted a technical violation for which no remediation is required because

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<sup>1</sup> We note that the documentation provided does not indicate the substance of the message, only that a message was left for you to return Ms. Moore’s call. *See* Response Letter at Ex. D. The City notes, however, that it “could provide a more thorough legal analysis of the City’s response along with affidavits of City employees . . . .” Response Letter at ¶ 5. While we expect that the parties will provide all relevant information when responding to a FOIA petition, we have concluded that such additional information is not necessary for our determination here.

<sup>2</sup> Correspondence between the City and Dave Hickey, a representative of the independent assessment firm, indicates that “a mass assessment is based upon the entire population of sales not just specific sales for each property as is typical of an appraisal which is done for mortgage lending or other purposes.” *See* Response Letter at Ex. D, p. 2.

you were subsequently afforded an opportunity to inspect all documents responsive to your request. *See, e.g., Del. Op. Att'y Gen. 08-IB08* (May 23, 2008) (finding no remediation necessary under harmless error doctrine). *See also Del. Op. Att'y Gen. 15-IB12* (Dec. 17, 2015) (meeting notices and agendas violated FOIA but no action affecting public rights taken at meetings); *Del. Op. Att'y Gen. 15-IB01* (June 12, 2015) (same); *Del. Op. Att'y Gen. 10-IB12* (Sept. 28, 2010) (agenda failed to include specific intersection where meeting to be held); *Del. Op. Att'y Gen. 00-IB12* (June 28, 2000) (agenda failed to include intent to discuss and take action regarding contract but action did not constitute material change to contract).

We note that your Petition is primarily concerned with the methods by which the City developed new values for certain properties. However, the DOJ does not provide opinion letters on the legality or propriety of property assessments by the City.

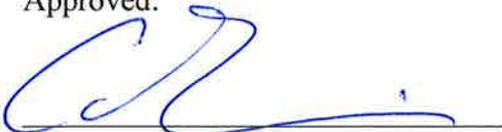
Very truly yours,



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Michelle E. Whalen  
Deputy Attorney General

Approved:



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Aaron R. Goldstein, State Solicitor

cc: Danielle Gibbs, Chief Deputy Attorney General (via email)  
Glenn C. Mandalas, Esq. (via email)