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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB02

February 8, 2017

VIA U.S. MAIL AND EMAIL

Mr. John Wells
2719 Barnsley Road
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Jwells8@aol.com

Re: FOIA Petitions Concerning Red Clay Consolidated School District

Dear Mr. Wells,

In February, March, and September of 2016, the Department of Justice received five petitions (“Petitions”) requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) of whether Red Clay Consolidated School District (“District”) violated FOIA’s public records provisions. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the District to provide responses to each petition. We have reviewed the Petitions, the responses, and all associated exhibits. Because each petition involved substantially similar allegations, we address them all here. Our determinations are set forth below.

FACTUAL BACKGROUND¹

Petition 1

On Saturday, December 19, 2015, Mr. Wells emailed Pati Nash, the District’s FOIA Coordinator, requesting the following:

¹ The Factual Background Section of this Opinion refers to your communications as made by “Mr. Wells” for ease of future reference by third parties.

[I]nformation showing all the stipends, purpose of stipend and amount. Also all other benefits, purpose of benefit and amount. {Benefits such as travel allowance, education allowance, phones, car allowance, etc. authorized by the school board for the following category of employees.} In [sic] any of these benefits have changed since 2008, request previous benefit and current benefit.

The request went on to list twenty-nine (29) categories of employees. On January 10, 2016, after fifteen business days had passed following the request, Mr. Wells asked Ms. Nash for a status update.

Ms. Nash responded to the December 19, 2015 request on February 4, 2016. She stated that there was no existing responsive document showing all stipends, their purpose and amount, but that one could be created for a charge. However, Ms. Nash did include a link to the teachers' contract, which laid out general stipend amounts for teachers only. Ms. Nash stated that there are no travel allowances. Ms. Nash suggested two ways in which Mr. Wells might narrow the request in order to obtain the requested information. She suggested that he might wish to request one of the three pay periods during which stipends are paid or, alternatively, request stipends and benefits for individuals.

On February 5, 2016, Mr. Wells responded to Ms. Nash. Mr. Wells again requested confirmation that the other employees were provided the same benefits as teachers.

We received Mr. Wells' petition regarding the December 19, 2015 request ("Petition 1") on January 22, 2016.² In Petition 1, Mr. Wells requested that "necessary action be taken to require RCSD's FOIA Coordinator to provide [him] information requested." However, Mr. Wells subsequently copied this office on his communications with Ms. Nash regarding the matter. As such, on February 11, 2016, Department of Justice FOIA Coordinator Kim Siegel asked Mr. Wells if he wished for this office to suspend his petition. Mr. Wells responded that he wished to proceed. On February 12, 2016, we acknowledged receipt of Petition 1 and forwarded it to the District for its response.

On February 17, 2016, Ms. Nash provided Mr. Wells with a memo regarding employee use of District vehicles, a memo about reimbursement of business expenses, and links to instructions for tuition reimbursement. Ms. Nash also provided the contracts of custodians, nutrition services, paraprofessionals, and secretaries. She reiterated that there was no existing document containing all of the information requested and again stated that one could be created for a charge. Ms. Nash estimated a cost to Mr. Wells of \$52.14 per hour for five (5) hours' work.

Counsel for the District responded to Petition 1 on February 29, 2016. The District responded that it had provided all existing responsive information. Specifically, the District provided an initial response on February 4, 2016 and a supplemental response containing additional responsive public records on February 17, 2016. Because it ultimately provided all responsive public records, the District argued that any violation regarding the timeliness of its

² Petition 1 is dated January 20, 2016.

response is moot. The District further argued that it is not required to create new public records or answer questions in response to a FOIA request. The District stated that it is nonetheless permitted to charge for the additional time to identify, locate, review and redact records in order to respond to Mr. Wells' request regarding the exact dollar amount received by individual employees.

Petition 2

On December 28, 2015, Mr. Wells emailed Ms. Nash to request documents "showing who made the decision to move forward in defense of the Referendum Lawsuit [sic]." Ms. Nash replied that she was searching for whether such records existed.³

On February 6, 2016, after twenty-seven business days had passed following the request, Mr. Wells emailed Ms. Nash stating that the December 28, 2015 request was for "...documents showing who make [sic] the decision not to return to the electorate to resolve this issue by calling for a new special election and limit it's [sic] electoral interventions."

We received Mr. Wells' petition with respect to the December 28, 2016 request ("Petition 2") on February 12, 2016. In Petition 2, Mr. Wells requested that the Department of Justice direct the District to provide the information requested. On February 15, 2016, we acknowledged receipt of Petition 2 and forwarded it to the District for its response.

Counsel for the District responded to Petition 2 on February 29, 2016.⁴ The District responded that no public records responsive to Mr. Wells' December 28, 2015 request exist, and that any responsive records that do exist are exempt from FOIA's definition of "public record" pursuant to 29 *Del. C.* § 10002(l)(6) because they are attorney work product or are otherwise protected by the attorney-client privilege. Because any responsive records which might exist are exempt from FOIA's definition of "public record," the District argued that any violation regarding the timeliness of its response is also moot.

Petition 3

On February 9, 2016, Mr. Wells emailed Ms. Nash requesting "the number of children that choiced into [the District's] schools in 2015-2016 and the tentative number for 2016-2017 in the same format as shown in the district[']s school profile. {In District – Out of District---Total Enrollment.}"

On February 23, 2016, the tenth business day following the request, Mr. Wells asked Ms. Nash for a status update.

³ While we were unable to determine the date of this particular correspondence on the record available to us, this fact is not relevant to our determination.

⁴ The February 29, 2016 letter from District counsel was a response to Petitions 1 and 2.

On February 24, 2016, Ms. Nash stated by email that the request was “premature” because the school choice deadline was in March and, as such, had not yet passed. As a result, she stated that April would be the “best time to provide” the information. That same day, Mr. Wells responded that, at a meeting on February 17, 2016, the District had shared a report with its board that showed school choice numbers for 2016-2017 for Skyline Middle School (“Skyline”). He then requested that Ms. Nash provide the information on which that report was based, specifying that he wanted information showing “in district choice” and “out of district choice.”

On February 25, 2016, Ms. Nash provided Mr. Wells with information on Skyline’s capacity, choice applications, choice invitations, waitlist, and the number of students receiving choice invitations elsewhere for the 2016-2017 school year. She explained that it was not possible to show the data broken out as requested because Skyline did not issue any choice invitations. Later that day Mr. Wells requested the choice data for 2015-2016 that had been part of the February 9, 2016 request. Mr. Wells also requested clarification regarding whether the projected enrollment for 2016-2017 included choice students from prior years or whether the numbers that Ms. Nash had provided were based entirely upon new attendance zones. He then requested the percentages of ELL (English Language Learner), low income, and special needs students projected to attend Skyline in 2016-2017.

On February 26, 2016, Mr. Wells emailed Ms. Nash to state that he had still not received any information in response to the February 9, 2016 request. Mr. Wells also described certain concerns, which he believed the information requested would address.

We received the petition with respect to Mr. Wells’ February 9, 2016 request (“Petition 3”) on March 7, 2016. In Petition 3, Mr. Wells requested that we require Ms. Nash to provide the information requested.

On March 10, Ms. Nash provided Mr. Wells a choice lottery report for 2015-2016 and a choice lottery report for 2016-2017. Mr. Wells replied that the information was not broken down as requested.

Counsel for the District responded to Petition 3 on March 11, 2016. The District argued that the District’s initial response, which explained that the information that Mr. Wells had requested on February 9, 2016 would not be available until a later, specifically identified time, satisfied FOIA. Further, the District argued that there is no requirement under FOIA that a body create records that do not exist in order to respond to a FOIA request. Finally, the District argued that the February 24, February 25, and February 26, 2016 requests constituted new FOIA requests, which the District fulfilled within fifteen business days.

On March 15, 2016, Ms. Nash explained in an email to Mr. Wells that the breakdown requested was not possible until the choice deadline for the 2016-2017 school year had passed. She also informed him that the report that she provided was the same report that the District had provided to the school board. Mr. Wells then asked Ms. Nash for the information for 2015-2016 and she resent the report. Mr. Wells subsequently asked Ms. Nash where the breakdown of “in district choice” and “out of district choice” students was. Ms. Nash replied that no such report is

generated and that the report from the Department of Education (“DOE”) used a prior year. Ms. Nash reiterated that a report such as the one requested would be available in April.

On March 16, 2016, we received Mr. Wells’ reply to the District’s March 11, 2016 response. In his reply, Mr. Wells argued that Petition 3 was timely, as his request was dated February 9, 2016. Mr. Wells also argued that his request was for two fiscal years and was in the format shown on the school profiles. He argued that the 2015-2016 information that the District had provided to him did not show the information requested, which was the “in district choice” and “out of district choice” students. Similarly, he argued that the 2016-2017 information that the District had provided to him did not show the information requested, which was the tentative choice numbers provided to the board showing in district and out of district choice.

On March 17, 2016, Mr. Wells asked Ms. Nash whether her March 15, 2016 email response was meant to indicate that the District had no document broken down as requested or, alternatively, that Mr. Wells had not appropriately worded his question. Mr. Wells also asked Ms. Nash for an explanation of what would be included in the April report and for the information that the DOE used for its own report if the information had been provided to the DOE by the District.

On April 13, 2016, Ms. Nash provided Mr. Wells with three (3) data sets: the 2015-2016 and 2016-2017 choice statistics, the special education numbers for Skyline, and ELL numbers for Skyline. Ms. Nash stated that the District did not have information on low-income students because that data is tracked by the DOE.

Petition 4

On February 23, 2016, Mr. Wells requested documents showing “the monthly rate of the Dental and Vision Plans that are being offered to district employees.” Specifically, he requested that the “monthly rate be shown for Employee, Employee & Spouse, Employee & Child(ren), and Family.” Mr. Wells also requested documents showing how the cost for life and disability insurance was determined.

We received Mr. Well’s fourth Petition with respect to the February 23, 2016 request (“Petition 4”) on March 28, 2016. In Petition 4, Mr. Wells requested we direct Ms. Nash to provide the information requested. Mr. Wells included a copy of the February 23, 2016 request and a response from Ms. Nash confirming that she received the request.⁵

On April 4, 2016, the twenty-eighth business day following the February 23, 2016 request, Ms. Nash provided Mr. Wells with a chart containing the requested information.

Counsel for the District responded to Petition 4 on April 8, 2016. The District argued that, because it provided all of the information that Mr. Wells requested on February 23, 2016, any violation regarding the timeliness of its response is moot.

⁵ We were unable to determine the date of this particular correspondence.

Petition 5

On August 29, 2016, Mr. Wells emailed Ms. Nash a request for:

- a) Copy of all documents concerning the districts [sic] authority to use[] local Tuition Tax Revenue to fund services to ELL students.
- b) A document showing the appropriate code and type of funds used for the expenditure of all local fund[s] in fiscal year 2016.
- c) Title of financial reports that show by appropriation and operating unit how and where all local Tuition Tax Revenue was expended in fiscal year 2016.

On September 19, 2016, the fourteenth business day following Mr. Wells' request, Mr. Wells asked Ms. Nash for a status update.

We received Mr. Wells' petition with respect to the August 29, 2016 request ("Petition 5") on September 26, 2016.⁶ In Petition 5, Mr. Wells requested that we require Ms. Nash to provide the information requested.

The District's Superintendent, Mervin Daugherty, responded to Petition 5 on October 5, 2016. The response indicated that the District did not possess documents responsive to Mr. Wells' request for "all documents concerning the districts [sic] authority to use[] local Tuition Tax Revenue to fund services for ELL students" but included a link to the relevant regulation. The response also included cost estimates to run reports responsive to Mr. Wells' requests for "[a] document showing the appropriate code and type of funds used for the expenditure of all local fund[s] in fiscal year 2016" and "[t]itle of financial reports that show by appropriation and operating unit how and where all local Tuition Tax Revenue was expended in fiscal year 2016." The District acknowledged that it had not provided a timely response to Mr. Wells' August 29, 2016 request, stating that the FOIA Coordinator confused the August 29, 2016 request with another similar request that Mr. Wells had submitted contemporaneously with his August 29 request, and which the FOIA Coordinator provided a response to on September 26.⁷

ALLEGED VIOLATIONS

We read each of the petitions to allege that the District violated FOIA by failing to provide the requested information, or otherwise failing to provide the requested information in the requested format, within the timeline prescribed by FOIA.

⁶ Petition 5 was dated September 22, 2016.

⁷ The FOIA Coordinator's response to the August 29, 2016 request was included in the District's response to Petition 5.

RELEVANT STATUTES

FOIA requires that public bodies:

respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, 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 because the request is for voluminous records, requires legal advice, or a record is in storage or archived. If access cannot be provided within 15 business days, the public body shall cite 1 of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.⁸

LEGAL ANALYSIS

Petition 1

The District did not deny that it failed to respond in a timely manner to Mr. Wells' December 19, 2015 request. Rather, the District argued that its ultimate responses, whether timely or not, "cured any defect in the timeliness of [the District's] initial response."⁹ FOIA requires that public bodies respond to requests within fifteen business days.¹⁰ The public body is not required to provide the requested documents within fifteen business days *per se*, but must respond with a denial or a representation "that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived."¹¹ We disagree that a timeliness violation is "cured" or "mooted" simply because the public body ultimately responded or because it was later determined that responsive public records did not exist. This is particularly so where, as here, the violation is part of a series of similar violations as detailed in the analysis below.¹² Accordingly, we find that the District violated FOIA by failing to respond within fifteen days of the original December 19, 2015 request as required by FOIA.

⁸ 29 Del. C. § 10003(h)(1).

⁹ Letter from M. Stafford to K. Siegel dated February 29, 2016 at 2.

¹⁰ 29 Del. C. § 10003(h)(1).

¹¹ *Id.*

¹² See *Levy v. Bd. Of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *7 (Del. Ch. Oct. 1, 1990) (rejecting school board's argument that a later action remedied earlier violations of the open meetings provisions because "[t]he undisputed record show[ed] a pattern of violations").

While we have determined that the District violated FOIA by failing to provide a timely response, we also find that the District did *not* violate FOIA by failing to create records that do not already exist. The Supreme Court of the United States has held that “an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.”¹³ “This Office has concluded that the law in Delaware is the same.”¹⁴ This Office has further stated that “FOIA does not require a public body to compile the requested data from other public records that may exist.”¹⁵ Similarly, “FOIA does not require an agency to make a summary or compilation of information in public records.”¹⁶ Here, while Ms. Nash offered to have a staff member compile the requested data, the District did not violate FOIA by failing to do so.

Petition 2

As with Petition 1, the District did not deny that it failed to respond in a timely manner to Mr. Wells’ December 28, 2015 request. Rather, the District argued that “no responsive public records exist,” but even if potentially responsive records exist, they would be protected by the attorney-client privilege and therefore would be exempt from FOIA’s definition of “public record.”¹⁷ Therefore, the District argued, the timeliness of its response is moot.¹⁸ As stated above, we disagree that a timeliness violation is “cured” or “mooted” simply because the public body ultimately responded or because it was later determined that responsive public records did not exist. Similarly, a timeliness violation is not “cured” or “mooted” if the records were exempt from FOIA. Accordingly, we find that the District violated FOIA by failing to respond within fifteen days of the original December 28, 2015 request as required by FOIA.

Petition 3

In regards to Petition 3, the question of whether the District failed to provide a timely response to the February 9, 2016 request requires closer analysis. On February 9, 2016, Mr. Wells requested data for the 2015-2016 school year and tentative data for the 2016-2017 school year in

¹³ *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)).

¹⁴ *See Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1546783, at *2 (June 28, 2004) (citing *Yeager*); 99-IB12, 1999 WL 1095340, at *2 (Sept. 21, 1999) (same). We note that you were the petitioner in both *Del. Op. Att’y Gen.* 04-IB14 and *Del. Op. Att’y Gen.* 99-IB12.

¹⁵ *Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1547683, at *2 (June 8, 2004).

¹⁶ *Id.*

¹⁷ Letter from M. Stafford to K. Siegel dated February 29, 2016 at 2; *See* 29 *Del. C.* § 10002(1)(6) (exempting from FOIA’s definition of “public record” “[a]ny records specifically exempted from public disclosure by statute or common law.”).

¹⁸ *Id.*

a single request. The District provided a timely response that the data for 2016-2017 would not be available until later in the year. However, the District did not address the request for the 2015-2016 school year. The District has represented that it considered the February 25, 2016 request for only the 2015-2016 data to be a new request, to which the District provided a timely response on March 10, 2016, ten business days after receipt.

As noted above, FOIA requires that public bodies respond to requests within fifteen business days, either by providing access to the requested records, denying access, or “advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.”¹⁹ Here, the District provided no such response within fifteen days. Under the circumstances, while we note that the District’s February 24, 2016 response might qualify as a timely denial as to the 2016-2017 choice data on the basis that no responsive public records exist, the District’s response did not address the request for the 2015-2016 school year data. However, the District was able to produce the data twenty-two (22) business days after the initial request. As such, the District violated FOIA by failing to respond within fifteen days of the February 9, 2016 request for the 2015-2016 school year data as required by FOIA.

While we have determined that the District violated FOIA by failing to provide a timely response, particularly with respect to the 2015-2016 choice data, we also find that the District did *not* violate FOIA by failing to provide the “tentative” 2016-2017 choice data requested within the 15 business days following the request because the requested records did not then exist. As noted above, FOIA does not require a public body to create records that do not already exist. Here, at the time of Mr. Wells’ request, the District had received and knew the number of its school choice applications, but had not yet issued invitations to the applicants. Therefore, the District did not know the tentative number of children who would be “choiced” into the District’s schools. We agree with the District that the number of applications (or even the number of invitations issued) “in no way equates with, or is analogous to” the “tentative number” of students who would choice into a District school.²⁰ Based upon the evidence of record, we are satisfied that the District had not yet created a record showing the estimated number of students that the District expected to choice into District schools at the time of the February 9, 2016 request. Therefore, we determine that the District did not violate FOIA by failing to provide the “tentative” 2016-2017 choice data. Rather, the District complied with the spirit of FOIA by offering to and ultimately sending the information when it became available.

For similar reasons, it is our determination that the District did not violate FOIA in connection with the February 24, 2016 request for school choice data for Skyline Middle School, which the District fulfilled within one business day. Nor did the District violate FOIA by failing to break down the data in the specific manner requested. Here, the District provided its existing responsive records within fifteen business days as required by FOIA.²¹ As such, the District did

¹⁹ 29 *Del. C.* § 10003(h)(1).

²⁰ Letter from M. Stafford to K. Siegel dated August 25, 2016 at 1.

²¹ 29 *Del. C.* § 10003(h)(1).

not violate FOIA in connection with the February 24, 2016 request for school choice data for Skyline Middle School.

Petition 4

Similar to its response to Petition 1, the District argued that while its response was not timely, the District “complied with its obligations under the law and cured any defect in the timeliness of the initial response.”²² As discussed above, we disagree that a timeliness violation is “cured” or “mooted” simply because a response was provided at a later date. Accordingly, we find that the District violated FOIA by failing to respond within fifteen days of the original February 23, 2016 request as required by FOIA.

Petition 5

The District acknowledged its error in not responding to Mr. Wells’ August 29, 2016 request. As noted above, FOIA requires that public bodies respond within the fifteen business days in the manner required by § 10003(h)(1). By failing to do so, the District violated FOIA.

CONCLUSION


We find that the District did not violate FOIA by failing to provide the 2016-2017 choice records requested until they became available. However, we find that the District *did* violate FOIA repeatedly, as alleged in each of the Petitions, by failing to respond to Mr. Wells’ requests in the manner and time prescribed by FOIA. However, because the District later provided Mr. Wells with all responsive records, we do not believe any specific remediation to be warranted. We nevertheless caution the District that repeated violations of FOIA may result in injunctive, declaratory or other prospective relief, in addition to an award of attorney fees and costs, in the event of a court action.²³ Additionally, while it is our determination that no *specific* remediation is warranted under the circumstances, in light of our concern regarding the District’s repeated failure to provide timely responses under FOIA, we strongly encourage the District to consult the statute and to pursue FOIA training. Although FOIA dictates that these materials “shall not be construed as legal advice,”²⁴ the District may also wish to consult prior Attorney General FOIA Opinions, the current Policy Manual for FOIA Coordinators, and the slides and video from the most recent Statewide FOIA Coordinator Training, which are available online at <http://www.attorneygeneral.delaware.gov/executive/opengov.shtml> as of the date hereof.

²² Letter from M. Stafford to K. Siegel dated April 8, 2016 at 1.

²³ See 29 Del. C. § 10005(d); see also *Levy v. Bd. Of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *7 (issuing a preliminary injunction after identifying a pattern of violations of FOIA’s open meetings provisions); cf. *Layfield v. Hastings*, 1995 WL 419966, at *1 (Del. Ch. July 10, 1995) (“The complaint does not purport to allege a series of prior violations of FOIA which might justify prospective relief even if the specific facts generating the complaint have become moot.”).


²⁴ 29 Del. C. § 10007(d).

Very truly yours,



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APPROVED BY:



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