



MATTHEW P. DENN  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-6499

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

**Attorney General Opinion No. 17-IB04**

**March 8, 2017**

**VIA U.S. MAIL AND EMAIL**

Ms. Patricia McCune  
PO Box 1098  
1182 Levels Road  
Middletown, DE 19709  
[mccpatti@gmail.com](mailto:mccpatti@gmail.com)

**Re: June 14, 2016 FOIA Petition Concerning the Town of Middletown**

Dear Ms. McCune:

On June 14, 2016, 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 Town of Middletown (the “Town”) violated FOIA’s public records provisions in connection with your March 4, 2016 request for records. By letter dated June 16, 2016, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Town to submit a written response to the Petition. We received the Town’s response (“Response Letter”) on June 21, 2016. We have reviewed the Petition and the Response Letter. Because we are satisfied that the Town no longer possesses the records, and because FOIA does not require a public body to respond to questions, we conclude that the Town did not violate FOIA as alleged in the Petition.

**FACTS**

On or about February 8, 2016,<sup>1</sup> you submitted a hand-written letter to the Town Mayor and Council. The subject line of the letter reads “FOIA – Deed – The Estates at Dove Run – Instrument: 20020507-0042679 – Tax Parcel No: P/O 23-057.00-001 & 002.” Your letter indicates that you were enclosing the first page of the deed and states:

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<sup>1</sup> While not relevant for purposes of this determination, we note that your correspondence does not indicate when it was received by the Town.

I notice that \$1,436,224.16 and \$634,900.00 was paid by you as “a body politic, of the State of Delaware, party of the second part,” What is the source of those funds? I seek the name, address, and dates of the Institution, Bond Entity or by whatever means was used to secure/have available and to what addresses/accounts the funds were paid through to the parties of the first part.

As indicated, you attached the first page of a deed dated April 25, 2002.

On March 4, 2016, you submitted a FOIA request to the Town on the Town’s official FOIA form. Your request was nearly identical to your February 8 letter, adding only that you also seek “dates of these events.”

On March 18, 2016, you had an in-person meeting with, at a minimum, the Town’s FOIA Coordinator. Then, on March 24, 2016, the Town’s FOIA Coordinator responded to your request in writing, stating that the Town “ha[d] exhausted [its] efforts in retrieving the documents pertaining to your question.” The March 24 letter further provides:

Regarding the first [request] having to do with researching the payment for a right-of-way in 2002 (Deed T20020035379),<sup>2</sup> I have been unable to locate record of the payments in any format. The Town of Middletown follows the State of Delaware’s General Records Retention Schedule, which calls for accounts payable files (includes paid bills, vendor files, payment vouchers, purchase requisition, purchase orders, bills, invoices, check vouchers, bids, payment authorizations, reports of receipt of goods or services, and shipping tickets) to be retained at the government office for 3 (three) years, and once there is a successful audit, they are destroyed. In addition, we are unable to access our former computer financial systems that are now defunct.

I have given you all of the Mayor and Council minutes from 2000 to 2003 regarding the Rutkoske land that is now Dove Run and the Brick Mill Elementary School. I am enclosing another set of minutes from the Planning and Zoning Commission that I did not have at the time of our in-person meeting on March 18. At this time, all of these documents complete your request.

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<sup>2</sup> While you indicate in your petition that the Town’s FOIA Coordinator was referring to Deed T20020035379 and you provided Deed 20020507-0042679, we note that the page that you provided indeed contains an identifier T20020035379. As such, we are satisfied that the document referred to in both your March 4, 2016 request and the Town’s March 24, 2016 letter are one and the same.

## SUMMARY OF ARGUMENTS

In your Petition, you state that you question whether the requested documentation is truly not available from the Town. You highlight the cost of the transaction<sup>3</sup> and question whether documentation “on this matter within [the Town] and/or State, Federal agencies and/or private/public investment as well as private companies is really not available from the Town.”

In its Response Letter, the Town states that FOIA does not require that the Town respond to questions. In the alternative, to the extent your question is deemed a request for records pertaining to documents relating to the source of the funds, the Town has determined that it does not possess any responsive documents. The Town has nonetheless produced minutes from the Mayor and Council meeting, as well as minutes from the Planning and Zoning Commission, from 2000 to 2003 regarding the land in question. The Town also indicated that it does not have any records in its possession regarding the real estate closing. Rather, the individual who served as Town Solicitor in 2002 – and who the Town believed to have handled the real estate closing for the Town – passed away in 2003 and the Town has no knowledge of what became of his records.

## RELEVANT STATUTES

Pursuant to 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. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.

Pursuant to 29 *Del. C.* § 10003(j)(1):

If all or any portion of a FOIA requests seeks records controlled by the public body but are not within its possession or cannot otherwise be fulfilled by the public body with reasonable effort from the records it possesses, then the public body shall promptly request that the relevant custodian provide the noncustodial records to the public body.

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<sup>3</sup> You indicate that the total purchase price was \$2,071,124.16, which included the sum of \$1,436,224.16 and \$634,900. The Town states that, according to the deed, the total purchase price was \$1,436,224.16, which was allocated as follows: \$786,824.16 divided equally between five individuals and the remaining \$634,900.00 to a Delaware limited liability company. The Town is correct that the deed reflects a total purchase price of \$1,436,224.16 and is correct with respect to the allocation of those funds as set forth in the deed. We have reviewed the first page of the deed and note that the allocation of those funds as set forth in the deed may fail to account for approximately \$14,500.00 of the total purchase price. However, the legal impact, if any, of any such discrepancy would be outside the scope of this determination.

## DISCUSSION

As an initial matter, we note that FOIA does not require a public body to answer questions.<sup>4</sup> Nor does FOIA require a public body to create records that do not exist.<sup>5</sup> Rather, FOIA's public records provisions pertain to *existing* documents or information.<sup>6</sup>

Here, the Town maintains that it has not violated FOIA in connection with your request because, aside from the minutes that it has already provided, it has been unable to locate any records responsive to your request.<sup>7</sup> Notably, your request relates to a real estate transaction that occurred nearly fourteen years prior to your request. The Town has indicated – and we are satisfied – that it exhausted its efforts in locating and retrieving responsive records within its custody.<sup>8</sup> Indeed, as evidenced by the Town's ability to locate minutes dating back more than

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<sup>4</sup> See, e.g. *Del. Op. Att'y Gen.* 08-IB05, 2008 WL 1727613, at \*1 (Feb. 22, 2008) (noting that “FOIA does not require a public body to answer questions in a written or spoken format”) (citing *Del. Op. Att'y Gen.* 00-IB08, 2000 WL 1092967, at \*2 (May 24, 2000)); *Del. Op. Att'y Gen.* 97-IB06, 1997 WL 606408, at \*5 (Mar. 17, 1997) (“We emphasize again that the School Board is not required to compile any lists of information contained in public records, *or to answer questions in a format requested by the complainants.*”) (emphasis added).

<sup>5</sup> See *Del. Op. Att'y Gen.* 15-IB02, 2015 WL 3919061, at \*2 (June 17, 2015) (“FOIA does not require a public body to create records that do not exist.”) (citing *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at \*4 (Aug. 21, 2006)).

<sup>6</sup> See *Del. Op. Att'y Gen.* 08-IB05, 2008 WL 1727613 at \*1 (“There are no existing documents that provide the information [the requesting party] seeks, and he has no right under FOIA to anything other than existing documents.”).

<sup>7</sup> We note that the Town has stated that it follows the State of Delaware's General Records Retention Schedule and, “[a]s far as [the Town's FOIA Coordinator] can determine, these records were destroyed some years ago.” Response Letter at 2; see also Letter from Kristen Krenzer to Patricia McCune dated March 24, 2016 (“The Town of Middletown follows the State of Delaware's General Records Retention Schedule, which calls for accounts payable files . . . to be retained at the government office for 3 (three) years, and once there is a successful audit, they are destroyed.”). However, this is a matter outside the scope of FOIA.

<sup>8</sup> Under different circumstances, we might rely on an affidavit from the records custodian in concluding that the scope of a public body's search for responsive records was sufficient. See, e.g., *Del. Op. Att'y Gen.* 04-IB14, 2004 WL 1547683, at \*3 (June 28, 2004) (school district provided affidavit in its response to the petition); *Del. Op. Att'y Gen.* 97-IB01, 1997 WL 111279, at \*1 (Jan. 14, 1997) (this Office requested affidavit). However, we do not believe such an affidavit to be necessary here. As noted above, the individual who served as Town Solicitor at the time of the real estate transaction, and who the Town believed to have handled the closing for the Town, passed away in 2003. The FOIA Coordinator was nevertheless able to locate some responsive records dating back more than fifteen years. Under these circumstances, we can find no reason to

fifteen years, we are satisfied that the Town performed an adequate search of its own records for records responsive to your request.<sup>9</sup> The question that remains, however, is whether records controlled by the Town are in the possession of a third party custodian. If so, 29 *Del. C.* § 10003(j)(1) mandates that the Town “promptly request that the relevant custodian provide the noncustodial records” to the Town.

On February 16, 2017, we sought clarification from the Town regarding whether it consulted with third parties in connection with your request. We noted that the first page of the deed bore the name Samuel J. Frabizzio, Esq. and requested clarification from the Town regarding whether it had consulted with Mr. Frabizzio regarding your request.<sup>10</sup> On February 17, 2017, the Town responded that it has not, as Mayor Kenneth L. Branner confirmed that Mr. Frabizzio has never represented the Town.<sup>11</sup> We also asked the Town to clarify whether it consulted with counsel who handled any municipal bond offering prior to the real estate closing at issue.<sup>12</sup> In its February 17, 2017 correspondence, the Town indicated that Mayor Branner has confirmed that there was a bond issued in 2000.<sup>13</sup> However, the bond “was related solely to the construction of a wastewater treatment facility” and “had absolutely nothing to do with the real estate closing at issue.”<sup>14</sup> As such, the Town stated that it “has not attempted to determine who bond counsel was at that time

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doubt the FOIA Coordinator’s representation to you that she had indeed exhausted her search for responsive records, *Cf. Del. Op. Att’y Gen.* 93-I023 (Aug. 31, 1993) (affidavit requested by this Office to determine that requested records did not in fact exist where City Administrator had discussed the possibility of a second file with the requesting party and was continuing her search for that file at the time the petition was filed). As we have previously noted, “[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” *Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1547683, at \*3 (quoting *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)).

<sup>9</sup> See, e.g., *Del. Op. Att’y Gen.* 12-IIB07, 2012 WL 1680116, at \*2 (May 4, 2012) (“We are satisfied that the City [of Wilmington] conducted a diligent search for the records requested and made all existing records available for inspection and copying.”); *Del. Op. Att’y Gen.* 93-I023 (concluding that the City of New Castle “conducted a diligent search of the City’s records” and, to its representatives’ knowledge and belief, provided all responsive documents within its possession). To be clear, this determination should not be read to establish a minimum threshold regarding the level or scope of search required under FOIA, as we are satisfied that the Town’s exhaustive search would satisfy even the most stringent standard.

<sup>10</sup> Letter from Michelle E. Whalen to Scott E. Chambers dated February 16, 2017.

<sup>11</sup> Letter from Scott E. Chambers to Michelle E. Whalen dated February 17, 2017 at 1.

<sup>12</sup> Letter from Michelle E. Whalen to Scott E. Chambers dated February 16, 2017.

<sup>13</sup> Letter from Scott E. Chambers to Michelle E. Whalen dated February 17, 2017 at 1-2.

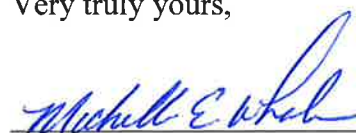
<sup>14</sup> *Id.* at 2.

nor has the Town consulted with said counsel.”<sup>15</sup> On this record, while we note that FOIA mandates that a public body “promptly request that the relevant custodian provide noncustodial records,”<sup>16</sup> we see no evidence in the record of any third party custodian of responsive records controlled by the Town. As such, we cannot conclude that the Town was under any obligation to consult with third parties regarding your request.<sup>17</sup>

### CONCLUSION


Based upon the foregoing, we are satisfied that the Town has fulfilled its obligations under FOIA in connection with your request. As such, it is our determination that the Town did not violate FOIA as alleged in your petition.

Very truly yours,



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Michelle E. Whalen  
Deputy Attorney General

Approved:

  
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Aaron R. Goldstein, State Solicitor

cc: LaKresha Roberts, Chief Deputy Attorney General (via email)  
Jennifer R. Noel, Deputy Attorney General (via email)  
Scott E. Chambers, Esq. (via email)  
Fred Townsend, Esq. (via email)

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<sup>15</sup> *Id.*

<sup>16</sup> 29 *Del. C.* § 10003(j)(1).

<sup>17</sup> The Town nevertheless indicates that its FOIA Coordinator “did call the New Castle County Recorder of Deeds office in an effort to assist and she also provided [you] with Mr. Frabizzio’s contact information.” Letter from Scott E. Chambers to Michelle E. Whalen dated February 17, 2017 at 1. This, we believe, was consistent with FOIA.