



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNCIL
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. 18-IB04

January 23, 2018

VIA U.S. MAIL AND EMAIL

George Flowers
305 Park Avenue
New Castle, DE 19720
gnkflow@comcast.net

RE: January 3, 2018 FOIA Correspondence Regarding the City of Wilmington

Dear Mr. Flowers:

We write regarding your correspondence, received on January 3, 2018, alleging that the City of Wilmington (the "City") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). We invited the City to submit a written response to the Petition. We received the City's response ("Response Letter") on January 10, 2018 and your reply ("Reply") on January 11, 2018. As set forth more fully below, it is our determination that the City did not violate FOIA by denying your request.

RELEVANT BACKGROUND

At some point prior to November 13, 2017, the Public Works Department hosted a series of training sessions that were provided by an outside consultant, Prince Advisory Services, to approximately 30 employees.¹ You were one of the participating employees.² Following the training, Prince Advisory Services prepared reports summarizing the sessions and providing assessments of the various employees:

¹ Response Letter at 1.

² *Id.*

Although there were approximately 30 employees that participated in the various sessions, the reports are not specific to individual employees. Each report discusses various groups of employees and the information on each employee is comingled together. There is one report that contains an assessment focused on one employee, which is not [you].³

“The reports also included summaries of employee self-evaluations, co-worker evaluations, personality assessments, and the participants’ strengths and weaknesses.”⁴

On November 13, 2017 FOIA, you sent a FOIA request to the City for “[a]ll reports and documentation submitted by the Prince Advisory Services for services th[e] company provided to the City of Wilmington, Department of Public Works, and all reports generated and filed by the same for any services related to Mediation, Conflict Resolution, and Coaching Efficiency.”

On December 18, 2017, you submitted a petition to this Office requesting a determination of whether the City violated FOIA by failing to respond to your request within 15 business days. That same day, we forwarded your December 18, 2017 petition to the City for a response. On December 20, 2017, while that petition was pending, the City provided a response to your November 13, 2017 FOIA request. Specifically, the City denied your request on the basis that the requested records are not public records pursuant to 29 *Del. C.* § 10002(1)(1). The City stated that the information was also exempted from public disclosure pursuant to 29 *Del. C.* § 10002(1)(6) pursuant to the common law right of privacy and City Code. Then, on December 21, 2017, the City acknowledged that it failed to provide a response to your request within 15 business days, but argued that your December 18, 2017 petition was now moot. On December 29, 2017, we determined that the City had indeed violated FOIA by failing to provide a response to your November 13, 2017 FOIA request within 15 business days. We noted that our determination was limited to the single issue raised in your December 18, 2017 petition, but indicated that you retained the right to submit a new petition if you wished to challenge the City’s December 20, 2017 response to your FOIA request.

POSITIONS OF THE PARTIES

In your Petition, you allege that the City violated FOIA by denying your November 13, 2017 FOIA request for “[a]ll reports and documentation submitted by the Prince Advisory Services for services th[e] company provided to the City of Wilmington, Department of Public Works, and all reports generated and filed by the same for any services related to Mediation, Conflict Resolution, and Coaching Efficiency.” You argue that the requested records “concerned activities and behaviors of City Employees and Officials, and was funded by tax payer funds.” You argue that the information is public, just as are the names and salaries of City employees. You note that there are other published reports and argue that “it is fair and just for the City to release the information requested . . . in a like manner.”

³ *Id.* at 2 n.3.

⁴ *Id.* at 3.

In its Response Letter, the City maintains that the reports are not public records for three independent reasons. First, the City maintains that the records are not public records pursuant to 29 Del. C. § 10002(1)(1) because they are personnel records and their disclosure would constitute an invasion of personal privacy.⁵ Specifically, the City argues that “reports provided to a department head discussing employees’ strengths and weaknesses and evaluating those employees is exactly the type of material a boss uses to evaluate employees and make personnel actions.”⁶ Next, the City argues that the records are exempted pursuant to 29 Del. C. § 10002(1)(6) and, more specifically, the common law right of privacy.⁷ Finally, the City argues that the records are exempted pursuant to 29 Del. C. § 10002(1)(6) on another basis. Specifically, the City argues that a City Code provision mandating that “[s]ensitive information concerning applicants for employment and employees of the city, including but not limited to . . . evaluation and selection process . . . and other personnel information shall be treated as confidential” is a “statute” as envisioned by FOIA.

In your Reply, you argue that “the City HR Code does not agree” with the City’s argument that the sessions are used for things such as promotions. You also state: “The City admits that these sessions included group sessions, which then suggests that official employee evaluations were performed in group sessions.” You note that the Division of Public Works – and not the Department of Human Resources – is the consultant’s client. You argue: “The evaluations that were performed in the sessions were self evaluations and evaluations of the work of [the consultant], not to be construed as official employee evaluations.”⁸

RELEVANT STATUTES

Delaware’s FOIA defines “public record” as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes”⁹ However, the statute also provides that certain categories of information “shall not be deemed public.”¹⁰ Among those categories of records are “personnel, medical, or

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2-3.

⁸ You also state: “Unfortunately, the City failed to address the malfeasance of certain employees which caused major dysfunction within certain departments.” However, as those allegations fall outside the scope of this Office’s role under FOIA, they are not addressed herein.

⁹ 29 Del. C. § 10002(1).

¹⁰ *See* 29 Del. C. §§ 10002(1)(1)-(19).

pupil files, the disclosure of which would constitute an invasion of personal privacy”¹¹ and “records specifically exempted from public disclosure by statute or common law.”¹²

DISCUSSION

As an initial matter, we note that Delaware’s FOIA does not require this Office – or the courts – to conduct an investigation or an *in camera* review of records that a public body has withheld in response to a FOIA request.¹³ Rather, as the Superior Court has recently made clear, FOIA *only* requires a determination of whether the City provided sufficient *reasons* for withholding the redacted information to satisfy its burden of proof.¹⁴

Under the circumstances, we are satisfied that the City, has invoked a well-recognized FOIA exemption with a clear understanding of that exemption. Specifically, the City has invoked 29 *Del. C.* § 10002(1)(1) and, through its written submission, has demonstrated a clear understanding of the limits of that exemption. As such, it is our determination that the City did not violate FOIA by denying your November 13, 2017 FOIA request.¹⁵

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, Chief Deputy Attorney General
on behalf of Allison E. Reardon, State Solicitor

cc: Allison E. Reardon, State Solicitor (via email)
Luke W. Mette, Esq. (via email)

¹¹ 29 *Del. C.* § 10002(1)(1).

¹² 29 *Del. C.* § 10002(1)(6).

¹³ *Flowers v. Office of the Governor*, 167 A.3d 530, 548-49 (Del. Super. 2017).

¹⁴ *Id.* at 549.

¹⁵ While the *Flowers* decision demonstrates that this Office is not required to inspect the requested records *in camera*, or to opine on whether the requested records are indeed “public records,” we note that the record here contains sufficient information to do so. Based upon the description provided by the City, we believe that the requested records are exempted pursuant to 29 *Del. C.* § 10002(1)(1).