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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB14

March 9, 2018

VIA EMAIL

Jeffrey Smith
news@deweycitizens.org

RE: FOIA Correspondence Regarding the Town of Dewey Beach

Dear Mr. Smith:

We write regarding your correspondence, received on February 21, 2018, alleging that the Town of Dewey Beach ("Town") 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 Town to provide a response to your Petition. We received the Town's response ("Response Letter") on February 27, 2018 and your reply thereto ("Reply") on March 2, 2018. For the reasons set forth below, we conclude that your Petition is moot.

On January 9, 2018, you submitted a FOIA request to the Town for a copy of the Town's "current" Insurance Policy, including the Commercial Policy Common Declarations, Commercial Policy Information Page, Policy Changes Endorsement, Schedule of Locations, Additional Insured- Land Leased, and General Liability Coverage Declaration. On January 31, 2018, the Town provided a copy of an insurance policy that appeared to be current with coverage dates of February 18, 2017-February 18, 2018 and certain changes effective March 22, 2017. On February 2, 2018, you sent an email to the Town's Mayor, TJ Redefer, stating that the Town's response did not include the Policy Changes Endorsements and the Schedule of Locations. You stated that you had information that the policy had been amended in December 2017 to list storage lots that were added to store surplus military equipment and included a photograph of part of a page from the amended policy. That same day, the Mayor responded by stating that he would forward your request to the Town's FOIA Coordinator and provided information about the storage locations. On February 6, 2018, the Assistant Town Manager, Jime Dedes, sent you a copy of the coverage proposal for February 18, 2018 through February 18, 2019 and an insurance policy with coverage dates of February 18, 2017-February 18, 2018 and certain changes effective January 24 and January 29, 2018.

In your Petition, you allege that the Town violated FOIA by failing to provide the Policy Changes Endorsement and Schedule of Locations for the policy that was in effect on January 9, 2018, the date of your request. In its Response Letter, the Town maintains that the omission was inadvertent. The Town provided copies of internal email correspondence regarding your request and affidavits from Sheena Gossett, who serves at the Town's Accounting Manager, and Ashleigh Hudson, who serves as the Town's Clerk and FOIA Coordinator. Both individuals represented that they located the missing page on February 23, 2018, the same date that they learned that the Town's former Director of Finance – whose last day with the Town was January 2, 2018 – kept a separate folder on her desk containing the Town's current insurance policies.¹ The Town's Response Letter included copy of the insurance policy, with December 7, 2017 policy changes, that was in effect on January 9, 2018. In your Reply, you note that you provided the Mayor with a photograph of a policy page to prove the existence of a December 7, 2017 policy change, but state the Assistant Town Manager still failed to provide copies of the December 7, 2017 policy changes. You bring attention to the fact that the Town's response did not include an affidavit from the Assistant Town Manager and appear to suggest that the Town willfully omitted the December 7, 2017 policy changes.

Under the circumstances, we have determined that your Petition is moot, as you are now in possession of the information you sought in your January 9, 2018 request.² We express no opinion regarding whether the requested records are, in whole or in part, "public records" as defined by FOIA. Of course, to the extent you believe prospective relief beyond this Office's jurisdiction to be warranted, you may seek judicial review of your claim.³

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

¹ Because the policy had been amended on December 7, 2017 and not again until January 24, 2018, the policy in effect on January 2, 2018 would also have been in effect on January 9, 2018, the date of your request.

² See *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) (“[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Bd.*, 1994 WL 274295, at *13 (“Because the documents that are the subject of [plaintiffs’] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot.”). In fact, the photograph that you sent to the Mayor on February 2, 2018 suggests that you may have already possessed some or all of the pages at issue.

³ See 29 Del. C. § 10005(d) (“Remedies permitted by this section include an injunction, a declaratory judgment, writ of mandamus and/or other appropriate relief. *The court* may award attorney fees and costs to a successful plaintiff of any action brought under this section.”).

APPROVED BY:

Allison E. Reardon

Allison E. Reardon, State Solicitor

cc: Fred A. Townsend, III, Esq.