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

**Attorney General Opinion No. 18-IB15**

**March 12, 2018**

**VIA U.S. MAIL & EMAIL**

Kyle Evans Gay, Esq.  
Connolly Gallagher LLP  
1000 N. West Street  
Suite 1400  
Wilmington, DE 19801

**RE: FOIA Correspondence Regarding the Trustees of New Castle Common**

Dear Ms. Gay:

We write regarding your correspondence, received on March 6, 2018, alleging that the Trustees of New Castle Common (“Trustees”) has violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”).<sup>1</sup> 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”). As set forth more fully below, it is our determination that the Trustees has violated FOIA. However, we decline your request to litigate this matter on your behalf.

On February 6, 2018, you submitted a FOIA request, on behalf of your client, Residents for a Livable City, LLC, to the Trustees for certain records.<sup>2</sup> On February 16, 2018, the Trustees’ counsel sent you a letter denying your request on the basis that “[c]ontrary to the Attorney General’s [July 28, 2017] opinion, the Board of Trustees does not believe that the Trust is subject to FOIA.”<sup>3</sup> The letter stated that the Trustees nonetheless has an interest in providing information

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<sup>1</sup> We note that you copied the Trustees’ President and its counsel on your Petition.

<sup>2</sup> Petition at Ex. B.

<sup>3</sup> *Id.* at Ex. C.

requested by residents of the City of New Castle and suggested that a member of Residents for a Livable City contact the President of the Trust with a more specific request.<sup>4</sup>

In your Petition, you allege that the Trustees' response amounted to a FOIA violation. We agree. Indeed, as we have previously made clear, we believe that the Trustees is a "public body" as defined by FOIA and, as such, must comply with FOIA's mandates.<sup>5</sup> Of course, this includes an obligation to make public records available for inspection and copying upon request.<sup>6</sup> Here, while the Trustees did in fact deny access to certain records upon receipt of a written request,<sup>7</sup> its response makes clear that its basis for doing so is that it does not believe it is subject to FOIA in the first instance.<sup>8</sup> Under the circumstances, and consistent with our prior ruling, it is our determination that the Trustees has violated FOIA by denying access to records without legal justification as required by FOIA.

Notwithstanding the foregoing, we decline your request that we take action in connection with the Trustees' FOIA violation. Importantly, this Office has no independent enforcement power under FOIA to impose remedies as contained in Section 10005(d).<sup>9</sup> "Rather, our enforcement power would be limited to initiating suit, at our sole discretion, after a finding of a FOIA violation."<sup>10</sup> Assuming – without deciding – that your client is a Delaware citizen with rights under FOIA,<sup>11</sup> we decline to exercise our discretion to file suit on your client's behalf at this time. Among other reasons, we note that this matter does not raise a significant question about the interpretation of FOIA to the majority of public bodies within the State of Delaware. Of course,

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<sup>4</sup> *Id.*

<sup>5</sup> *See Del. Op. Att'y Gen.* 17-IB34, 2017 WL 3426274, at \*4 (July 28, 2017) ("[W]e conclude that the Trustees is a public body and must comply with FOIA.").

<sup>6</sup> 29 *Del. C.* § 10003(a).

<sup>7</sup> *See* 29 *Del. C.* § 10003(h) (providing that public bodies must respond to a FOIA request within 15 business days and, if the public body denies the request, indicate the reasons for the denial).

<sup>8</sup> As the Trustees disputes that it is a "public body," the Trustees' position appears to be that its records are not "public records" as defined by FOIA.

<sup>9</sup> *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. *The court* may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.") (emphases added).

<sup>10</sup> *Del. Op. Att'y Gen.* 18-IB05, 2018 WL 1061276 at \*7 (Jan. 30, 2018) (quoting 29 *Del. C.* § 10005(e)).

<sup>11</sup> *See Del. Op. Att'y Gen.* 16-IB20, 2016 WL 5888776 (Sept. 30, 2016) (concluding that "citizen" as used in Delaware's FOIA refers to citizens of the State of Delaware).

while not intended to serve as legal advice, we also note that FOIA states that citizens “shall have the absolute right to file suit regardless of the determination of the Attorney General.”<sup>12</sup>

Very truly yours,

  
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Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:

  
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Allison E. Reardon, State Solicitor

cc: Andrew P. Taylor, Esq. (via email)

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<sup>12</sup> 29 Del. C. § 10005(e).