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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB29

June 5, 2018

VIA EMAIL

Courtney French, Esq.
cofrench@gannett.com

RE: May 16, 2018 FOIA Petition Regarding the City of Wilmington

Dear Mr. French:

We write in response to your correspondence, received on May 16, 2018, alleging that the City of Wilmington (the “City”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your client’s February 15, 2018 request for records. Specifically, you allege that the City violated FOIA by denying reporter Christina Jedra’s request for documents evidencing the number of Wilmington Police Department employees who were assigned to the Criminal Investigations Division over a twenty year period. We treat your correspondence as a petition (“Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. We invited the City to submit a written response to the Petition. We received the City’s response and supporting documents on May 21, 2018 (“Response Letter”). We have reviewed your Petition and the City’s Response Letter. As set forth more fully below, it is our determination based on the sworn affidavit submitted by Wilmington Police Department supervisor Cecelia Ashe that the City did not violate FOIA, as the affidavit indicates that the City has no records responsive to Ms. Jedra’s request beyond what it has already produced.

RELEVANT FACTS

On February 15, 2018 Christina Jedra, a News Journal reporter, submitted a FOIA request to the City for “copies of city records that show the number of Wilmington Police Department employees who are/were assigned to the Criminal Investigations Division from the year 1998 to the present.”¹ On February 20, 2018, the City’s FOIA coordinator responded by e-

¹ Email from Courtney French to OpenGovernment@state.de.us dated May 16, 2018.

mail, indicating that he “spoke with WPD and they do not keep records in this matter. By that I mean, there is not a document for each year showing deployment and assignments. As you can imagine, deployment and assignment change constantly. Even attempting to answer your question for recent years would likely require hours of work, which would result in you incurring significant fees. Before we provide you an estimate of those fees, I was wondering if you would like to narrow your request or have a discussion about what you are after and what might be more easily available.” Ms. Jedra responded that the City’s response “doesn’t make sense” and asked for a cost estimate for producing records. On March 2, 2018, the City’s FOIA coordinator responded that “after further discussions with WPD, I can provide you with the following information. Currently, there are 44 officers assigned to CID. WPD does not have documents, which provide this information historically. As you know, FOIA does not require the government to create documents that do not already exist.” On March 5, 2018 Ms. Jedra filed a second FOIA request with the City, requesting a copy of the City’s budget PowerPoint presentation for FY2018 that was presented in 2017. The PowerPoint was provided by the City on March 19, 2018. After reviewing the PowerPoint, Ms. Jedra surmised that the City did have historical documents referencing how many WPD employees were assigned to the Criminal Investigations Division for “any given fiscal year, at least going back [to 2015]” and this petition followed.²

SUMMARY OF ARGUMENTS

In your Petition, you allege that the City violated FOIA by denying Ms. Jedra’s request for documents showing the number of Wilmington Police Department employees who were assigned to the Criminal Investigation Division from 1998 to the present. You dispute the City’s position that the information is not available because the PowerPoint of WPD’s budget presentation for FY 2018 is “clearly responsive” to Ms. Jedra’s original request as slide 18 “shows 55 officers assigned to the CID/Evidence Detection Unit.” Further, you assert that the City’s “FY2019 budget provides reason to believe that responsive records exist going back to at least 2014” and that the City “should have at least undertaken a second search for responsive records.” You request this office direct the City to do a second, diligent search for records responsive to Ms. Jedra’s request.³

Attached to its Response Letter, the City provided an affidavit of Cecilia Ashe, who attested that while the City maintains a current personnel list, it changes this list constantly whenever staffing changes occur. At the time of the FOIA request, Ms. Ashe was able to determine the number of officers currently assigned to the Criminal Investigations Division, and this information was provided to Ms. Jedra. Ms. Ashe attested that the City does not have sufficient records to determine the number of detectives for the other 19 years requested. Moreover, Ms. Ashe’s attestation explains that the WPD budget presentation for FY2018 does not provide an accounting of how many officers were actually assigned to the CID at any point

² All cited email correspondence was provided as an attachment to the Petition.

³ Email from Courtney French to OpenGovernment@state.de.us dated May 16, 2018.

in time. Slide 18 reflects “the authorized strength for the Criminal Investigations Division.”⁴ As the City explained in its Response letter, “WPD is rarely, if ever, staffed at its full authorized strength” and that “Slide 18 is simply a projection of the FY2018 deployment and not responsive to Ms. Jedra’s request for the specific amount of actual police officers assigned to the CID unit.”⁵

DISCUSSION

FOIA defines a “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.”⁶ Pursuant to 29 *Del. C.* § 10003(a), “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body,” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”

The mandate to provide access to public records is limited in sections 10003(h)(1) and (2). A public body is permitted to deny access to records under some circumstances, but it must “indicate the reasons for the denial.”⁷ The statute does not require a public body to cite a specific FOIA exemption when denying access to records, but Delaware courts have determined that any denial of records must, in fact, be authorized by FOIA.⁸ The burden of proof rests upon the custodian of records to justify the denial of access to the records.⁹

Here, the City is not asserting that public documents exist and are exempt from disclosure. Rather, the City has explained that records responsive to Ms. Jedra’s request for “copies of city records that show the number of Wilmington Police Department employees who are/were assigned to the Criminal Investigations Division from the year 1998 to the present” do not exist. The City has provided an affidavit, explaining that while the current personnel list could be—and was—provided, historical personnel lists are not maintained. Ms. Jedra infers from her review of the WPD’s budget presentation PowerPoint for FY 2018 that the records

⁴ Affidavit of Cecilia Ashe dated May 21, 2018.

⁵ Letter from Loren Holland to Ms. Siegel dated May 21, 2018.

⁶ 29 *Del. C.* § 10002(1).

⁷ 29 *Del. C.* § 10003(h)(2).

⁸ See *Gannett Co. v. Delaware Criminal Justice Info. Sys.*, 768 A.2d 508, 511 (Del. Super. 1999), *aff’d* 765 A.2d 951 (Del. 2000) (“In order to achieve [a clear and comprehensive policy of disclosure in order to ensure government accountability], FOIA requires the disclosure of all ‘public records’ as provided by § 10002(d).”); *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 781 (Del. Super. 1995) (holding that a public body’s records are available for inspection by the public unless they fall within any of the exceptions to the term “public record”).

⁹ 29 *Del. C.* § 10005(c).

must exist, but the City has explained that this presentation reflects budgeted and not actual positions.

CONCLUSION

Based on the foregoing, it is our determination that the City did not violate FOIA, as you allege, as the City's representative has stated under oath that specific documents requested do not exist.

Very truly yours,

/s/ Patricia A. Davis

Patricia A. Davis
Deputy Attorney General

Approved:



Allison E. Reardon, State Solicitor

cc: Aaron Goldstein, Chief Deputy Attorney General (via email)
Loren Holland, City Solicitor (via email)