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June 3, 2024

VIA EMAIL

Alexander C. Burns, City Solicitor
Baird Mandalas Brockstedt & Federico, LLC
alex@bmbfclaw.com

VIA EMAIL

Thomas Gaynor, Steven Linehan, et al.
TOMSJL1@msn.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear City Solicitor Burns and Mr. Gaynor, Mr. Linehan, et al.:

Enclosed is a petition from Thomas Gaynor, Steven Linehan, and other concerned citizens of Rehoboth Beach alleging that the City of Rehoboth Beach violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA").

By way of this letter, we request that the City provide a response to the allegation(s), including the factual basis and any legal authorities for its position, by **Tuesday, June 11, 2024**. In many instances, the City will need to submit a sworn affidavit with its response to satisfy its burden of proof. Please see the attachment to this letter for information about this burden. After we receive the City's submission, we will issue a determination to the parties, unless you are otherwise notified.

We ask that the City email its submission to OpenGovernment@delaware.gov and the parties copy each other on any correspondence with this Office regarding this matter. We also ask that the parties notify us immediately if the parties resolve this matter and no longer require a written determination from this Office. For more information on FOIA petition procedures, please visit the recently updated Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations, available at: <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2023/05/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations-FINAL.pdf>.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Enclosure

FAQ's REGARDING A PUBLIC BODY'S BURDEN OF PROOF FOR FOIA PETITIONS
UNDER 29 Del. C. § 10005

This document is intended for your convenience and does not constitute legal advice. It is not binding legal authority and may not be cited for such purpose. This information is based on developing caselaw, and this Office's interpretation of the law in this area is therefore subject to change. You should consult with legal counsel for guidance specific to the enclosed petition.

Burden of Proof: “The burden of proof is on the custodian of records to justify the denial of access to records and is on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.” 29 Del. C. § 10005(c).

Does the public body need to submit an affidavit with its response to meet its burden of proof?

Almost always. In addition to consulting with legal counsel and responding to the legal arguments raised by the petitioner, public bodies will need to provide the relevant facts to the Department of Justice in response to a FOIA petition. These facts include such things as what types of searches were done for records, including who in the agency was contacted as part of a search, and what actual records were reviewed by the searcher, by way of example. For a FOIA petition involving public meetings, affidavits may be required for facts such as where a meeting notice was physically located or what time it was posted, for example. The Delaware Supreme Court has held that even an attorney's unsworn statements about the location of public records and a public body's search efforts were not enough to meet the burden of proof, explaining a “statement made under oath, like a sworn affidavit, will ensure that the court's determination regarding the public body's satisfaction of the burden of proof is based on competent evidence.”¹ When preparing an affidavit, public bodies must do more than merely cite conclusory or generalized assertions.² That is, an affidavit that states “these are not public records” or “this meeting complied with FOIA” will not meet a public body's burden of proof.

¹ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1011 (Del. 2021).

² *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022) (finding “that the generalized statements in the Affidavit do not meet ‘the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents’”).

When responding to a FOIA Petition about searching for responsive records, what should an affidavit include?

The Delaware Superior Court has opined that certain facts should be provided by sworn affidavit, including who (identified at least by the staff's position) provided certain information relevant to whether responsive records existed, when such inquiries were made, and what, if any, documents were reviewed.³ "Unless it is clear on the face of the request that the demanded records are not subject to FOIA, the public body must search for responsive records."⁴ An affidavit in response to a petition regarding a search for responsive records therefore must explain in detail the search the public body undertook at the time the initial FOIA request was received.⁵ "A description of the search and outcome of the search must be reflected through statements made under oath, such as statements in an affidavit, in order for the public body to satisfy its burden of proof."⁶ These assertions must be detailed. The facts necessary to support a search will depend on the circumstances, but the affidavit should describe where a public body searched, what, if any, records were reviewed, why those locations were selected to search, and any other relevant aspects. With these detailed statements, the public body should also consider including an attestation "that all files likely to contain responsive materials [if such records exist] were searched."⁷

When is an affidavit required for a claim related to open meetings?

Although the *Judicial Watch* cases involve records requests, the Delaware Supreme Court suggests that all factual assertions need to be sworn to be competent evidence. If the public body's response to an open meeting claim requires proof of certain facts, we believe that those facts should be submitted under oath. This could include, by way of example, when and where public notice of a meeting was posted, when minutes were posted following a meeting, or what time a meeting started.

³ *Judicial Watch*, 2022 WL 2037923, at *3.

⁴ *Judicial Watch*, 267 A.3d at 1012.

⁵ *Judicial Watch*, 267 A.3d at 1013 ("The [public body] bears the burden to create a record from which the Superior Court can determine the [public body] performed an adequate search for responsive records").

⁶ *Id.* at 1012-13.

⁷ *Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 368 (D.C. Cir. 2020) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).