

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

STATE OF DELAWARE, ex rel.	:	
Joseph R. Biden , III, Attorney General of the State of Delaware,	:	C.A. No: 11C-08-004 (RBY)
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE CAMDEN-WYOMING SEWER AND WATER AUTHORITY	:	
	:	
Defendant.	:	

*Submitted: October 1, 2012
Decided: November 7, 2012*

*Upon Consideration of Plaintiff's
Motion for Judgment on the Pleadings*
GRANTED IN PART, DENIED IN PART

OPINION AND ORDER

Ralph K. Durstein, III, Esq., Deputy Attorney General, Frank N. Broujos, Esq., Deputy Attorney General, and Peter O. Jaminson, Esq., Deputy Attorney General, Department of Justice, Wilmington, Delaware for Plaintiff.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton & Fires, Dover, Delaware for Defendant.

Young, J.

SUMMARY

Coming to this Court is Plaintiff's Motion for Judgment on the Pleadings in this case seeking information, particularly employee salary information, under Delaware Freedom of Information Act. Since the Plaintiff has appropriately commenced this action on behalf of the individual who was denied that information by the Camden-Wyoming Sewer and Water Authority; and since that Authority is a public entity as properly designated by the Delaware Legislature; that Authority is obligated to disclose the requested information. Accordingly, Plaintiff's Motion for Judgment on the Pleadings and costs, as a matter of law, is well-taken, and is **GRANTED**. Plaintiff's accompanying motion for attorneys' fees is **DENIED** inasmuch as this is a question of first impression, and legitimately contested.

FACTS

Established by formal resolutions of the Towns of Camden and Wyoming in 1962, the Camden-Wyoming Sewer and Water Authority ("CWSWA") provides water treatment and services to those towns, located in Kent County, Delaware. CWSWA was formed pursuant to the provisions of 16 *Del. C.* Chapter 14. According to the briefs, it is the only sewer and water authority in the state.

CWSWA's Board is comprised of six (6) members, three (3) appointed by the Town of Camden and three (3) appointed by the Town of Wyoming. Board members' salaries are not paid directly out of the treasuries of the Towns. Aside from the appointment of members, the Towns appear to have no input or control over the day-to-day operations or administration. The Board holds monthly meetings, all of which are open to the public, a process which has been in effect since its inception.

In addition to the Board, CWSWA has a superintendent and a staff of ten (10) current employees. The enabling statute provides the CWSWA with the authority necessary to conduct almost all aspects of its business, granting it the power to contract; to purchase or lease property; to borrow money; to adopt bylaws necessary to regulate its affairs and conduct its business; to fix and collect the rates and fees; and to appoint officers, agents, employees and servants, prescribing their duties and compensation.

CWSWA does not receive public funds from the entities of the State or the Towns of Camden and Wyoming. All of its operational revenue is generated through user fees, paid by its customers for the use of sewer and water services. The ten (10) employees mentioned above are not considered State of Delaware employees for any purpose, nor are they employees of either of the Towns. They are not eligible for state pensions or benefits.

Chapter 100 of Title 29 (29 *Del. C.* §10000-10006) contains the sections collectively known as the Freedom of Information Act (“FOIA”).¹ Due to events outside the pleadings of this case, the Attorney General had at a prior time issued an opinion stating that, under FOIA as it existed at that time, CWSWA did not fall within the definition of “public body.”² In response, the General Assembly promptly

¹ The General Assembly adopted amendments to some portions of Chapter 100 of Title 29 in August, 2012. Though the changes were relatively minor in terms of substance, they did impact the lettering of some sub-parts. The citations used in this opinion reflect the statute in its most recently updated form. For that reason, the citations used in this opinion differ slightly from the citations appearing in the parties’s briefs, presented to the Court before the amendments were reflected in most electronic versions of the Delaware Code.

² Del. Op. Att’y Gen. 11-IIB03, 2011 WL 1428938 (March 16, 2011).

amended §10002, specifically including authorities created under Chapter 14 of Title 16 within FOIA's definition of a "public body." On May 9, 2011 after the passage of that Amendment to S.B. 36, one Georgette Williams submitted a request, under FOIA to CWSWA, for information regarding the compensation paid by CWSWA to its employees and contractors during the 2010 calendar year. CWSWA denied the request on the ground that it was not a "public body" subject to the disclosure requirements imposed by FOIA. Ms. Williams subsequently filed a complaint with the State Attorney General's Office requesting a determination of whether CWSWA's denial violated FOIA.

The State Department of Justice responded by letter dated July 1, 2011, advising Ms. Williams that CWSWA was a "public body" subject to the disclosure requirements, and was in violation of FOIA by denying her request for records. Ms. Williams requested that the Attorney General's Office file suit on her behalf. That was done on August 3, 2011.

STANDARD OF REVIEW

According to Superior Court Civil Rule 12c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."³ A motion for judgment on the pleadings will be granted when there are no material issues of fact remaining, and the moving party is entitled to judgment as a matter of law.⁴ The non-moving party will be entitled to the benefit of any

³ Del. Super. Ct. R. 12(c).

⁴ *O'Leary v. Telecom Resources, LLC*, 2011 WL 379300, at *3 (Del. Super. Jan. 14, 2011) (internal citations omitted).

inferences that may be drawn from the pleadings.⁵ If there exists even one single set of conceivable circumstances under which the non-moving party could succeed, based on the evidence presented to this point, then the motion must be denied.⁶ The standard for granting a motion for judgment on the pleadings is a stringent one, and will be denied unless it is clear that the moving party is entitled to a judgment as a matter of law.⁷ All parties agree that no issue of material fact exists herein.

DISCUSSION

The pleadings have raised several significant legal issues, which will be considered separately:

1. Does the Superior Court have jurisdiction to decide this matter?
2. Is The Camden-Wyoming Sewer and Water Authority a “public body” ?
3. Is The Camden-Wyoming Sewer and Water Authority, as a “public body,” obliged to disclose its employees’ salaries?
4. Does FOIA, as amended, apply to documents created/in existence before the amendment made The Camden-Wyoming Sewer and Water Authority a “public body” ?
5. Does the Attorney General have the authority to pursue this matter on behalf of Georgette Williams-which is really to ask: is the entity for whom or for which this

⁵ *Id.*

⁶ *Hennegan v. Cardiology Consultants, P.A.*, 2007 WL 4200811, at *2 (Del. Super. Sept. 6, 2007).

⁷ *Textron, Inc. v. Acument Global Technologies, Inc.*, 2011 WL 1326842 at *5 (Del. Super. April 6, 2011).

action is undertaken a “citizen” ?

1. Does the Superior Court have jurisdiction to decide this matter?

The Defendant initially questioned this Court’s subject matter jurisdiction over the claims presented in its Answering Brief. However, no explanation was provided to explain the basis for such an objection to jurisdiction by this Court. The hearing revealed that there was no longer disagreement between the parties on this issue. For the sake of completeness, the basis of jurisdiction will be discussed.

The applicable statute does not specifically set out jurisdiction for the scenario at issue. Despite that, the statute does provide some general language to help the Court reach a decision. §10005 describes enforcement procedures. It is there that several other jurisdictional grants are found. According to §10005(b), in cases where a “citizen” has been denied access to “public records,” “venue shall be placed in a court of competent jurisdiction for the county or city in which the public body ordinarily meets or in which the plaintiff resides.” This particular passage also contains language specifically giving jurisdiction to the Superior Court for any appeals from a determination by the Chief Deputy Attorney General made pursuant to the procedures set forth in §10005(e). As jurisdiction is placed in this Court for decisions involving a public body represented by the Attorney General, it would certainly be logical and appropriate to find that actions by the Attorney General against a public body would also fall under this Court’s jurisdiction. Furthermore, there is nothing about the requested remedies that would cause this action to fall outside of this Court’s jurisdiction. Declaratory judgment

actions are within the jurisdiction of the Superior Court, unless there is a special basis for equitable jurisdiction.

2. Is The Camden-Wyoming Sewer and Water Authority a “public body” ?

The applicable portion of the definition of a “public body” as set forth in 29 *Del. C.* §10002(g) includes any body empowered by the state that: “(1) Is supported in whole or in part by any public funds; or (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or make reports, investigations or recommendations.” Before the amendment clarifying the intent of the statute, CWSWA was not considered to be a “public body”, according to an Attorney General Opinion issued March 16, 2011.⁸

CWSWA contends that the language inserted by the Amendment fails to fit within the intent of the statute, because it does not describe a body that comports with the rest of the definition for “public body.” More specifically, CWSWA argues that it not supported by, and does not expend or disburse, public funds of any kind. It is also not impliedly or specifically charged to investigate, or make reports or recommendations. Consequently, CWSWA believes that it should not be considered a “public body.”

The General Assembly’s authority to make law is derived from the State

⁸ Del. Op. Att’y Gen. 11-IIB03, 2011 WL 1428938 (March 16, 2011).

Constitution. The Delaware Constitution states that “[t]he legislative power of this state shall be vested in a General Assembly”⁹ In fact, Delaware’s courts have consistently described the General Assembly’s power to make law as “unlimited.”¹⁰ Plaintiff argues, and this Court agrees, that regardless of any motive or wisdom which a party asserts might be behind the amendment, the judicial branch is “bound by a most solemn sense of responsibility to sustain the legislative will in the appropriate field of its exercise”¹¹

Acts of the General Assembly necessarily enjoy a presumption of constitutionality.¹² The imposition of this presumption places the burden on the party attacking the constitutionality of an act to demonstrate why it is invalid.¹³ It also implies that the Court must give deference to the decisions of the legislature.¹⁴ Under Delaware’s constitutional scheme, the General Assembly’s unlimited power to legislate will be restrained only by limitations imposed in either the state or national constitution.¹⁵

The enabling statute explicitly declares that authorities created under the act

⁹ Del. Const. Article II, Section 1.

¹⁰ *E.g.*, *State ex rel. James v. Schorr*, 65 A.2d 810, 812 (Del. 1948).

¹¹ *Collison v. State ex rel. Green*, 2 A.2d 97,108 (Del. 1938).

¹² *New Castle County Council v. State*, 688 A.2d 888, 891 (Del. Nov. 8, 1996).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

are “public bodies.”¹⁶ The Amendment in question was directed to ensuring that such water and sewer authorities would not be able to rely on what some purported to be a “loophole” to justify a refusal to comply with a FOIA request. Curative legislation of this kind does not violate the separation of powers. It is well within the General Assembly’s Authority.¹⁷ Such legislation serves the dual purpose of clarifying public policy and the intent of the law.¹⁸

Defendant next argues that the present situation invokes usage of the fundamental rules of statutory construction. A court engages in statutory construction and interpretation only when the statutory language in question is ambiguous. In some cases, a court may engage in this exercise when “giving a literal interpretation to words of the statute would lead to such unreasonable absurd consequences as to compel a conviction that...could not have been intended by the Legislature.”¹⁹ Neither of these scenarios is presented by the case at hand. The General Assembly could not have been more clear in amending the statute. The results are exactly what were expected and intended. Thus, the rules and cases cited by Defendant are inapposite to the present case.

Defendant’s final argument associated with this question is that allowing CWSWA to be designated a “public body” under FOIA creates a slippery slope.

¹⁶ 16 *Del. C.* §1402(a)(1).

¹⁷ *Sierra Club v. DNREC*, 919 A.2d 547 (Del. Ch. 2007), *aff’d* 919 A.2d 547 (Del. 2007).

¹⁸ *Id.*

¹⁹ *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1246 (Del. Super. 1985).

Some private corporations are engaged in exactly the same business, funded by the same revenue source as CWSWA. Such a scenario, would allegedly empower the General Assembly to extend the requirements of FOIA to private corporations. While this “slippery slope” argument does give the Court some pause, Plaintiff’s position on this issue is much stronger. As noted, the General Assembly has practically “unlimited” power to legislate. The language of the statute is clear and unambiguous. There is no question that the General Assembly intended to bring CWSWA within the definition of a “public body.” If the Defendant cannot demonstrate that the amendment violates the constitutional limits on the General Assembly’s power to legislate, the Court will sustain the judgment of the legislature.²⁰ Therefore, the Court finds that The Camden-Wyoming Sewer and Water Authority is a “public body” subject to the requirements of the FOIA.

3. Is The Camden-Wyoming Sewer and Water Authority, as a “public body”, obliged to disclose its employees’ salaries?

Whether information is subject to disclosure under FOIA depends upon whether that information is a “public record.” According to 29 *Del. C.* §10002(k), information constitutes a “public record” when it meets the following three-step test:

(1) The information is “owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected by any public body,” and

²⁰ *New Castle County Council v. State*, 688 A.2d 888, 891 (Del. 1996).

- (2) The information relates “in any way to public business,” and
- (3) Does not fall within an exception.²¹

The information Ms. Williams requested meets all three prongs of the test. Salary information would be completely within the creation and control of CWSWA such that the first prong is met. Given the CWSWA’s position as a public body, one cannot dispute that salary information relates in some way to public business, satisfying the second prong. Finally, such information would not fall within any of the exceptions.

Delaware case law solidly supports the Plaintiff’s position on this issue. The Court in *Gannett Co., Inc. v. Christian* held that salary information must be disclosed under FOIA, because there was no right to privacy in salary information.²² Previous legal analysis by the Attorney General’s Office also found that salaries paid by public taxpayer funds must be disclosed.²³

The Defendant aims to distinguish this case from *Gannett* based on the specific language used by the Court in that case in its decision: “it is generally recognized that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of

²¹ 29 Del. C. §10002(k)(1)-(19).

²² *Gannett Co., v. Christian*, 1983 WL 473048 (Del. Super. Aug. 19, 1983).

²³ Del. Op. Att’y Gen. 3W-077 (Aug. 4, 1977); Del. Op. Att’y Gen. 3W-023 (March 10, 1978); Del. Op. Att’y Gen. 02-IB24 (Oct. 1, 2002); Del. Op. Att’y Gen. 06-IB11 (May 31, 2006).

privacy over this information.”²⁴ CWSWA argues that this language implies that disclosure is required only of the salaries of persons paid with traditionally defined public funds, or who are public employees. CWSWA’s employees are not public employees, nor are they paid with traditionally defined public funds. That is not dispositive of the issue. A statement by the Court requiring disclosure of the salaries of public employees or those paid with public funds, does not necessarily preclude disclosure of the salaries of non-public employees or those not paid with public funds.

Despite CWSWA’s contention that case law actually makes the answer to the question less clear, the Court needs only to look to the governing statutes to arrive at a conclusion. The enabling legislation sets forth a mandate of disclosure and access to financial records.²⁵ According to the statute, there are many records, including salary information, that CWSWA will have to maintain and make available to the public.²⁶ Furthermore, the Towns of Camden and Wyoming, as the founding municipalities, must be afforded full access to all of Defendant’s books and records.²⁷ The General Assembly was very clear about its intention. Chapter 14 defines both the sources of funding and still mandates that financial information must be fully disclosed, consistent with the duty a public body would

²⁴ *Gannett*, 1983 WL 473048, at *1.

²⁵ 16 *Del. C.* §1405(e).

²⁶ *Id.*

²⁷ 16 *Del. C.* §1405(e).

have under FOIA.²⁸ The Court finds that the Defendant must disclose the requested information as it is within FOIA's definition of "public records."

4. Does FOIA, as amended, apply to documents created/in existence before the amendment made The Camden-Wyoming Sewer and Water Authority a "public body"?

CWSWA argues that it should not be ordered to produce documents in response to the FOIA request filed by Ms. Williams, because she requested only "salary information," not documents. This is no more than a quibble over semantics, which is ineffective. Still, the Defendant contends that any documents created before April 19, 2011, or that pertain to events occurring prior to that date, are not subject to FOIA's disclosure requirement. This argument is based on the fact that prior to the Amendment in question, the CWSWA was not considered within FOIA's definition of a "public body."²⁹

There is no support for such a refusal to disclose found in either Chapter 14 or Chapter 100. In fact, the language found in the statutes completely refutes the Defendant's position. CWSWA already had an ongoing duty to maintain certain records, including salaries, for public inspection.³⁰ The duty was not affected by the FOIA amendment, because it merely established that CWSWA was a "public

²⁸ 16 *Del. C.* §1401-1421.

²⁹ Del. Op. Att'y Gen. 11-IIB03, 2011 WL 1428938 (March 16, 2011).

³⁰ 16 *Del. C.* §1405(e).

body.”

The applicable statute makes clear that the intention is to cover “all public records.”³¹ In fact, FOIA includes specific language demonstrating that it does not matter whether the record is in active use or storage.³² Furthermore, there is no time frame or time period limitation present in FOIA. Defendant attempts to argue that forcing this disclosure is a retroactive application of FOIA. That is not correct. The FOIA language states the intention of the General Assembly to include past and current documents. Thus, the duty to produce records under FOIA applies to any and all applicable records existing on the date the request was made. The time or date when those records were created is irrelevant.

5. Does the Attorney General have the authority to pursue this matter on behalf of Georgette Williams-which is really to ask: is the entity for whom or for which this action is undertaken a “citizen”?

29 Del. C. §10005(e) explicitly authorizes the Attorney General of Delaware to bring suit on behalf of a “citizen,” to compel compliance with FOIA. The Defendant alleges Ms. Williams was acting in her official capacity as town councilperson and treasurer, and therefore does not fall within the definition of citizen. CWSWA does not dispute that Georgette Williams is a “citizen.” Instead, Defendant argues that Ms. Williams made the request in her official capacity.

³¹ 29 Del. C. §10003(a).

³² *Id.* §10003(a).

Thus, she was allegedly acting on behalf of the Town of Wyoming. Defendant's position is that the Town, as a non-citizen, should be represented by its own solicitor, and not the Attorney General's Office. For these reasons, the Defendant believes that the Attorney General should have declined to pursue this matter, because he has no standing to bring the case.

In support of this argument, the Defendant cites to *Koyste v. Delaware State Police* and *Office of Public Defenders v. Delaware State Police* in an attempt to draw a comparison to the present case.³³ In *Koyste*, the Plaintiff was an employee and representative of the Federal Public Defenders Office.³⁴ His request was a circuitous attempt to gain access to state police files and records, in order to prepare a defense for a client who had already been denied access to the same materials on three separate occasions.³⁵ The reason for the denial was that the documents fell under the pending litigation exemption.³⁶ Attempting to act as a "citizen" to obtain these documents for defense purposes is not what FOIA was intended to allow, the Court held.³⁷

In *Office of Public Defenders*, one of the Assistant Public Defenders asked

³³ *Koyste v. Delaware State Police*, 2001 WL 1198950 (Del. Super. Sept. 18, 2001); *Office of Public Defenders v. Delaware State Police*, 2003 WL 1769758 (Del. Super. March 31, 2003).

³⁴ *Koyste*, 2001 WL 1198950, at *2.

³⁵ *Id.* at *3.

³⁶ *Id.*

³⁷ 29 *Del. C.* §10001.

for documents from the state police, in both her official and individual capacities.³⁸ The documents in question (training manuals and standard operating procedures) were desired in relation to pending litigation.³⁹ The Court made clear that the documents would not be disclosed to the Public Defender, though they could potentially be disclosed to a “citizen.”⁴⁰ The facts in that case did not support the claim by the Assistant to standing as an individual citizen.⁴¹ The Assistant was clearly “asserting citizenship only to avoid the bar on her employer imposed by the Act’s standing requirement.”⁴² A contention evidenced by the fact that the Assistant stated in the Complaint that she was “acting on behalf of the Public Defender.”⁴³

The present case is easily distinguished from the aforementioned examples. Most importantly, Ms. Williams did not request information protected from required disclosure by any exemption. Furthermore, she was acting in her individual capacity, not on behalf or at the behest of, an entity. Finally, as far as the pleadings show, Ms. Williams was not trying to circumvent prior court rulings, or to act inappropriately, in making her request.

³⁸ *Office of Public Defenders v. Delaware State Police*, 2003 WL 1769758, at *1 (Del. Super. March 31, 2003).

³⁹ *Id.* at *1.

⁴⁰ *Id.*

⁴¹ *Id.* at *4.

⁴² *Id.*

⁴³ *Office of Public Defenders*, 2003 WL 1769758, at *4.

Defendant's next argument alleges that the original request, made by Georgette Williams, was made in her official capacity. That request is not an aspect of this case. There is but one request at issue here: the request made on May 9, 2011. Documents related to other matters and related allegations are outside of these pleadings. Facts and arguments outside the pleadings cannot be considered in a motion for judgment on the pleadings.⁴⁴ The additional documents submitted by the Defendant in support of this contention will not be considered by this Court in deciding Plaintiff's Motion.

The Defendant also attempts to speculate as to Ms. Williams' motives, based on her affiliation with the town council. Ms. Williams does not lose her rights as a citizen by virtue of holding a public office, a point made exceptionally clear by the United States Supreme Court in a discussion of the federal FOIA.⁴⁵ In that case, the Court said that the decision to allow access to records "cannot turn on the purposes for which the [FOIA] request is made." The Court goes on to say that "the identity of the requesting party has no bearing on the merits of his/her FOIA request."⁴⁶ This position is cited by the Attorney General's Office in a 2006 opinion.⁴⁷ "Under FOIA, a record is public, or it is not."⁴⁸ Public bodies are

⁴⁴ *Mergenthaler v. Asbestos Corp. of America*, 500 A.2d 1357, 1361 (Del. Super. 1985).

⁴⁵ *United States Dep't. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1988).

⁴⁶ *Id.*

⁴⁷ Del. Op. Att'y Gen. 06-IB09, 2006 WL 1779490, at *5 (April 25, 2006).

⁴⁸ *Id.*

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provided no discretion to require a person to state the purpose for a request. Such a requirement could have a potentially chilling effect on the exercise of rights, by citizens, under FOIA.⁴⁹

CONCLUSION

For the forgoing reasons, Plaintiff's Motion for Judgment on the Pleadings is **GRANTED** as to the requests for a declaratory judgment and writ of mandamus, but **DENIED** as to Plaintiff's request for the award of attorneys' fees. Costs are awarded to Plaintiff.

SO ORDERED this 7th day of November, 2012.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Opinion Distribution

⁴⁹ *Id.*