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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB05

March 10, 2017

VIA U.S. MAIL & EMAIL

Karl Baker
950 West Basin Rd.
New Castle, DE 19720
kbaker@delawareonline.com

Re: FOIA Petition Concerning the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Baker:

We write in response to your petition, dated February 20, 2017 (“Petition”). In the Petition, you allege that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated Delaware’s Freedom of Information Act (“FOIA”),¹ in connection with your December 1, 2016 request for records. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited DNREC to submit a written response to the Petition. We received the DNREC’s response (“Response Letter”) on February 23, 2017 and your reply to DNREC’s response (“Reply”) on March 6, 2017. We have reviewed the Petition, the Response Letter, and the Reply. For the reasons set forth below, it is our determination that DNREC did not violate FOIA as alleged in the Petition.

RELEVANT FACTS

On December 1, 2016, you sent a request to DNREC for the following:

[A]ll emails from and to the Office of Governor Jack Markell, from and to DNREC Secretary David Small, and from and to DNREC

¹ 29 Del. C. §§ 10001-10007.

Assistant Secretary Kara Coats referencing a possible violation of a DNREC secretary order concerning crude oil shipments via barge from the Delaware City refinery to other destinations sent between Sept. 1, 2015 and Nov. 30, 2016.²

At some point thereafter, DNREC's FOIA Coordinator placed a request with its Information Technology staff to retrieve emails to and from DNREC's Secretary, its Deputy Secretary, and the Governor regarding crude oil shipments.³ DNREC staff then undertook a review of the records to determine whether they were responsive and, if so, whether the attorney-client privilege would apply.⁴ On January 10, 2017, DNREC's FOIA Coordinator emailed you a status update.⁵

On February 10, 2017, DNREC's FOIA Coordinator informed you that "any e-mails that were found responsive to your request fall under the common law FOIA exemption, pursuant to 29 *Del. C.* § 10002(1)(6), as attorney-client privileged and/or other relevant exemptions."⁶ That same day, you responded by asking for the identity of the attorney involved.⁷

On February 13, 2017, DNREC's FOIA Coordinator responded that she was "not at liberty to disclose the name of the attorney involved in the matter."⁸ That same day, you responded:

As I'm understanding it, your response means the only emails that were found for this FOIA request were sent to or from Governor Markell's legal counsel, acting only in his or her capacity as legal counsel, and not as a go between [sic] for the governor and DNREC. Is that correct?⁹

In response, DNREC's FOIA Coordinator reiterated that your request was denied pursuant to 29 *Del. C.* § 1002(1)(6) "as it relates to the attorney-client privilege and/or other relevant exemptions," referenced a voicemail from you regarding the name of the attorney involved, and stated that she

² Email from Karl Baker to DNREC dated December 1, 2016.

³ Response Letter at 1.

⁴ *Id.*

⁵ *Id.*

⁶ Email from Susan Baker to Karl Baker dated February 10, 2017 (4:47 PM).

⁷ Email from Karl Baker to Susan Baker dated February 10, 2017 (5:52 PM).

⁸ Email from Susan Baker to Karl Baker dated February 13, 2017 (8:31 AM).

⁹ Email from Karl Baker to Susan Baker dated February 13, 2017 (9:17 AM).

was not obligated to disclose that information to you.¹⁰ On February 14, 2017, you asked her whether she was “arguing that disclosure of the name of the attorney is exempt under FOIA.”¹¹ In response, she stated: “FOIA applies to requests for ‘records’ and the records you have requested have been denied to you pursuant to 29 *Del. C.* § 10002(1)(6). There is no further obligation under FOIA to answer questions.”¹²

POSITIONS OF THE PARTIES

You alleged generally that DNREC violated FOIA in denying your request for records. Specifically, you stated that 29 *Del. C.* § 10002(1)(6) does not mention attorney-client privilege.¹³ You stated: “The clear intention of my request was to find emails sent or received by Gov. Jack Markell and officials within his administration about an environmental topic of significant public interest.”¹⁴

In its Response Letter, DNREC noted that the request was denied “based on the ‘common law’ exception covering documents subject to the attorney-client privilege. 29 *Del. C.* §10002(1)(6).”¹⁵ DNREC stated that it has “engaged with its lawyers at every step of the investigation” and, “[w]ithout personally searching and reviewing every email within the scope of the request, [DNREC’s counsel] would expect to find that lawyers were included, and the communications were privileged.”¹⁶ DNREC also argued that “[t]he records consist of pending investigative files compiled for civil enforcement purposes, which are also exempt from FOIA under §10002(1)(3).”¹⁷ Finally, DNREC argued that, “[g]iven the past litigation over related issues at the Delaware City Refinery, *e.g.*, *Sierra Club v. DNREC*, 2015 WL 1548851 (March 31, 2015), and the pending investigation of violations, as noted by [you] in [your] request, the FOIA exception for pending and potential litigation, §10002(10)(9), would also apply.”¹⁸ DNREC noted that it

¹⁰ Email from Susan Baker to Karl Baker dated February 13, 2017 (5:26 PM).

¹¹ Email from Karl Baker to Susan Baker dated February 14, 2017 (11:34 AM).

¹² Email from Susan Baker to Karl Baker dated February 14, 2017 (12:04 PM).

¹³ Petition at 1.

¹⁴ *Id.*

¹⁵ Response Letter at 2.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 2.

¹⁸ *Id.* (citation omitted).

“issued a Notice of Violation to the [Delaware City] Refinery [Company] owner, DCRC, on December 23, 2016”¹⁹ and included a copy of that letter as an attachment to its Response Letter.²⁰

In your Reply, you argued that DNREC’s argument regarding the applicability of the attorney-client privilege “cannot be proven until a thorough search of every email is conducted.”²¹ You also argued that pending litigation exemption does not apply, as you are neither a party nor a potential party to any litigation related to the information you seek.²² Finally, with respect to DNREC’s invocation of the investigatory exemption, you argued that DNREC incorrectly stated that your request cited a DNREC investigation into a possible violation of the DNREC Secretary’s order.²³ You stated that you “did not have any knowledge of an investigation . . . when [you] sent the FOIA [request]” and believed that “the investigation did not begin until approximately 12 days after your . . . FOIA request was sent.”²⁴ You also noted that, in its response to your FOIA request, DNREC “did not explicitly list all reasons for denial, consequently placing [you] in a disadvantaged position.”²⁵

RELEVANT STATUTES

Delaware’s FOIA defines “public record” is 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”²⁶ However, among the information that FOIA exempts from the definition of “public records” are “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files”²⁷ and “[a]ny records pertaining to pending or potential litigation which are not records of any court.”²⁸ FOIA also exempts from the

¹⁹ *Id.* at n.1.

²⁰ *Id.* at Ex. A.

²¹ Reply at 1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ 29 *Del. C.* § 10002(1).

²⁷ 29 *Del. C.* § 10002(1)(3).

²⁸ 29 *Del. C.* § 10002(1)(9).

definition of “public record” “[a]ny records specifically exempted from public disclosure by statute or common law.”²⁹

DISCUSSION

As an initial matter, we note that FOIA does not require a public body to answer questions.³⁰ As such, to the extent that you argue that DNREC violated FOIA by failing to answer your question regarding the name of the attorney involved, it is our determination that DNREC did not violate FOIA as alleged.

Here, we note that DNREC initially denied your request on the basis that the records are protected from disclosure by the attorney-client privilege. While we note that the attorney-client privilege is indeed a valid exemption pursuant to 29 *Del. C.* § 10002(1)(6),³¹ we need not determine whether or to what extent the privilege applies here.³² By the very terms of your request, which asks for communications relating to a possible violation of a DNREC secretary’s order, the request seeks documents relating to an investigation of the Delaware City Refinery Company (“DCRC”) as noted in its December 23, 2016 letter. Delaware courts have made clear that, for purposes of FOIA, the investigatory exemption attaches as soon as an agency is first made aware of a potential issue.³³ The record here demonstrates that the investigation at issue pre-dated DCRC’s December

²⁹ 29 *Del. C.* § 10002(1)(6).

³⁰ See, e.g. *Del. Op. Att’y Gen.* 08-IB05, 2008 WL 1727613, at *1 (Feb. 22, 2008) (noting that “FOIA does not require a public body to answer questions in a written or spoken format”) (citing *Del. Op. Att’y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000); *Del. Op. Att’y Gen.* 97-IB06, 1997 WL 606408, at *5 (Mar. 17, 1997) (“We emphasize again that the School Board is not required to compile any lists of information contained in public records, *or to answer questions in a format requested by the complainants.*”) (emphasis added).

³¹ See *Mell v. New Castle County*, 2004 WL 1790140, at *5 (Del. Super. Aug. 4, 2004) (recognizing that the attorney-client privilege is a valid FOIA exemption pursuant to the exemption for “records specifically exempted from public disclosure by statute or common law”); *Del. Op. Att’y Gen.* 16-IB11, 2016 WL 3462342, at *8 (June 6, 2016) (noting that the attorney-client privilege “is a well-established basis for withholding records requested under FOIA” pursuant to 29 *Del. C.* § 10002(1)(6)); *Del. Op. Att’y Gen.* 02-IB16, 2002 WL 31031225, at *1 (July 30, 2002) (“The ‘privileges for attorney-client communication and work product established by common law have been incorporated into the Public Records Act.’”) (quoting *Denver Post Corp. v. Univ. of Col.*, 739 P.2d 874, 880 (Col. App. 1987)).

³² Similarly, we need not determine whether, or to what extent, 29 *Del. C.* § 10002(1)(9) applies.

³³ See *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980) (concluding that both a document and a formal complaint which *led to* an investigation by the

12, 2016 letter.³⁴ As those records would be “investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files,”³⁵ they are not “public records” subject to disclosure under FOIA.³⁶ Therefore, it is our determination that DNREC did not violate FOIA in denying your December 1, 2016 request.³⁷

CONCLUSION

Based upon the foregoing, we conclude that any records responsive to your December 1, 2016 request are “investigatory files compiled for civil or criminal law-enforcement purposes”

Delaware Association of Professional Engineers were exempted from FOIA pursuant to the investigatory file exemption).

³⁴ See Response Letter at Ex. A (noting that “DNREC learned of the Shipment [referenced in DCRC’s December 12, 2016 letter] when the Delaware Department of Justice (“DDOJ”) disclosed to DNREC the receipt of an anonymous complaint” and that “[i]n response to the inquiries from DNREC and the DDOJ, DCRC representatives met with DNREC representatives on November 20, 2015, to discuss the circumstances of the Shipment”).

³⁵ See 29 Del. C. § 10002(1)(3).

³⁶ Additionally, while DNREC did not present the argument here, we note that the requested records may also be exempt from FOIA pursuant to the executive privilege recognized by the Delaware Superior Court in *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 785 (1995) (“This Court, therefore, recognizes as part of the constitutional and common law of the State the doctrine of executive privilege with respect to the source and substance of communications to and from the Governor in the exercise of his appointive power.”). Of course, as the *Guy* court noted, the privilege is not absolute. *Id.* Rather, the applicability of the privilege in the FOIA context would subject to a balancing test. *Id.* However, having already determined that the records are exempt from FOIA’s definition of public record pursuant to 29 Del. C. § 10002(1)(3), we need not conduct such an analysis here.

³⁷ 29 Del. C. § 10003(h)(2) states: “If a public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial.” As we have previously noted, that provision “does not require a public body to cite a specific [FOIA] exemption.” *Del. Op. Att’y Gen.* 16-IB02, 2016 WL 1072888, at *2 (Jan. 14, 2016). However, “any denial of records must be authorized by FOIA.” *Id.* Here, we recognize that DNREC’s FOIA Coordinator initially provided a reason for its denial, citing directly to 29 Del. C. § 10002(1)(6) and, more specifically, the attorney-client privilege “and/or other relevant exemptions.” We also recognize that we have expressly declined to examine whether or to what extent the attorney-client privilege would applicable here on the basis that such analysis was not necessary. However, we note that DNREC first invoked 29 Del. C. § 10002(1)(3) and (9) in response to the Petition. While, in this instance, we have determined that DNREC’s denial of your request was indeed authorized by FOIA, we nevertheless caution DNREC to give careful consideration to the reason(s) provided, pursuant to 29 Del. C. § 10003(h)(2), for any FOIA denial.

and, as a result, are not “public records.” As such, it is our determination that DNREC did not violate FOIA, as alleged in the Petition, by denying you access thereto.

Very truly yours,

/s/ LaKresha S. Roberts

LaKresha S. Roberts
Chief Deputy Attorney General

cc: Ralph K. Durstein, III, Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)