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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB21

July 13, 2017

VIA U.S. MAIL AND EMAIL

Pamela Cranston
38198 Terrace Road
Rehoboth Beach, DE 19971

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

Dear Ms. Cranston:

I write in response to your correspondence, received on July 15, 2016, alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated the open records provisions of Delaware’s Freedom of Information Act (“FOIA”),¹ in connection with your June 30, 2016 request for records. I treat your correspondence as a petition (the “Petition”) for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred. For the reasons set forth below, I conclude that DNREC violated FOIA in denying your request.

FACTS

On June 30, 2016, you sent a request to DNREC for the following: “[A]ll 2015 and 2016 documentation of meetings, phone calls, email messages, and letters – any kind of communication – between the developers of the proposed Beach Walk project on the Coastal Highway in Rehoboth Beach, DE (on the site of the Bay Mart Shopping Center) and the DNREC Secretary and/or his staff.”² You included a request that documents from the developer include “those working on behalf of the developer, such as his engineers, attorneys, and the like”³

¹ 29 *Del. C.* §§ 10001-10007.

² E-mail from P. Cranston to J. Bothell dated June 30, 2016.

³ *Id.*

DNREC responded to your request on July 5, 2016. Along with its July 5 response, DNREC provided you with certain documents related to a variance issued to Beachwalk Residential Condominium Development (“Beachwalk”), which included the variance request and related memoranda.⁴ DNREC then noted that the Beachwalk project remained under review with the Sussex Conservation District (“SCD”)⁵ and stated that SCD’s policy is to only provide information on approved plans in response to FOIA requests.⁶ DNREC argued that the requested records were properly withheld pursuant to the investigatory file exemption to FOIA, 29 *Del. C.* § 10002(1)(3).

DETERMINATION

The investigatory file exemption to FOIA has been broadly and properly interpreted to apply to a wide variety of criminal and civil investigative files. It applies in many instances to DNREC files when the nature of the work being performed by DNREC is investigative in nature or is being performed by a division of DNREC whose functions are in part investigative in nature. The review being conducted in this case was not an investigation. It was a regulatory approval process, which would ultimately be public in nature, and involved an open dialogue between the applicant and the entity that would ultimately approve or disapprove the application. Pursuant to 29 *Del. C.* § 10005(c), the public body bears the burden of proof to justify a denial of access to records. Here, DNREC has failed to satisfy its burden. Although DNREC has broadly asserted that “[i]f SCD was required to produce the pre-approval correspondence, it would have a chilling effect on SCD’s ability to have an open discourse with an applicant to bring its draft plan into compliance with the Regulations,” DNREC has failed to offer adequate support for this argument. Indeed, the Delaware Supreme Court has found such argument unpersuasive in similar contexts.⁷ Therefore, based upon the record before me, I conclude that DNREC violated FOIA by denying your request pursuant to 29 *Del. C.* § 10002(1)(3). I recommend that DNREC provide all public records, subject to redaction of non-public information pursuant to any other FOIA exceptions, within 15 days of this determination. Additionally, to the extent the SCD FOIA policy is inconsistent with this determination, DNREC and/or SCD may wish to review and revise the policy accordingly.

⁴ E-mail from G. Williams to P. Cranston dated July 5, 2016.

⁵ SCD is a soil and conservation district operating under the administration and direction of DNREC. 7 *Del.C.* § 3908.

⁶ E-mail from G. Williams to P. Cranston dated July 5, 2016.

⁷ *See, e.g., Pusey v. Del. Alcoholic Beverage Control Comm’n*, 596 A.2d 1367, 1371 (Del. 1991) (“[W]e find unpersuasive the argument which suggests that disclosure of confidential financial information might somehow impair the Commission’s ability to obtain such information in the future. It is assumed that individuals who submit applications for liquor licenses respond truthfully to all questions. If, however, they do not, the statute provides that the Commission may refuse to grant a license if an applicant makes false statements to the Commission.”).

Very truly yours,

A handwritten signature in black ink, appearing to read "L Roberts", written in a cursive style.

LaKresha S. Roberts
Chief Deputy Attorney General

cc: Ralph K. Durstein, III, Deputy Attorney General (via e-mail)
Devera Scott, Deputy Attorney General (via e-mail)
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