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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB24

July 14, 2017

VIA EMAIL

Edward E. Bintz
vze3wycc@outlook.com

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

Dear Mr. Bintz:

I write in response to your petition, dated February 8, 2017 (“Petition”).¹ In the Petition, you allege that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated Delaware’s Freedom of Information Act (“FOIA”),² in connection with your January 1, 2017 and February 3, 2017 requests for records (“Requests”).

On November 4, 2016, you initiated a lawsuit in the United States District Court for the District of Delaware against the Federal Emergency Management Agency (“FEMA”).³ In that matter, which is still pending, you have appealed the base flood elevation that FEMA assigned to your property located in the Town of South Bethany, Delaware. As of the date of this letter, the parties are actively litigating: 1) whether, and to what extent, the administrative record should be supplemented, and 2) whether, and to what extent, discovery should be permitted.⁴

¹ While I note that you are a Delaware property owner, it is not clear to me that you qualify as a Delaware citizen. As such, I feel compelled to note that it is not clear to me that you have standing to pursue this, or any other legal challenge, pursuant to 29 *Del. C.* §10005.

² 29 *Del. C.* §§10001-10007.

³ See *Bintz v. The Fed. Emergency Mgmt. Agency*, D. Del., Civ. A. No. 1:16-cv-01024-RGA, Docket Item (“D.I.”) No. 1.

⁴ See *id.* at D.I. Nos. 12-25, 27.

On January 29, 2017, while your federal lawsuit was pending, you sent a request to DNREC for the following:

[A]ll memoranda, correspondence (including emails) or other documents either sent by or received by Michael Powell or other DNREC personnel on or after January 1, 2013 to or from FEMA, RAMPP (or any other subcontractor to FEMA), the Town of South Bethany (or its mayor or any of its town council members) relating to the base flood elevation to be established by FEMA in its flood insurance rate map for oceanfront homes on Ocean Drive in South Bethany, DE.⁵

On February 1, 2017, DNREC's FOIA Coordinator responded that she was in receipt of your request, but was "denying your request based on the fact that th[e] matter qualifie[d] as 'potential litigation,' pursuant to 29 *Del. C.* §10002(l)(9)."⁶

On February 3, 2017, you sent a request to DNREC for the following:

Copies of all correspondence, notices, memoranda, or other documents to or from the Town of Bethany Beach, the Town of South Bethany, the U.S. Army Corps of Engineers or FEMA (or any of their agents or subcontractors) reflecting the actual or estimated dates on which beach replenishments in South Bethany or Bethany Beach occurred or were projected to occur after the initial beach replenishments in South Bethany and Bethany Beach that were completed during 2008.⁷

On February 6, 2017, you sent an email to DNREC's FOIA Coordinator asking that she inform you whether DNREC would be providing the information that you requested on January 29, 2017 and February 3, 2017.⁸ Moments later, DNREC's FOIA Coordinator responded: "The records you seek in both of your requests relate to pending or potential litigation and thus are exempt from FOIA pursuant to 29 *Del. C.* §10002(l)(9). The records are not "Public records" subject to disclosure by DNREC and will, therefore, not be released."⁹

⁵ FOIA request submitted by vze3wycc@outlook.com to DNREC_Watershed_FOIA@state.de.us dated January 29, 2017.

⁶ Email from Susan Baker to vze3wycc@outlook.com dated February 1, 2018 (12:44 PM).

⁷ FOIA request submitted by vze3wycc@outlook.com to DNREC_Watershed_FOIA@state.de.us dated February 3, 2017.

⁸ Email from Ed Bintz to Susan Baker dated February 6, 2017 (1:07 PM).

⁹ Email from Susan Baker to Ed Bintz dated February 6, 2017 (1:38 PM).

DETERMINATION

Delaware's FOIA exempts from the definition of "public record" "[a]ny records pertaining to pending or potential litigation which are not records of any court."¹⁰ This office has repeatedly made clear that the purpose of the exemption is to maintain a level playing field, as "Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure."¹¹ Indeed, the exemption applies where litigators or litigants are seeking information that might help them in court.¹² As a result, the applicability of the exemption "turns on the identity of the requestor and the purpose of the request."¹³ While the requesting party's motives are generally irrelevant to a FOIA analysis, "this is not so when the requesting party seeks information from a public body to advance that party's private interest in litigation."¹⁴

Here, you initiated your FEMA lawsuit in November 2016. While that lawsuit was pending, you requested records from DNREC specifically related thereto. In fact, there is no articulated reason for which you seek the records other than to advance your litigation position in your pending FEMA lawsuit, for which court rules provide you with a proper mechanism for seeking these documents.¹⁵ Although DNREC is not currently a party to your federal lawsuit against FEMA, the Delaware General Assembly has not expressly required that the pending or potential litigation exception be restricted to agencies that are parties to litigation (as the State of California has done).¹⁶

Notably, this matter presents an issue of first impression. What is well-settled, however, is the Delaware courts' strong opposition to allowing litigants to use FOIA as a means to advance

¹⁰ 29 *Del. C.* § 10002(1)(9).

¹¹ *Op. Att'y Gen.* 06-IB21 (Oct. 23, 2006) (citing *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003)).

¹² *Office of the Public Defender v. Delaware State Police*, 2003 WL 1769758, at *2 (Del. Super. March 31, 2003).

¹³ *Op. Att'y Gen.* 03-IB21 (Oct. 6, 2003).

¹⁴ *American Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at *4 (Del. Super. March 15, 2007) (citing *Mell*, 835 A.2d at 147).


¹⁵ *Koyste v. Delaware State Police*, 2001 WL 1198950, at *3 (Sept. 18, 2001) ("Although Plaintiff Koyste does not directly state why he wants the State Police materials, his purpose is clear: for use by the Federal Public Defender's Office in the defense of its client . . .").

¹⁶ *Cf.* Cal. Gov. Code § 6254(b) (exempting "[r]ecords pertaining to pending litigation to which the public agency is a party") (emphasis added).

their existing litigation position. This interest is underscored by the current stage of the proceedings in your pending lawsuit. As noted above, it is clear that you seek the requested information in order to advance your litigation position in your *pending* FEMA lawsuit. We also note that DNREC's counsel has repeatedly indicated a willingness to coordinate a response to a subpoena or other appropriate discovery request in the pending litigation. As such, under these unique circumstances, and in due deference to the judiciary, it is my determination that the requested records are currently – and at all times relevant to this matter have been – exempt from FOIA's definition of "public record" pursuant to 29 *Del. C.* §10002(l)(9).¹⁷ As such, DNREC did not violate FOIA by denying you access thereto.

This determination is directed solely to the parties identified herein. It is based on the unique facts relevant to this matter. It does not constitute precedent and should not be cited as such by future parties.

Very truly yours,


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)

¹⁷ See 29 *Del. C.* § 10002(l)(9) (indicating that such records "shall not be deemed public"); 29 *Del. C.* § 10003(d)(1) (noting that all records held by a "[state] agency are 'public records' to which the public should have access unless they fall within the scope of enumerated exemptions in § 10002"); 29 *Del. C.* § 10003(k) (permitting the removal of nonpublic records and noting that "all documents shall be considered public records unless subject to 1 of the exceptions set forth in § 10002").