



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 18-IB03**

**January 10, 2018**

**VIA U.S. MAIL AND EMAIL**

Mr. Thomas Fowler  
Ocean View Marina LLC  
11 Middle Road  
Newark, DE 19711  
[backbaytours@verizon.net](mailto:backbaytours@verizon.net)

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

Dear Mr. Fowler:

We write in response to your correspondence, dated December 27, 2017 (“Petition”), requesting a determination of whether the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated Delaware’s Freedom of Information Act (“FOIA”). We invited DNREC to submit a written response to the Petition. We received DNREC’s response (“Response”) on December 30, 2017 and your reply (“Reply”) on January 1, 2018. For the reasons set forth below, it is my determination that DNREC did not violate FOIA as alleged in the Petition.

**RELEVANT FACTS**

On November 20, 2017, you sent the following request to DNREC’s Division of Parks and Recreation (“Division”) via email: “Delaware Attorney General’s opinion on proposed shared use of Ocean View Marina land and the Division of Parks and Recreation land on and near Assawoman Canal and Trail. Tax parcels 134 – 13.00- 2.00 and 2.00 A and State owned parcel 134- 13.00-94.00. Opinion was issued in the fall of 2017”<sup>1</sup> On December 7, 2017, a DNREC representative informed you that your request required legal advice and that she expected to provide a response the following week. On December 20, 2017, DNREC denied your request on the basis that the requested document is exempted from FOIA pursuant to 29 *Del. C.* § 10002(1)(6), which exempts

<sup>1</sup> The remainder of your request is not relevant to this determination.

“[a]ny records specifically exempted from public disclosure by statute or common law.” Specifically, DNREC stated that the records are protected by the attorney-client privilege.

### **POSITIONS OF THE PARTIES**

In your Petition, you allege that DNREC violated FOIA by denying your request. Specifically, you dispute DNREC’s position that the requested record is privileged. You allege that Attorney General opinions are available on the Delaware Department of Justice website and are public records. You state that the Division informed you that the opinion would be a factor in its decision to accept or decline a proposed public/private partnership of the identified lands. You allege that the Division was seeking legal advice on behalf of both parties.<sup>2</sup> Finally, you argue that the Division should have sought legal advice from the Environmental Unit within the DOJ, rather than an “Attorney General Opinion.”

In its Response, DNREC argues that the requested record is confidential legal advice rendered by an attorney to its client. According to DNREC, “[t]he fact that this advice was rendered by a Deputy Attorney General (“DAG”) does not change the common law rule.” DNREC maintains that the requested record is distinguishable from formal opinions issued by the Attorney General pursuant to 29 *Del. C.* § 2504(2). Specifically, DNREC argues that Section 2504(2):

confers two distinct powers. First, the DOJ and the AG are tasked with providing legal representation to various State entities. Second, the AG is authorized to publish formal opinions in book form on a periodical basis. The first power establishes an attorney-client relationship, and thus contemplates the rendering of legal advice deemed confidential at common law, whereas the second power allows the AG to share selected legal opinions with the public at large.

DNREC also notes that, pursuant to Rule 1.6 of the Delaware Lawyers Rules of Professional Conduct, “confidential legal advice may not be shared with the public without the consent of the client.” As such, DNREC argues that it would “grossly violate the lawyers’ ethical duty to clients, and would destroy the attorney-client relationship” to require publication of all legal opinions that Deputy Attorneys General provide to their respective clients.

In your Reply, you maintain that the opinion “was exercised on behalf of both parties” and, as such, “Ocean View Marina is directly or indirectly a client.” You state that a Division employee implied this through phone conversations and email exchanges.

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<sup>2</sup> Based upon the available record, I presume that Ocean View Marina – on whose behalf you state that you have submitted your Petition – is a party to the proposed partnership.

## DISCUSSION

Under the circumstances, I am satisfied that the requested record is exempted from FOIA pursuant to 29 Del. C. § 10002(1)(6) and, more specifically, the attorney-client privilege. The record does not reflect that the Attorney General received a request for a public legal opinion pursuant to 29 Del. C. § 2504 (2) on the proposed shared use.<sup>3</sup> Nor does the record reflect that DNREC waived its attorney-client privilege with respect to the communications you are seeking. Rather, the referenced opinion appears to be a confidential legal opinion that was prepared by a Deputy Attorney General at the request of and on behalf of his or her client. This type of confidential communication is protected by the common law attorney-client privilege. As such, it is my determination that DNREC did not violate FOIA by denying your request for a copy thereof.

## CONCLUSION

Based upon the foregoing, it is my determination that DNREC did not violate FOIA as alleged.

Very truly yours,



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Aaron R. Goldstein  
Chief Deputy Attorney General

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

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<sup>3</sup> *Cf. Del. Op. Att’y Gen.* 17-IB64 (Dec. 22, 2017), available at <https://opinions.attorneygeneral.delaware.gov/2017/12/22/17-ib64-12222017/> (formal opinion issued by this Office at the request of the Delaware Department of Education “pursuant to a request from local school superintendents for an Attorney General’s opinion”).