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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB36

August 10, 2018

VIA U.S. MAIL & EMAIL

John D. Flaherty
Coalition to Keep Bus Service on Rodney Square
712 W. 26th St.
Wilmington, DE 19802
Jdf0000@aol.com

RE: FOIA Petition Regarding the Office of the Governor

Dear Mr. Flaherty:

We write in response to your correspondence received on July 23, 2018, alleging that the Office of the Governor (“OGov”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) by redacting the records provided in response to your records request.¹ We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. The issues raised in your Petition have been directly addressed by prior decisions of the Delaware courts, which this Office must follow. Therefore, for the reasons set forth below, we determine that OGov has not violated FOIA as alleged in your Petition.

PROCEDURAL BACKGROUND

On December 24, 2017, the Coalition to Keep Bus Service on Rodney Square sent a FOIA request to Governor John Carney for “all communications prior to September 13, 2017 regarding DART bus service on Rodney Square and specifically communications and

¹ You previously submitted a Petition regarding this same request challenging the timeliness of OGov’s response. *See Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at *2 (June 7, 2018) (concluding that OGov did not violate FOIA with respect to the timeliness of its records production).

information regarding the development of the proposal to remove bus routes serving Rodney Square.”² OGov provided three sets of documents in response to your request on May 23, 2018, May 30, 2018, and June 6, 2018.³

You sent a Petition to this Office on July 23, 2018 claiming that OGov violated FOIA by redacting large portions of the responsive records under executive privilege, which provided “no explanation or justification for the Governor’s decision to dismantle the Rodney Square bus hub.” You further argued that the subject matter of bus stops was not explicitly one of the nineteen exemptions in the FOIA statute and that FOIA law is to be liberally construed in favor of transparency in questionable circumstances. In a letter dated July 30, 2018 (“Response”), OGov responded that its decision to withhold certain documents under executive privilege was proper and noted instances in which the Governor addressed his reasoning for the Rodney Square bus stop decision. OGov also attached an affidavit of its Deputy Legal Counsel along with other exhibits. On August 2, 2018, you sent a reply to this Office (“Reply”) stating that although you are “not challenging the right of the Governor to use Executive Privilege which, in many cases, is needed in the fulfillment of his job as chief executive of our state,” the Rodney Square bus hub is for the benefit of the public, and the public has a right to know the reasons for the Governor’s decision regarding the bus hub.

DISCUSSION

Pursuant to FOIA, the definition of “public record” excludes “any records specifically exempted from public disclosure by statute or common law.”⁴ Executive privilege is a common law and constitutional privilege recognized in Delaware law “with respect to the source and substance of communications to and from the Governor in exercise of his appointive power.”⁵ The essential argument of your Petition is that OGov erred in its exercise of the executive privilege. To counter, OGov has provided an affidavit from its legal counsel attesting: 1) the redacted records have been personally reviewed; 2) there is a “good faith basis for the claims of executive privilege;” and 3) the “redactions to the 48 emails are appropriate.”⁶ Additionally,

² See Response, Ex. D.

³ See *id.*

⁴ 29 *Del. C.* § 10002(1)(6).

⁵ *Guy v. Judicial Nominating Commission*, 659 A.2d 777, 784-785 (Del. Super. 1995) (recognizing that the “source and substance and advice of the information provided to the governor” by the Nominating Commission warrants protection under the executive privilege). In explaining the evolution of the privilege, the Court stated “The privilege against disclosure of the decision-making process is a tripartite privilege because it exists for the legislative and judicial branches of government as well as for the executive. It arises from two sources, one common law and the other constitutional.” *Id.* at 782 (internal citations omitted).

⁶ Response, Affidavit of Deputy Legal Counsel Jacqueline Paradee Mette.

OGov further expounded upon its assertion and understanding of the executive privilege, citing to various authorities.⁷

OGov's responsive submission meets the specificity standard established by the Delaware Superior Court in *Flowers v. Office of the Governor* for responses to FOIA requests.⁸ In *Flowers*, the court considered OGov's asserted privileges, including the executive privilege, in the context of a FOIA records request. The petitioner in *Flowers* claimed that OGov's response in that case, which consisted of an affidavit from the Governor's Deputy Legal Counsel listing the privileges under which documents had been withheld and stating that legal counsel had personally reviewed the documents in question, was not sufficiently specific to satisfy FOIA.⁹ The Superior Court rejected this argument, stating that "the Response and Blount Affidavit show the Governor's Office carefully applied well-recognized privileges with a clear understanding of those privileges when it applied them."¹⁰ In reviewing the language and legislative history of FOIA, the Court stated "it is clear to the Court that the General Assembly contemplated that a public body could meet its burden of proof without resorting to the production of an index or compilation of each document withheld under each FOIA exemption."¹¹ Under *Flowers*, which is binding on this Office, OGov does not have an obligation in this case to produce an index with every exemption or compilation of each document withheld under FOIA.¹² Instead, OGov's affidavit verifying its legal counsel's review of the redacted documents, along with its detailed written submission of its reason for redaction, is sufficient under the standard established in *Flowers*.¹³

⁷ See Response.

⁸ 167 A.3d 530, 549 (Del. Super. 2017) (stating that "an affidavit, along with a detailed written submission that indicates the reasons for the denial *may* be sufficient to satisfy the public body's burden") (emphasis in original); see also *Del. Op. Att'y Gen.* 17-IB44, 2017 WL 4081549, at *1 (Aug. 30, 2017) (finding that OGov's affidavit of its legal counsel and "detailed written submission that indicated the reasons for the denial of access to the redacted information" were sufficient under *Flowers*).

⁹ *Id.* at 539-40.

¹⁰ *Id.* at 549.

¹¹ *Id.*

¹² See *id.*

¹³ In addition to the affidavit of counsel stating that OGov has a "good faith basis for the claims," OGov's Response offered extensive legal analysis of the application of the executive privilege. Consistent with *Flowers*, our inquiry is limited to assessing whether OGov properly raised and explained its decision to make redactions. We are not empowered to assess the underlying legal validity of the application of executive privilege in this context. See Footnote 8 *supra*. That limitation on our role is rooted in the statutory reality that a public body need not provide a privilege log or other index sufficient to permit a document-by-document analysis of a

CONCLUSION

Therefore, we conclude that OGov did not violate FOIA as alleged in your Petition.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'A. Goldstein', with a horizontal line underneath it.

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Jacqueline Paradee Mette, Esq. (via email)
Dorey L. Cole, Esq. (via email)

public body's invocation of executive privilege. We believe that only a court, through its ability to order *in camera* review, is capable of that kind of analysis.