



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-IB52

November 29, 2018

VIA EMAIL

Ms. Andrea Green, Esq.
Law Office of Andrea Green, LLC
28412 Dupont Blvd., Suite 104
Millsboro, Delaware 19966

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

Dear Ms. Green:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control ("DNREC") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). 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 with regard to your records requests. For the reasons set forth below, we conclude that DNREC has not violated FOIA as alleged.

BACKGROUND

You have presented this Petition on behalf of your client, Anthony Scarpa. On July 18, 2018, Mr. Scarpa sent DNREC a records request under FOIA for the following documents:

I am submitting a FOIA request for the following information related to DNREC Permit AGU 1/02-S-03.

Renewal Application dated 11/16/16 prepared by Atlantic Resource Management for Clean Delaware, LLC. I am requesting Appendix A, B, C, D, E & F.

I am requesting all well test data for the past 5 years for all Clean Delaware Monitoring wells and well test results for the Slim, Collins & Russell neighborhood.

I am requesting information on the number of homes in the Slim, Collins & Russell neighborhood that Clean Delaware has supplied water treatment systems to, including the type of systems, date installed and follow up well test data.¹

DNREC's FOIA Coordinator responded to Mr. Scarpa's request thereafter by providing the renewal application as requested but denying the other requests pursuant to 29 *Del. C.* § 10002(1)(3) and (9), which exempt certain investigatory files and pending or potential litigation records which are not records of any court.

On behalf of Mr. Scarpa, you filed a Petition with this Office appealing the denial of his FOIA request and alleging that DNREC improperly withheld records responsive to the requests. Your four primary arguments were as follows: 1) the public's right to access provided in 7 *Del. C.* § 6014 preempt the exemptions that DNREC asserted; 2) the response presented insufficient reasons for denial; 3) the potential litigation exemption does not apply; and 4) the investigatory files exemption does not apply to all or most of the requested records.

On November 16, 2018, DNREC submitted a letter ("Response") addressing each of your arguments. First, DNREC argued that any rights under 7 *Del. C.* § 6014 are not appropriately raised in the context of a FOIA petition, and even if appropriately raised, the FOIA statute does not permit access to the records requested here. Second, DNREC pointed to a pending Environmental Appeals Board ("EAB") appeal by the Keep Our Wells Clean organization regarding the Artesian Wastewater Management, Inc. ("AWM") construction permit in which the requested records "are pertinent to the appeal, for use as evidence."² Mr. Scarpa is the co-founder of Keep Our Wells Clean. Third, the records requested are related to investigatory files "pertinent to a contested permit that is currently on appeal and pending an evidentiary hearing."³ Finally, DNREC noted that Mr. Scarpa's involvement in the pending appeal provided notice that the requested documents are evidence related to the case and the two applicable exemptions were properly identified under the FOIA statute.

By letter dated November 20, 2018 ("Reply"), you asserted that there is no litigation currently pending regarding Clean Delaware and noting that a Motion in Limine had been granted in the pending appeal of the AWM permit which limited evidence to only that evidence regarding site selection that was presented to the DNREC Secretary. You alleged that no evidence regarding Clean Delaware's compliance with its permit is currently in the underlying record. You supplied an affidavit from Mr. Scarpa stating "the information sought in the FOIA request is not for the purpose of that administrative appeal."⁴ Although Mr. Scarpa is a co-founder, you argued that Keep Our Wells Clean is the party to the pending appeal and not Mr. Scarpa who has made this

¹ Petition.

² Response.

³ *Id.*

⁴ Reply.

request in his individual capacity. You asserted the investigatory files exemption does not protect data simply because it is placed in an investigatory file, and moreover, the scope or temporal limits of the investigation here have not been clearly defined nor supported with sworn testimony. The Reply also stated that monitoring data shared with or submitted by Clean Delaware should not be considered as a part of the investigatory files. You further argued that DNREC failed to articulate a legitimate reason for denial, and because Clean Delaware's compliance with its permit was not raised in the initial evidence in the underlying hearing to Mr. Scarpa's knowledge, "it is DNREC's position" that such evidence would be excluded and discovery cannot be utilized in this appeal to obtain the documents. Finally, you reiterated your former argument that 7 Del. C. § 6014 requires the release of these requested records.

DISCUSSION

As noted above, the Petition contained four primary arguments. First, you alleged that DNREC has failed to comply with a statutory duty under 7 Del. C. § 6014. This argument may be appropriate in other contexts,⁵ but it is settled that this Office may only decide questions with respect to the FOIA statute and therefore cannot offer an opinion on DNREC's compliance with 7 Del. C. § 6014.⁶ Second, in responding to a request, a public body is required to set forth its reasons for denial but is not required to produce an index to each record denied or even cite to a specific exemption in the statute.⁷ Here, in its response to Mr. Scarpa's FOIA request, DNREC specifically referred to two exemptions under the FOIA statute, and thus, we find no violation in DNREC's manner of presenting its denial to your client.

With respect to the remaining arguments, DNREC cited the pending litigation exemption in 29 Del. C. § 10002(1)(9) as a basis for denial of the requested documents. Those documents included the well test data results from the Clean Delaware monitoring wells, well test results from a neighborhood, and information regarding Clean Delaware's supplied water treatment systems to that neighborhood. All these items are clearly aimed at investigating the groundwater quality issues of the area.

⁵ A party who alleges that a government agency failed to carry out a non-discretionary duty may have available remedies elsewhere. See *Brittingham v. Town of Georgetown*, 113 A.3d 519, 524 (Del. 2015).

⁶ *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at *2 (Oct. 12, 2018) (finding that this Office has "no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute") (citations omitted).

⁷ See 29 Del. C. § 10003 (h); *Del. Op. Att'y Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015) ("The statute does not require a public body to cite a specific FOIA exemption when denying access to records, but Delaware courts have determined that any denial of records must, in fact, be authorized by FOIA.").

In *Grimaldi v. New Castle County*, the court described the rationale for the pending litigation exemption as “when parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in the litigation.”⁸ Litigants are not permitted “to use FOIA as a means to obtain discovery which is not available under the Court’s rules of procedure.”⁹ In that case, a litigant requested a resume which the court found to be “very much related to [the] litigation” since it was relevant to a claim in the complaint.¹⁰ The pending litigation exemption is not limited to court cases only and includes quasi-judicial proceedings such as this administrative appeal.¹¹

Here, DNREC identified a specific pending appeal, EAB 2017-14, regarding a construction permit amendment for the AWM facility. The Clean Delaware site is located in physical proximity to the proposed AWM facility site.¹² Mr. Scarpa is the co-founder of the Keep Our Wells Clean organization, who is the appellant in that matter.¹³ One of the issues in the pending appeal is whether DNREC properly considered the cumulative effects on groundwater from Artesian and the surrounding facilities in its site design,¹⁴ and Mr. Scarpa’s request is for well monitoring and

⁸ 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016).

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ *See Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *4-6 (May 6, 2003) (finding an administrative appeal before the Planning Board constitute a quasi-judicial proceeding which falls within the scope of the pending litigation exemption).

¹² Reply.

¹³ Mr. Scarpa is the co-founding member of Keep Our Wells Clean and appears to be an active participant in this AWM matter on behalf of Keep Our Wells Clean. *See* Reply, Ex. A; Response. We are not persuaded that Mr. Scarpa can simply shed his role in the appellant community organization and file a FOIA request in his individual capacity to avoid application of the pending litigation exemption. Such an exception would substantially undermine the pending litigation exemption itself with respect to all organizational parties, creating the opportunity for organization members to file FOIA requests in their individual capacity to advance the organization’s position in the litigation. These circumstances differ from a recent opinion considering the potential litigation exemption in which there was a factual dispute over whether a person was acting as a conduit for another person who intended to file suit. *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826, at *4-6 (Feb. 20, 2018). The Office determined there it did not have the means or time to determine this factual dispute. Here, the relationship between the litigant and the requestor is clear from the record, and we determine that this relationship in the context of active litigation does not permit an organizational party to allow its members to make FOIA requests in their individual capacity for documents related to that same organization’s litigation.

¹⁴ *See* Response; Reply, Ex. C. Additionally, DNREC noted the local news coverage of this matter in its Response. One News Journal article cited in the Response included a link to an earlier

water quality data for the areas surrounding the facility at issue. In the appellants' pre-hearing memorandum, the organization specifically raised DNREC's alleged failure to perform the requisite environmental reports studying hydrogeological and surface water conditions.¹⁵ Your arguments regarding whether the Board will actually permit the discovery of these specific documents at this stage of the proceedings mischaracterize the applicable standard here. Litigants cannot use the FOIA process to advance their interests in pending litigation, and the critical question here is whether the requested records have a sufficient nexus to this pending appeal.¹⁶ The query does not extend into parties' intentions to use the available discovery process or whether they would be successful in doing so.¹⁷ Although our Office does not have the available means to further explore the factual issues here to the extent we would like, we find that DNREC has sufficiently demonstrated that the requested records relate to the pending EAB appeal and therefore, DNREC appropriately withheld the documents pursuant to the pending litigation exemption in 29 *Del. C.* § 10002(1)(9).¹⁸

article regarding the Clean Delaware site violations, which included the following statement attributed to Keep Our Wells Clean: "They worry that once the Artesian/Allen Harim project is online, water sprayed on a large field across the street from Clean Delaware will eventually make its way into the groundwater system and travel east, where it will push the existing contamination toward people's homes, and possibly even the public water supply of the Town of Milton." See <https://www.delawareonline.com/story/news/local/2018/04/20/its-like-living-cesspool-sussex-county-wonders-how-far-dirty-water-has-spread/529864002/>. In an October 5, 2018 article, Mr. Scarpa is quoted with regard to the EAB appeal, noting the purported lack of in-depth environmental studies which should have been considered for the construction permit. Mr. Scarpa is quoted as follows: "The big thing they didn't do is they never took the Clean Delaware site into consideration when they approved the spray fields." See <https://www.capegazette.com/article/artesian-activists-gear-fight-over-spray-fields/166953>. These statements create reasonable inferences that Keep Our Wells Clean believes the Clean Delaware site and its impact are relevant to the pending EAB appeal. Although DNREC did not directly cite these articles in its Response, the information is publicly available online from local media sources, and we take notice of this relevant press coverage in this Opinion.

¹⁵ Reply, Ex. C.

¹⁶ See *Grimaldi*, 2016 WL 4411329, at *9-10 (discussing the pending litigation exemption).

¹⁷ *Id.*

CONCLUSION

Thus, it is our determination that DNREC has not violated FOIA as alleged.¹⁹

Very truly yours,



Aaron Goldstein
Chief Deputy Attorney General

cc: Ralph K. Durstein, III, Deputy Attorney General
Dorey Cole, Deputy Attorney General

¹⁹ Because we have decided the documents were appropriately withheld under the pending litigation exemption, we need not address the additional arguments regarding the investigatory files exemption.