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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB05

February 12, 2019

VIA EMAIL

Christopher M. Coggins, Esq.
Coggins Law, LLC
1007 N. Orange St., 4th Floor
Wilmington, Delaware 19801

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

Dear Mr. Coggins:

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”) with regard to your¹ records requests. 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. For the reasons set forth below, we conclude that DNREC has not violated FOIA as alleged.

BACKGROUND

On November 13, 2018, you sent DNREC two records requests (“Requests”). The first request was for the “[b]ases and reasoning for October 15, 2018 Denial of FOIA Request 2018-0345.” You then listed three categories of documents: 1) all “correspondence, . . . , and any other written or record item/thing that is related or similar to those listed here about, . . . or mentioning FOIA Request 2018-0261, any of its contents, or its denial from October 8, 2018 through the date on which a final response to this FOIA Request is provided;” 2) all “correspondence, . . . , and any other written or record item/thing that is related to or similar to those listed here that was reviewed, considered, or discussed by those involved with or consulted about FOIA Request 2018-0261, any

¹ As emphasized in your Reply, you filed this Petition in your individual capacity as a Delaware citizen. Your Reply also indicated you continue to represent Joseph and Margaret Booth (the “Booths”), as stated in a previous petition filed last month. *See Del. Op. Att’y Gen.* 19-IB01 (Jan. 23, 2019).

of its contents, or its denial from October 8, 2018 through the date on which a final response to this FOIA Request is provided;” and 3) “[i]dentify all persons involved with or consulted regarding or about FOIA Request No. 2018-0261.”² On that same day, you made the same request for the same types of records for a second FOIA request, “FOIA Request No. 2018-026[9],” which you previously submitted.

Both of the underlying records requests (Request No. 2018-0261 and 2018-0269) relate to environmental actions involving dry cleaning businesses, one of which was the subject of a previous Attorney General Opinion issued last month.³ Attorney General Opinion 19-IB01 found that Request No. 2018-0261 for records relating to the Toni Dry Cleaners site was appropriately denied, as those records pertain to pending litigation between DNREC and your clients.⁴ FOIA Request No. 2018-0261 requested records pertaining to your clients and the site of the dry cleaning business that is named in the pending litigation in Attorney General Opinion 19-IB01.⁵

On December 6, 2018, DNREC denied both Requests, stating:

DNREC hereby denies your request pursuant to 29 Del. C. § 10002(e), which states that a FOIA Request is a request to inspect or copy public records. Your request does not ask to inspect or copy public records. Additionally, the communications sought would be privileged legal advice that is exempt from FOIA under 29 Del. C. § 10002(l)6).⁶

You filed a Petition with this Office challenging the denial of the FOIA Requests, based on your “concerns that DNREC failed to adhere to its obligations under FOIA.”⁷ The Petition set forth two main arguments: 1) you properly “requested” documents under FOIA through the use of DNREC’s web portal; 2) the records are not exempt as privileged legal advice because DNREC must submit an affidavit to support its exemption; the exemption was only asserted for a portion of the documents; the assertion did not meet the exemption for executive sessions set forth under 29 Del. C. § 10004(b)(4); and in reliance on federal cases, any counsel’s opinion or recommendation that has operative and controlling effect over the decision-making process must be disclosed. To remedy DNREC’s FOIA violation, you requested a determination that DNREC’s failure to provide the requested records violated 29 Del. C. § 10003 and is unlawful; an order for

² Petition.

³ *See Del. Op. Att’y Gen.* 19-IB01 (Jan. 23, 2019); Reply.

⁴ *Del. Op. Att’y Gen.* 19-IB01 (Jan. 23, 2019).

⁵ *See id.*; Petition.

⁶ Petition, Ex. A, B.

⁷ Reply. In your Petition, you noted that you do not challenge DNREC’s denial of the third item in your Requests.

DNREC to provide the records; an award of attorney's fees and costs; and all other appropriate relief.⁸

On January 24, 2019, DNREC submitted an email ("Response") through its counsel, arguing that your Petition is an attempt to re-open the recently-decided Attorney General Opinion 19-IB01. Further, DNREC objected to the acceptance and review of the Petition, as it is duplicative and not consistent with the FOIA review process. In addition to reiterating the reasons in the initial denial, DNREC asserted for the first time that the requested records pertain to the pending litigation involving your client and are also exempt pursuant to 29 Del. C. § 10002(l)(9). As such, you have a path to obtain these records (if permitted by the court) through the discovery process.

By correspondence dated January 29, 2019 ("Reply"), you made multiple arguments to support your contention that the denial of records was inappropriate. You argued that DNREC's response was contradictory because DNREC first stated that there was no "request to copy or inspect records" but DNREC also stated that certain records were exempt. You argued that DNREC's denial did not meet its burden under the *Flowers v. Office of the Governor*, as DNREC did not submit an affidavit and a detailed written document indicating the reasons for denial.⁹ The Reply also reiterated several arguments from the Petition, including the arguments that the DNREC should have met the open meeting standard of 29 Del. C. § 10004(b)(4) and that the legal opinions having operative and controlling effect must be disclosed. You also noted that DNREC did not address these arguments in its Response.

Additionally, you objected to DNREC's citation to the pending and potential litigation exemption in its Reply for several reasons: 1) the delayed assertion of this exemption prejudiced your position; 2) DNREC failed to describe the relevant litigation and the nexus between the requested documents and the pending litigation; 3) DNREC failed to meet its burden under the *Flowers* case to justify the denial of records; 4) DNREC's Response indicated no authority or changed circumstance to allow assertion of a reason for the records denial for the first time in the petition process. You also denied that Attorney General Opinion 19-IB01 has any precedential impact here, as it considered different records and issues. Finally, you stated that the requested records do not relate to either pending case involving your clients and to the extent that such requests seek those records, none of those records "should reasonably be found to respond to that request and the November 13 FOIA Requests."¹⁰

⁸ This Office may determine whether a FOIA violation has occurred but does not have the authority to issue injunctive orders or award attorneys' fees and costs. *See* 29 Del. C. § 10005.

⁹ 167 A.3d 530 (Del. Super. 2017).

¹⁰ Reply.

The additional submissions by the parties received after the date of your Reply are not considered part of this record, nor considered in this Opinion.

DISCUSSION

When challenged, the public body has the burden of proof to justify its reasons for denying access to records.¹¹ First, you argued that DNREC improperly cited to 29 *Del. C.* § 10002(e) to deny the records. However, DNREC denied the third item in your Requests “to identify” certain individuals on this basis. A request to identify individuals is not a request to inspect or copy records, and FOIA does not require a public body to answer questions or create documents that do not exist.¹² Thus, we find that DNREC appropriately denied your request on this basis.¹³

Second, you contended that DNREC improperly cited 29 *Del. C.* § 10002(l)(6) to deny access to the requested documents. This section excludes from the definition of “public record” any records that are exempt from disclosure by common law or statute.¹⁴ It is well-settled that this exemption includes the attorney-client privilege and attorney work product doctrine.¹⁵ You argued that the *Flowers* case requires DNREC to submit an affidavit and detailed written submission with its denial and/or its Response to the Petition. In *Flowers*, the petitioner requested all communications from or received by specified individuals for a specific topic, and the Governor’s office denied the request, citing the attorney-client and executive privileges and other exemptions.¹⁶ The Court found that the Governor’s Office met its burden by providing a detailed submission describing how the exemptions were applied and an affidavit from the legal counsel who reviewed the documents. *Flowers* makes clear that “FOIA *only* requires a determination of

¹¹ 29 *Del. C.* § 10005(c).

¹² *Del. Op. Att’y. Gen.* 18-IB24, 2018 WL 2266975, at *4 (May 4, 2018).

¹³ The record is unclear on this point, but to the extent that DNREC intended to apply this exemption to the first and second items of your Requests, we disagree and determine that the first and second items of your Requests were adequately presented as requests to inspect or copy records.

¹⁴ 29 *Del. C.* § 10002(l)(6).

¹⁵ *Del. Op. Att’y. Gen.* 18-IB10, 2018 WL 1405826, at *3 (Feb. 20, 2018) (“We have expressly recognized in the past that the FOIA exemption for ‘records specifically exempted from public disclosure by statute or common law’ applies to the attorney work product doctrine and the attorney-client privilege.”); *Del. Op. Att’y. Gen.* 16-IB11, 2016 WL 3462342, at *8 (June 6, 2016) (stating that attorney-client privilege “is a well-established basis for withholding records requested under FOIA.”)

¹⁶ *Flowers*, 167 A.3d at 533, 549.

whether the [public body] provided sufficient *reasons* for withholding the redacted information to satisfy its burden of proof.”¹⁷

However, unlike *Flowers*, DNREC and your clients are involved in pending litigation,¹⁸ and you requested the “bases and reasoning” for denying a FOIA request for records involving this same pending litigation. In other words, you requested documents comprising DNREC’s legal reasoning to determine whether certain documents pertain to pending litigation. Even the FOIA statute itself refers to determining the applicability of an exemption as a legal question, noting that a public body may not charge for the “legal review of whether any portion of the requested records is exempt from FOIA.”¹⁹ The Requests are framed to seek documents that are protected from disclosure, and the applicability of the attorney-client privilege and attorney work product to these Requests is self-evident.²⁰ In these circumstances, we find that DNREC has sufficiently asserted its reasons for denying the request and that DNREC has not violated FOIA as asserted.²¹

As we find the FOIA Requests were properly denied for the reasons in DNREC’s denial, we do not address the applicability of the pending or potential litigation exemption.

CONCLUSION

¹⁷ *Del. Op. Att’y Gen.* 18-IB04, 2018 WL 1061272, at *3 (Jan. 23, 2018) (emphases in original).

¹⁸ *See Del. Op. Att’y Gen.* 19-IB01 (Jan. 23, 2019); Reply.

¹⁹ 29 *Del. C.* § 10003(m).

²⁰ Your argument citing to federal authority to argue for certain limits on the scope of the attorney-client privilege is inapposite. This exemption under FOIA requires application of this State’s common law.

²¹ We acknowledge that in reaching this conclusion we accept DNREC counsel’s inherent representation that the protections of the “privileged legal advice” have not been waived. We do not believe that this representation requires a separate sworn statement from DNREC to meet its burden. *See Del. Op. Att’y Gen.* 17-IB59, 2017 WL 6348853, at *3 (Nov. 20, 2017) (citing to counsel’s duty of candor in the Delaware Lawyers’ Rules of Professional Conduct, stating “the factual representations made by Counsel to the Council regarding the status of the land acquisition at issue and the impact that releasing the information would have on negotiations with respect thereto serve to satisfy the County’s burden.”).

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

Very truly yours,



Aaron Goldstein
Chief Deputy Attorney General

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