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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB10

February 22, 2019

VIA EMAIL

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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 your records request. 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

This Petition is submitted in your individual capacity challenging a records request to DNREC. On November 13, 2018, you sent DNREC a records request, Request Number 2018-0344 (“Request”). This request was for “DNREC’s or the State of Delaware’s involvement, arrangements, and relationship with, employment of, contracting with or through, retaining or retention of (i) Leo Mullin, which includes [sic] and his employees, agents, or related entities, and/or (ii) Environmental Liability Assessment, LLC, which includes its employees, agents, . . . including but not limited to: . . . [nine categories of records].” These nine categories of records including all correspondence with Leo Mullin or Environmental Liability Assessment, LLC (collectively, hereinafter “ELA”); all “correspondence, documents. . . regarding, concerning, related to or mentioning Leo Mullin, Environmental Liability Assessment, LLC the services either has, is or will be providing to DNREC or the State of Delaware; all Requests for Proposal for which ELA responded to, submitted a bid for, or expressed interest in; all “contracts, agreements, . . .” with or involving ELA; all payments or transfer of funds between DNREC, the State of

Delaware, or their agent and ELA for any reason; “all invoices, bills, . . . or documentation required under a contract, agreement, proposal, or bid submitted, . . . sent, . . . to DNREC or the State of Delaware by” ELA; “[a]ll lists, documents, reports, . . . identifying ‘Potentially Responsible Parties,’ . . . owners of a property, site, or facility for which DNREC has issued a Notice of Liability or Secretary’s Order” or had determined that a hazardous substance was released or may be released thereon¹ and “a[]ll documents describing services” ELA has been or is in the process of being retained to perform.² On December 6, 2018, DNREC denied the Request pursuant to 29 *Del. C.* § 10002(1)(9) which exempts records pertaining to pending or potential litigation which are not records of any court.

You filed a Petition with this Office in your individual capacity, challenging the denial of the FOIA Request. The Petition set forth three main arguments: 1) DNREC failed to identify with specificity the pending litigation in its denial; 2) the requested records do not relate to the pending litigation; and 3) Attorney General Opinion No. 18-IB52 demonstrates that DNREC improperly cited to the pending or potential litigation exemption. As remedies, you requested a determination that DNREC’s failure to provide the requested records violated 29 *Del. C.* § 10003 and is unlawful; an order for DNREC to provide the records; an award of attorney’s fees and costs; and all other appropriate relief.³

On February 5, 2019, DNREC submitted an email (“Response”) through its counsel, arguing that your request was properly denied. DNREC cited to the pending litigation, which is comprised of two cases between DNREC and your clients, Joseph and Margaret Booth. The two cases are *Garvin v. Booth*, C.A. No. S18M-10-040 and *Booth v. DNREC*, C.A. No. S18A-08-001. Because ELA is an expert witness in *Booth v. DNREC*, DNREC argued that the records were appropriately withheld pursuant to 29 *Del. C.* § 10002(1)(9), asserting you have a path to obtain these records (if permitted by the court) through the discovery process. As further proof of the connection to this litigation, DNREC points to your clients’ reference to “a third party collections agent” in your client’s Opening Brief in *Booth v. DNREC*.⁴ ELA is a third party agent who reviews financial records for DNREC to determine the ability of a party to pay environmental costs. By a supplemental email, DNREC stated that ELA has not been asked to prepare a financial analysis yet, as the Booths have refused to provide their financial records. Further, DNREC objected to this third Petition you have recently submitted, as it is redundant and an abuse of the FOIA review

¹ This item in the Request is worded broadly, but we read this language as pertaining only to ELA, as the initial paragraph of your Request indicated.

² Petition.

³ 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; *Del. Op. Att’y Gen.* 19-IB01, 2019 WL 639456, at *1 (Jan. 23, 2019); *Del. Op. Att’y Gen.* 19-IB05 (Feb. 12, 2019).

⁴ Response.

process, suggesting that this Office award attorneys' fees to DNREC similar to the authority granted to the courts.⁵

By correspondence dated February 8, 2019 ("Reply"), you made multiple arguments to support your contention that the denial of records was inappropriate. 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.⁶ You asserted that Attorney General Opinion No. 19-IB01 supports your argument that the records are unrelated. You also argued that the Opening Brief did not specifically reference ELA as a "third party collections agent," and this sentence nor the rest of the Brief contains the words "ELA" or "Mr. Mullin" or a related term. You also claimed that your client's ability to pay is not an issue in the pending enforcement action and that the "unnecessary and never-prepared" financial analysis could not be used as evidence. As such, you asserted that Mr. Mullin is not an expert witness. Finally, you objected to DNREC's claims regarding the abuse of the FOIA petition process.

DISCUSSION

When challenged, the public body has the burden of proof to justify its reasons for denying access to records.⁷ DNREC cited the pending or potential litigation exemption in 29 *Del. C.* § 10002(1)(9) to deny access to the requested documents. "Any records pertaining to pending or potential litigation which are not records of any court" are exempted from the definition of "public record."⁸ This Office has acknowledged that the purpose of this 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."⁹ "[W]hen 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."¹⁰ Indeed, the exemption applies where litigators or litigants are seeking information

⁵ See *supra* note 4. However, we do not foreclose the possibility that this Office may find that a party abused the FOIA petition review process and take appropriate action.

⁶ 167 A.3d 530 (Del. Super. 2017).

⁷ 29 *Del. C.* § 10005(c).

⁸ 29 *Del. C.* § 10002(1)(9).

⁹ *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003).

¹⁰ *Grimaldi v. New Castle County*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016).

that might help them in court.¹¹ For the exemption to apply, “there must be a sufficient nexus between the records requested under FOIA and the subject matter of the litigation.”¹²

The parties dispute a number of facts in their submissions, but the following facts have not been disputed. Your clients and DNREC are involved in two pending lawsuits. In the Opening Brief in *DNREC v. Booth*, your clients stated: “DNREC expected the Booths to: . . . (iii) submit to DNREC’s Ability to Pay process (“ATP”) and turn over years of personal financial information to a third-party collections agent, who keeps a percentage of the payments it collect for DNREC from potentially responsible parties.”¹³ ELA is an independent consultant for DNREC who has asked your client for their personal financial information in order to conduct an “Ability To Pay” analysis.¹⁴ DNREC has not yet ordered this analysis due to your clients’ refusal to provide their financial records.¹⁵ However, DNREC has preliminarily engaged with ELA to assist with this pending litigation, and DNREC believes that ELA is an expert witness in the pending litigation.¹⁶ These circumstances demonstrate that the pending litigation does, in fact, relate to the requested records, and we conclude that DNREC appropriately denied your records request pursuant to 29 *Del. C. § 10002(1)(9)*.¹⁷

¹¹ *Office of the Public Defender v. Delaware State Police*, 2003 WL 1769758, at *2 (Del. Super. Mar. 31, 2003).

¹² *Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003).

¹³ Reply.

¹⁴ Response.

¹⁵ Supplemental Response.

¹⁶ Because a party makes its own determinations about witness presentation, we rely on DNREC’s assertion.

¹⁷ As noted in Attorney General Opinion No. 19-IB01, this Office is not required to surmise the parties’ future litigation positions, but to determine whether the requested records pertain to the subject matter of the pending litigation. *Del. Op. Att’y Gen.* 19-IB01, 2019 WL 639456, at *3 (Jan. 23, 2019).

CONCLUSION

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

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

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