



KATHLEEN JENNINGS
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. 19-IB12

February 27, 2019

VIA EMAIL

Ms. Christina Jedra
cjedra@delawareonline.com

RE: FOIA Correspondence Regarding the Office of the Governor

Dear Ms. Jedra:

We write in response to your correspondence alleging that the Office of the Governor (“OGov”) 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 OGov has not violated FOIA as alleged.

BACKGROUND

On September 18, 2018, you submitted a request for records for all “correspondence - including but not limited to snail mail, emails, and text messages – between representatives of the governor’s office, including the governor, and the Buccini/Pollin Group from January 2017 to the present.”¹ OGov produced records on November 7, December 10, and December 20, 2018 in response totaling 161 pages, noting that redactions had been “applied to material subject to executive privilege.” You submitted a Petition to this Office alleging that OGov had improperly asserted executive privilege to withhold or redact materials. In particular, you cited emails between OGov and the Buccini/Pollin Group (“BPG”) and the emails from the director of scheduling for the Governor “(a non-cabinet, non-policy position).”² The Petition asked this Office to determine whether the redactions in OGov’s production constituted an improper denial under FOIA.

¹ Response.

² Petition.

OGov submitted a letter from its counsel on February 13, 2019 (“Response”), stating that redactions were appropriate. OGov asserted that the executive privilege protects the Governor’s “deliberative and mental processes including materials prepared by or for the Governor.”³ OGov argued that communications with the governor’s staff that contribute to the deliberative process should be considered within the executive privilege, including the requested calendar items, and the communications or contacts with outside parties might be discouraged if they could not be held in confidence. OGov asserted that communications which were withheld in their entirety were received early in the decision-making process before the governor had reached his conclusions with regard to the unspecified policy matter.

OGov further argued that public interest could not be used to outweigh executive privilege for the deliberative processes outside of litigation, and that even if that were permitted, the petitioner had not demonstrated sufficient public interest to do so.⁴ With regard to scheduling communications in particular, OGov additionally cited precedent for not disclosing past locations or times of appointments to protect the security of the governor and public in the event such information might constitute or be construed as an ongoing pattern.

You responded to OGov on February 15, 2019 (“Reply”). You argued that the “Delaware courts have not recognized a deliberative process privilege, and it should not be conflated with the executive privilege that Delaware courts have recognized.”⁵ You further contended that only the closest advisors would qualify for the privilege, as determined in the *In Re Sealed* case of the D.C. Circuit Court. Furthermore, although Delaware courts have not addressed it, you cited to cases outside of Delaware which did not view governor’s calendar and scheduling as categorically exempt from FOIA. You further alleged that the public interest must be weighed against the need for disclosure in the FOIA context. You asserted that the public interest is based on several factors, including: 1) BPG receives significant public funding, 2) BPG is a major campaign donor to the governor, 3) Mr. Buccini is a chairman of the board of Wilmington Housing Partnership, and 4) “BPG’s reach touches much of where Delawareans live, work and play.”⁶ As an attachment to your Reply, you included copies of comments that you solicited on Facebook and Twitter regarding whether citizens would be interested in seeing the Governor’s emails with BPG.

DISCUSSION

In its production, OGov withheld materials pursuant to the executive privilege. FOIA exempts those records which are “specifically exempted from public disclosure by statute or

³ Response.

⁴ See 29 Del. C. § 10005(c) (stating “the burden of proof shall be on the custodian of records to justify the denial of access to records”).

⁵ Reply.

⁶ Reply.

common law.”⁷ 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.”⁸

This matter falls squarely under the *Flowers v. Office of the Governor* decision and this Office’s subsequent opinions.⁹ FOIA does not require a public body to produce “an index or compilation of each document withheld under each FOIA exemption.”¹⁰ To demonstrate that the executive privilege was appropriately applied to a production, the submission of “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.”¹¹ In *Flowers*, the appellants requested that the OGov provide “at least a general description of the criteria used in asserting various privileges such that a requestor or a reviewing court may determine the propriety of those asserted privileges.”¹² The Court rejected this approach and accepted OGov’s affidavit from its legal counsel and a written submission indicating its reasons for denial. The Court found that OGov “applied well-recognized privileges with a clear understanding of those privileges when it applied them.”¹³

Under these parameters, and as set forth in *Flowers*, this Office’s review is limited to determining whether OGov’s affidavit and written submission indicate that OGov applied the executive privilege with a clear understanding of the privilege when OGov performed the review. In this instance, OGov has supplied an affidavit from its Associate Legal Counsel who personally reviewed the documents and attested that there is a “good faith basis for the claims of executive privilege and that the redactions to the emails are appropriate.”¹⁴ In addition, OGov submitted a detailed explanation describing executive privilege. We find that this submission is adequate under the *Flowers* standard established by the Superior Court.

⁷ 29 *Del. C.* § 10002(1)(6).

⁸ *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 784-85 (Del. Super. 1995) (recognizing that the confidential records of the Judicial Nominating Commission warrant protection under the executive privilege).

⁹ 167 A.3d 530 (Del. Super. 2017); *see also Del. Op. Att’y Gen.* 18-IB36, 2018 WL 3947261 (Aug. 10, 2018); *Del. Op. Att’y Gen.* 17-IB44, 2017 WL 4081549 (Aug. 30, 2017).

¹⁰ 167 A.3d at 549.

¹¹ *Id.*

¹² *Id.* at 547.

¹³ *Id.* at 549.

¹⁴ Response.

CONCLUSION

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

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

cc: Alexandra Clapp, Esq., Associate Legal Counsel, Office of the Governor
Dorey L. Cole, Deputy Attorney General