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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB13

March 1, 2019

VIA EMAIL

Paul G. Enterline, Esq.
113 South Race Street
Georgetown, Delaware 19947
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RE: FOIA Correspondence Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Enterline:

We write in response to your correspondence submitted on behalf of your client, Chris Corrado, 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 record 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, it is our determination that DNREC violated FOIA by asserting the potential litigation exemption under 29 *Del. C.* § 10002(l)(9) in these circumstances and recommend that DNREC, within the statutory timeframes under FOIA, produce the remaining responsive records subject to other applicable exemptions under FOIA.

BACKGROUND

On November 19, 2018, your client requested various records regarding his neighbor’s property in order to “discuss and determine the ownership of a row of pilings located on the property line between these two parcels.”¹ DNREC denied this request under 29 *Del. C.* § 10002(l)(9) as records pertaining to pending or potential litigation. You submitted an amended request on your client’s behalf on December 21, 2018 requesting various documents, including but not limited to, 1) “leases, licenses, permits, . . . related to the boat slips adjoining the properties;” 2) “drawings, plots . . . showing the locations or boundary lines of boat slips adjoining the properties;” 3) “drawings, plots, . . . of any structures or improvements in or around the boat slips

¹ Petition.

adjoining the properties;” 4) “correspondence, records, or communications, relating to the boat slips, or pilings in or around the boat slips, adjoining the properties;” 5) “rules, regulations, . . . governing the installation of pilings, piers, or other structures, in or around the boat slips adjoining the properties;” and 6) “[a]ny other records or information relevant to this matter not otherwise specifically requested above.”² On January 22, 2019, DNREC responded to your request by providing links to State Code and regulations and denying the remaining items on the basis of 29 *Del. C.* § 10002(1)(9). This Petition followed.

In your Petition, you argued that DNREC improperly denied the requests because litigation is not an option for this matter under 7 *Del. C.* §7210. Further, in the alternative, you claim that the denial is overly broad, as your client is entitled to records relating to his own boat slips.

DNREC responded to the Petition on February 14, 2019 (“Response”). DNREC asserted that potential litigation is contemplated by this FOIA request, pointing to the requestor’s statement that he intended to use the documents to determine ownership of the pilings and noting that the requestor had retained counsel in contemplation of litigation with the adjoining property owner. DNREC indicated that the “analysis therefore turns on whether potential litigation is ‘likely or reasonably foreseeable’ between [your client] and his neighbor.”³ DNREC acknowledged that there is no pending litigation and that you correctly noted that the requestor does not have a cause of action against DNREC. However, DNREC emphasized that your statements regarding the exhaustion of remedies prior to judicial intervention pointed to an intent to file a suit if the dispute was not resolved by the information sought. Finally, DNREC stated FOIA makes no distinction for one’s own self or property which would permit a release of your client’s records to him.

DISCUSSION

As the sole basis for its denial, DNREC cited the pending or potential litigation exemption in 29 *Del. C.* § 10002(1)(9), asserting that “potential litigation” exists between the requestor and an adjoining property owner.⁴ A two-pronged test is used to determine if the “potential litigation” exemption would justify a records denial under FOIA: “(1) litigation must be likely or reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”⁵

This Office has previously decided that the “‘potential litigation’ exemption can only be reconciled with the broader language of the FOIA statute if it is limited to potential litigation against the government agency from which the documents in question are sought, or some closely

² *Id.*

³ Response.

⁴ 29 *Del. C.* § 10002(1)(9).

⁵ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (adopting this Office’s test for determining the applicability of the “potential litigation” exemption).

affiliated person or entity.”⁶ DNREC referenced only potential litigation between the private parties in support of the exemption. As the requestor seeks these documents allegedly for potential litigation against an adjacent property owner and not the government agency from which the records are sought or some closely affiliated person or entity, we find that the assertion of *29 Del. C. § 10002(1)(9)* is unsupported by the record before us.

CONCLUSION

We conclude that DNREC violated FOIA by asserting the potential litigation exemption under *29 Del. C. § 10002(1)(9)* in these circumstances and recommend that DNREC, within the statutory timeframes under FOIA, produce the remaining responsive records, subject to other applicable exemptions under FOIA.

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

cc: Kayli H. Spialter, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁶ *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826, at *5 (Feb. 20, 2018).