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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB29

June 7, 2019

VIA EMAIL

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

Dear Mr. Tomasetti:

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, it is our determination that DNREC violated FOIA by denying the first and second items in your request pursuant to 29 *Del. C.* § 10002(l)(9) and recommend that DNREC, within the statutory timeframes under FOIA, produce the remaining responsive records subject to any other applicable FOIA exemptions.

BACKGROUND

On March 22, 2019, you submitted a records request to DNREC on behalf of your clients (the owners of 38856 Cleveland Avenue), requesting three items: 1) the "application, surveys and drawings and written decision" concerning the bulkhead repair/replacement of 38854 Cleveland Avenue in Selbyville, Delaware; 2) the "application, surveys and drawings" including correspondence with the neighbors, "especially regarding claims pertaining to [a] title issue" for the neighboring property at 38856 Cleveland Avenue; and 3) copies of any DNREC decisions in the last five years regarding a denial of a "bulkhead repair/replacement based on a property line

dispute,” such as a cloud on title.¹ In response to the third item, DNREC stated that it searched and found no responsive records. DNREC denied access to the first and second items pursuant to 29 Del. C. § 10002(1)(9), stating those items involved records pertaining to pending or potential litigation which are not records of any court.

You then filed a Petition with this Office, challenging DNREC’s response to items 1 and 2 in the request. You argue that DNREC improperly denied the requests because you are “unaware of any pending or potential litigation pending in the State of Delaware or Federal Court pertaining to the items requested in [your] request by or against DNREC by either party in [your] request.”² You allege that you bring this request as a concerned citizen about the environment and quality of life in Delaware, noting you own property within a mile of the subject property. You argue that you cannot be denied records simply because you are an attorney whom DNREC may assume will potentially use the records in litigation.

DNREC responded to the Petition on May 24, 2019 (“Response”). DNREC contends that the requested records in items 1 and 2 directly relate to potential litigation and have been properly withheld. After giving public notice of a proposed permit for a dock, boat lift, bulkhead repair, and related work at 38856 Cleveland Avenue, DNREC denied this permit “without prejudice.”³ Subsequently, the adjacent property owners submitted documentation to show a potential encroachment on their property resulting from the permit. Your clients filed a second permit application for 38856 Cleveland Avenue in 2018, which DNREC again denied, asserting that the property line dispute still existed and the adjacent property owners refused to agree to the permit. DNREC instructed your clients to resubmit the application with a “letter of no objection” from the neighbors or with court documentation supporting resolution of the property line issue.⁴ DNREC asserts that the potential litigation exemption is justified in these circumstances, as the property line dispute can only be resolved through litigation, and “[h]ere, where DNREC would not be a party to the action to clear title, but rather review any permit reapplication, the exception nevertheless applies.”⁵ Therefore, DNREC argues that regardless of whether the public body is a party to the litigation, a potential litigant should be precluded from using FOIA to advance their own personal stake in the anticipated litigation.

¹ Petition.

² *Id.*

³ Response.

⁴ *Id.*

⁵ *Id.*

DISCUSSION

As the sole basis for its denial of the two items in dispute, DNREC cites 29 *Del. C.* § 10002(l)(9), asserting that potential litigation exists between the requesting party's clients and the adjoining property owners. A two-pronged test is used to determine whether the potential litigation exemption applies 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."⁶

This Office has previously decided that the potential litigation exemption is limited to potential litigation against the government agency from which the records are sought, or some closely affiliated person or entity.⁷ In this instance, DNREC merely alleges that there is potential litigation between the private parties, acknowledging that litigation is not currently pending and that DNREC would not be a party to this potential litigation.⁸ As DNREC alleges that the requestor seeks these documents 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(l)(9) is not supported by the record before us.

⁶ *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).

⁷ *Del. Op. Att'y Gen.* 19-IB13, 2019 WL 1511368, at *2 (Mar. 1, 2019) ("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(l)(9) is unsupported by the record before us."); *Del. Op. Att'y Gen.* 18-IB10, 2018 WL 1405826, at *5 (Feb. 20, 2018) (stating "we believe 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 affiliated person or entity").

⁸ Response.

CONCLUSION

We conclude 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 to items 1 and 2 of the FOIA request, subject to any other applicable FOIA exemptions.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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