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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 19-IB30**

**June 20, 2019**

**VIA EMAIL**

Kenneth T. Kristl, Esquire  
Widener University, Delaware Law School  
Environmental & Natural Resources Law Clinic  
[ktkristl@widener.edu](mailto:ktkristl@widener.edu)

**RE: FOIA Petition Regarding the Delaware Department of Agriculture**

Dear Mr. Kristl:

We write in response to your correspondence submitted on behalf of your client, Maria Payan, alleging that the Delaware Department of Agriculture (“DDA”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed below, we find that DDA failed to include the reasons for redacting portions of the provided records in its response as required by FOIA. Because DDA has since provided those reasons, no additional actions are recommended. We respectfully caution DDA to state its reasons for any redactions in its future responses.

**BACKGROUND**

On April 10, 2019, your client sent a FOIA request to DDA for “copies of the notice of intent, animal waste management plan, and permit records for 21 Concentrated Animal Feeding Operations (CAFOs) that were identified in a public notification for permit coverage issued by DNREC and DDA on April 10, 2019.”<sup>1</sup> Ms. Payan initially objected to the treatment of her request

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<sup>1</sup> Petition.

as a FOIA request, as the requested documents relate to a public comment period for the general permit for 21 CAFOs, which was originally scheduled to close on May 9, 2019. DDA provided a response to your client on May 1, 2019, enclosing redacted records, and reminded your client of the opportunity to “make an appointment with the Nutrient Management Program to review the Notice of Intent and the Animal Waste Management Plan files in person.”<sup>2</sup> In response to a call from your client, DDA supplemented its response by email on May 23, 2019, explaining the various types of redactions made to the documents, which included phone numbers, emails, business information, tax information, and maps.

This Petition followed, alleging several flaws in DDA’s response. First, you argue that because these requested documents directly relate to a public notice period, Delaware regulations require DDA to make these public records available to the public “without delay.”<sup>3</sup> Second, citing 29 *Del. C.* § 10003(h) in support, you allege that “[t]o the extent that DDA treated Ms. Payan’s request under FOIA, DDA’s heavy redactions of information in the public records without explanation was improper,” and “[b]ecause the public body did not indicate the reasons for redaction, the DDA should be found in violation of FOIA.”<sup>4</sup> Third, citing to 7 *Del. Admin. C.* § 7201-6.32, you assert that the records must be provided without redaction, “unless the information is clearly delineated as trade secrets or confidential business information at the time of submission and is determined to be such pursuant to both state and federal law.”<sup>5</sup> As DDA did not provide any of these reasons in its May 1, 2019 response to your client, you assume that no such claims were made by the permittees regarding any information submitted with their applications, meaning DDA’s redactions were improper under 7 *Del. Admin. C.* § 7201-6.32. Fourth, you claim your client did not receive an adequate opportunity for public comment as required by 7 *Del. Admin. C.* § 7201-6.30.3. Fifth and finally, you argue that DDA failed to comply with the federal law requiring DDA to “provide for, encourage, and assist” the public. For these reasons, you request that DDA be found in violation of FOIA and that DDA be required “to produce all of the requested records to [your client] immediately and without redactions.”<sup>6</sup> Additionally, you request that DNREC and DDA be required to “renotify the public of the proposed permit coverage to the 21 CAFO facilities and to provide adequate time to allow for proper public inspection of the records and submittal of public comments.”<sup>7</sup>

On June 6, 2019, DDA’s counsel replied to your Petition by letter (“Response”), arguing that DDA has fulfilled its obligations under FOIA. DDA recounted the events leading up to the

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

DDA's provision of the redacted records. In addition, DDA advised that it has since reconsidered the redactions to the names of the poultry integrators. On June 4, 2019, DDA provided "Delaware Animal Waste Management Plans" to your client with the names of the poultry integrators unredacted. DDA states that those records still included the redactions related to phone numbers, emails, other business information, tax information, and maps. DDA concludes it "has not withheld or otherwise denied Ms. Payan reasonable access to responsive public record documents and has not violated FOIA."<sup>8</sup>

## DISCUSSION

As a preliminary matter, FOIA limits this Office to determining whether a violation of FOIA has occurred or is about to occur.<sup>9</sup> The General Assembly did not confer jurisdiction on this Office to determine through the FOIA petition process whether any law other than FOIA has been violated.<sup>10</sup> As such, we cannot address the majority of the Petition's disputes that pertain to state and federal requirements outside of FOIA, and we address only the allegation under FOIA.

The Petition alleges that DDA failed to comply with 29 *Del. C.* § 10003(h)(2). This section provides that "[i]f the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial."<sup>11</sup> Public bodies must provide a response to a FOIA request "as soon as possible, but in any event within 15 business days after the receipt thereof" or must follow the statutory requirements for an extension.<sup>12</sup> Here, DDA timely responded to your client's FOIA request in its May 1, 2019 correspondence, and it is uncontroverted that DDA failed to provide any reason or explanation for its redactions in this response.<sup>13</sup> However, upon receipt

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<sup>8</sup> Response.

<sup>9</sup> 29 *Del. C.* § 10005(e).

<sup>10</sup> See, e.g., *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at \*2 (Oct. 12, 2018) (finding that this Office has "no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute"); *Del. Op. Att'y Gen.* 18-IB27, 2018 WL 2994705, \*2 (May 31, 2018) (finding that the school district did not violate FOIA when it provided access to the public records and declining to determine whether those records constituted an accurate portrayal of the district's revenue pursuant to separate statutory authority); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at \*2 (Aug. 8, 1996) ("To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* Section 6921, that matter is beyond the jurisdiction of this office and is not addressed here.").

<sup>11</sup> 29 *Del. C.* § 10003(h)(2).

<sup>12</sup> 29 *Del. C.* § 10003(h)(1).

<sup>13</sup> Cf. *Del. Op. Att'y Gen.* 15-IB14, 2015 WL 9701645, at \*3 (Dec. 29, 2015) ("The Petition states that the State Police violated FOIA because it did not cite any statutory exemption to justify its refusal to disclose records regarding the cell site simulators. As noted above, however, FOIA

of your client's request for this information, DDA provided the reasons for the redactions in an email dated May 23, 2019 and reiterated those reasons in its Response to this Petition. Thus, your client now has DDA's reasons for redacting portions of the document production.

### CONCLUSION

We conclude that DDA failed to include the reasons for redacting portions of the provided records in its response as required by FOIA. Because DDA has since provided those reasons, no additional measures are recommended. We respectfully caution DDA to state its reasons for any redactions in its future responses.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Andrew G. Kerber, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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does not require a public body to cite a specific exemption when denying access to public records. Rather, FOIA requires that the public body provide a reason for denying access to the records, and the State Police did so.”).