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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB56

October 1, 2019

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

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

Dear Mr. Chase:

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 failed to meet its burden of proof and is in violation of FOIA. We recommend that DNREC provide the public version of the document identified as the “QAPP” and review its records and provide a supplemental response to you in accordance below.

BACKGROUND

The U.S. Air Force and the Dover Air Force Base advised DNREC and the Delaware Division of Public Health of elevated levels of perfluoroalkyl substances (“PFAS”) in four water wells near the Dover Air Force Base. On August 19, 2019, you submitted a records request to DNREC seeking the following:

Pursuant to the Freedom of Information Act, 29 *Del. Code* 100, I am requesting copies of all emails, letters, texts, and communication of any other sort between DNREC and representatives of Dover Air Force Base regarding off-base sampling

of water wells, including a copy of the DNREC's request for the UFP-QAPP, and the copy of the UFP-QAPP from DAFB that is now in DNREC's possession.¹

DNREC responded stating that a public version of the requested document is not available. Also, DNREC noted that the U.S. Air Force and Dover Air Force are leading the investigation and advised you to contact the U.S. Air Force Public Affairs office, as suggested in an attached news release. You then filed this Petition, asking this Office to review DNREC's decision.

DNREC's counsel responded to the Petition on September 17, 2019 ("Response"). DNREC first contends that its response does not constitute a denial, as DNREC simply stated it would provide the public version of the requested document when available. If, however, our Office determines that this response was a denial, DNREC asserts that the records were appropriately denied pursuant to 29 Del. C. § 10002(1)(3) and 29 Del. C. § 10002(1)(6), under the common law right of privacy. DNREC explains that the Quality Assurance Project Plan ("QAPP") you requested outlines water monitoring procedures to ensure the sampling and resultant data are sufficient. DNREC states that the "Air Force has prepared a QAPP for its intended PFAs monitoring activities," and this document "was shared with DNREC as a part of an ongoing investigation under the express understanding that it contains confidential private information."² DNREC states that it expected to receive a public version of the QAPP by September 25, 2019 for posting on its website. DNREC states that the "U.S. Air Force has been investigating PFAS at the Dover Air Force Base since at least 2016," and "the investigation continues pursuant to several environmental statutes, including the Delaware Hazardous Substance Cleanup Act."³ Furthermore, DNREC argues that the QAPP contains personal identifiers subject to the common law right of privacy, including street addresses and parcel numbers.

In a reply dated September 23, 2019 ("Reply"), you argue that DNREC is improperly claiming the investigative file exemption for an investigation it is not conducting and because personal identifiers should only be redacted, the common law right of privacy does not support withholding the entire body of records. Additionally, you challenge that DNREC may avoid FOIA compliance by entering into an agreement to not share the version of QAPP currently in its possession. Finally, you contend that DNREC "disturbingly" suggests that it can withhold information about groundwater contamination from the public, contrary to its mission of protecting public health.⁴ You point out that DNREC's argument suggests that routine inspection records of various other facilities would also be exempt.

¹ Petition.

² Response.

³ *Id.*

⁴ Reply.

DISCUSSION

As a preliminary matter, your FOIA request sought copies of specific communications including the QAPP, and we find that DNREC's response declining to provide the requested documents constitutes a denial of records under FOIA. As such, we must determine whether DNREC properly asserted a basis to do so.

DNREC carries the burden of proof to justify its denial of access to records.⁵ DNREC sets forth two bases here: the investigatory files exemption and the common law right of privacy under 29 *Del. C.* § 10002(1)(6). DNREC asserts it properly withheld the requested communications and QAPP pursuant to 29 *Del. C.* § 10002(1)(3), which exempts from disclosure "investigatory files compiled for the purposes of criminal or civil law-enforcement." This Office has found that this exemption applies to "a wide variety of criminal and civil investigative files," and that it applies "in many instances to DNREC files when the nature of the work being performed by DNREC is investigative in nature or is being performed by a division of DNREC whose functions are in part investigative in nature."⁶

DNREC specifically states that the U.S. Air Force is in charge of the investigation that began in 2016, and the QAPP was shared with DNREC as part of an ongoing investigation. DNREC does not allege that it has or had an investigative role in this matter, nor does DNREC allege sufficient facts to determine that the U.S. Air Force's QAPP or the other requested materials qualify for the investigatory files exemption under FOIA. As such, we find that DNREC has not met its factual burden demonstrating that the investigatory file exemption is applicable to the records requested, and we conclude that DNREC violated FOIA by declining to produce the records on this basis.

⁵ 29 *Del. C.* § 10005(c).

⁶ *Del. Op. Att'y Gen.* 17-IB21, 2017 WL 3426261, at *1 (July 13, 2017).

CONCLUSION

Accordingly, we recommend that DNREC, within fifteen business days of the date of this Opinion, produce a supplemental response to your FOIA request, including the public version of the QAPP which DNREC acknowledged is appropriate for public disclosure. In addition, we recommend that DNREC review its records and produce any other public records responsive to your request; any records produced should be redacted or withheld as necessary to comply with any other applicable exemptions under FOIA, including the common law right of privacy under 29 Del. C. § 10002(1)(6).⁷

Very truly yours,



Charles M. Oberly III
Senior Advisor to the Attorney General⁸

cc: Kayli Spialter, Deputy Attorney General
Dorey Cole, Deputy Attorney General

⁷ DNREC argues that the street addresses and parcel numbers in the QAPP are also exempt under the common law right of privacy. We recommend that DNREC take common law privacy rights into account when making any redactions in its production.

⁸ The Chief Deputy Attorney General designated the Senior Advisor to the Attorney General to issue this opinion.