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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB67

December 18, 2019

VIA EMAIL

Richard L. Abbott, Esq.
Abbott Law Firm, LLC
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RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Abbott:

We write regarding your correspondence on behalf of your client, Ocean One Holdings, LLC, alleging that the Delaware Department of Transportation (“DelDOT”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with respect to your records request. 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. For the reasons set forth below, we find that DelDOT has not violated FOIA as alleged.

BACKGROUND

On September 25, 2019, you submitted a records request on behalf of your client to DelDOT for the following documents:

1. All written communications from January 1, 2018 to present (“Communications”) regarding appraisals or review appraisals of property and/or value (“Appraisals”) for lands owned by Danda Brittingham Family Limited Partnership (the “Property”) performed for any acquisition for the DELDOT SR1/SR16 Grade Separated Intersection (the “Project”).
2. All draft Appraisals regarding the Property for the Project.
3. All final Appraisals regarding the Property for the Project.
4. All requests for proposals issued by DelDOT to solicit bids from appraisers for Appraisals regarding the Property.

5. All written agreements with any appraiser for any of the Appraisals regarding the Property.
6. All Communications by or between DelDOT employees or agents regarding appraisal methods for the Appraisals of the Property.¹

DelDOT responded to each numbered item, as follows: 1) enclosed some responsive communications regarding the appraisals but noted that certain records have been withheld pursuant to the attorney-client privilege; 2) stated draft appraisals are exempt pursuant to 29 *Del. C.* § 10002(1)(2), 29 *Del. C.* § 10002(1)(6) including attorney-client privilege, and 29 *Del. C.* § 10002(1)(9); 3) stated no final appraisals exist as of that date; 4) enclosed responsive bid solicitations; 5) enclosed written agreements with the appraiser; and 6) stated no responsive records exist for communications regarding appraisal methods.

By letter dated November 4, 2019, you responded to DelDOT, challenging DelDOT's responses to Items 1-3. First, you alleged that DelDOT improperly asserted the attorney-client privilege, as "virtually no" communications were produced regarding the appraisals or review appraisals and you claimed it is "inconceivable that every single communication between and among DelDOT and its fee appraiser were solely for the purposes of the rendition of legal services by a lawyer."² Second, you argued that withholding the draft appraisals was improper, as they are not subject to attorney-client privilege or the exemption for trade secrets or commercial or financial information, nor is there any potential litigation. You claimed that the parties have not started negotiating. Third, you stated that some records in the initial production indicate that DelDOT, in fact, does have final appraisals, and those final appraisals must be produced. You asked DelDOT to provide all the requested records within ten days. DelDOT then sent the final appraisal for one of the subject parcels. After a series of brief exchanges about the status of the other requests, this Petition followed.

The Petition challenges DelDOT's response to the FOIA request, arguing DelDOT improperly withheld the appraisals and the communications regarding appraisals. First, you state that there is no potential litigation, as Real Property Acquisitions Act requires voluntary negotiations be exhausted before a condemnation action may be filed. Second, you contend real estate appraisals do not meet the exemption for trade secrets or commercial or financial information. Finally, you argue that attorney-client privilege "has been asserted where it does not apply," incorporating the arguments in your November 4, 2019 letter by reference.³

DelDOT's counsel responded on November 26, 2019 ("Response"). DelDOT explains that it is "in the process of acquiring two parcels of real property needed for the construction of a grade separated interchange at the intersection of SR 1 and SR 16 in Sussex County."⁴ On November

¹ Petition.

² *Id.*

³ *Id.*

⁴ Response.

14, 2019, DelDOT offered just compensation for one parcel and for a billboard and easement on the second parcel. DelDOT notes it is required to engage in negotiations to obtain the parcels, and it is currently in negotiations with your client; if such negotiations fail, DelDOT may file a condemnation action to acquire the property through eminent domain. DelDOT represents it has “re-reviewed” the withheld the communications with the appraiser and confirmed that those records are appropriately withheld under 29 Del. C. § 10002(1)(6) as attorney-client privileged or attorney work product materials.⁵

Additionally, DelDOT contends that its draft appraisals are properly withheld as attorney-client privileged or attorney work product materials and pursuant to 29 Del. C. § 10002(1)(9), which exempts records pertaining to potential or pending litigation which are not records of any court. Applying the two-part test for the potential litigation exemption, DelDOT contends both prongs are met. First, DelDOT argues there is a realistic and tangible threat of litigation. DelDOT is required by statute to negotiate with your client before it can file a condemnation suit. DelDOT states your client has retained counsel, identifying two attorneys who have worked on this matter on your client’s behalf since 2017. DelDOT contends that your client’s counsel has sent written demands, asserting claims and demanding action and disputing the appraisal methodology and the necessity of obtaining the entire fee simple interest on one parcel instead of an easement. Your client has requested a service road. Also, DelDOT alleges that your client has accused DelDOT of unequal treatment and discrimination, thereby creating reasonably foreseeable claims under the 14th Amendment of the United States Constitution. In addition, DelDOT contends that the parties have not agreed to an amount and litigation over the amount is foreseeable. Further, as DelDOT’s appraiser prepared these draft appraisals for the purpose of establishing DelDOT’s estimate of just compensation, they are exempt under attorney-client privilege or attorney work product.

DelDOT asserts you are attempting to gain an advantage in future litigation, as the draft appraisals reports would not be available to your client pursuant to Superior Court Rule 26 in any subsequent litigation between the parties. DelDOT alleges that the communications you seek regarding the appraisals also would not be available under Rule 26, as these records are communications with DelDOT’s expert witness. Finally, DelDOT represents that the final appraisals were sent to you on November 14, 2019 and November 22, 2019, rendering your claims for Item 3 moot.

DISCUSSION

As a preliminary matter, we accept DelDOT’s representation that it has provided the final appraisal reports to you on November 14, 2019 and November 22, 2019, and any objection to this

⁵ *Id.*

item in the request is now moot.⁶ We next address the Petition’s remaining claims regarding Items 1 and 2: draft appraisals and the communications regarding the appraisals.⁷

FOIA exempts “any records pertaining to pending or potential litigation which are not records of any court.”⁸ DelDOT asserts your client requests these records for use in potential eminent domain litigation with DelDOT. 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.”⁹ “When determining whether litigation is ‘likely or reasonably foreseeable,’ the public body should look for objective signs that litigation is coming.”¹⁰ These signs may include factors such as a “written demand letter in which a claim is asserted, or action is demanded, [which] may give rise to a proper inference that litigation will soon follow.”¹¹ Other indications may include prior litigation between the parties, proof of ongoing litigation with similar claims, or retention of legal counsel with respect to the claim at issue and expression of an intent to sue.

Your client and DelDOT are involved in negotiations for DelDOT’s acquisition of your client’s property. DelDOT has provided copies of the final appraisals supporting its offer in your negotiations, but your client is seeking the draft appraisals and communications related to those appraisals. The Delaware Code expressly provides that condemnation litigation may ensue if these negotiations are not successful. DelDOT represents that the parties have disputed appraisal methods and have not reached final resolution regarding the amount of just compensation to date, nor have the parties resolved other remaining issues surrounding this acquisition. Under these circumstances, we find that DelDOT adequately demonstrated that potential litigation is likely or reasonably foreseeable, and the draft appraisal reports and communications related to the appraisals have a clear nexus to this potential litigation. As such, we conclude DelDOT properly

⁶ See *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) (“[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (in response to plaintiffs’ request for a declaration that the Board wrongfully denied them timely access, stating “[b]ecause the documents that are the subject of [plaintiffs’] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot”).

⁷ DelDOT withdrew its arguments under 29 *Del. C.* § 10002(l)(2) for purposes of this Petition.

⁸ 29 *Del. C.* § 10002(l)(9).

⁹ *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).

¹⁰ *Id.*

¹¹ *Id.*

denied the requests for the draft appraisals and the communications regarding the appraisals under 29 *Del. C.* § 10002(1)(9).

CONCLUSION

For the reasons set forth above, we conclude that DelDOT has not violated FOIA as alleged.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Bradley S. Eaby, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General