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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB05

January 23, 2020

VIA EMAIL

Richard L. Abbott, Esq.
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RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Abbott:

We write in response to your correspondence submitted on behalf of your client 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 has not violated FOIA as alleged.

BACKGROUND

On behalf of your client, you filed an application dated June 28, 2019 with DNREC to amend the State Wetlands Map to remove the wetlands designation from your client’s property. On December 3, 2019, you filed the following request for records with DNREC:

A. Subject – Delmarsh LLC Application (“Application”) for State Wetlands Map (“Map”) Amendment dated June 28, 2019 requesting removal of Lots 22-25, 32 and Undesignated Lot located on Flack Avenue and Bayshore Drive in Town of Bowers, Kent County, Delaware (the “Property”) from the Map. B. Documents Requested on Subject – 1. All emails or other written communications from or to DNREC personnel regarding the Subject. 2. All analyses, reports, studies, evaluations, or recommendations

regarding the Subject. 3. All documents supporting the inclusion of any Property on the Map as marsh, wetlands, or any other Map designation. 4. All documents in any electronic or hard copy files regarding the Application, other than those submitted to DNREC by Delmarsh LLC or its agent or representative.”¹

On December 11, 2019, DNREC denied your request, citing 29 *Del. C.* § 10002(l)(9) which exempts records pertaining to pending or potential litigation which are not records of any court.

You filed a Petition with this Office, alleging that DNREC improperly denied your request pursuant to the pending or potential litigation exemption. You attached a copy of your responsive email to the denial, objecting that DNREC included no explanation about how this exemption applies in the circumstances. You argue a “conclusory assertion of pending or potential litigation without any indication that might be the case is inadequate to satisfy the FOIA standard.”² Additionally, you note that no litigation is pending and that no decision on your underlying application has been issued, meaning that a favorable decision or a denial “on solid grounds” would not result in litigation.³ Because no pending or potential litigation exists, you contend the requested documents must be produced, noting that everything the government does may result in litigation and allowing the exemption in these circumstances would allow the exception to swallow the rule.

DNREC responded to the Petition on January 2, 2020 (“Response”). DNREC notes that your request seeks documents related to the application and “DNREC’s consideration of the [a]pplication.”⁴ DNREC acknowledges your client’s application was sent by letter dated June 28, 2019 and that its staff corresponded regarding the application from July to September 2019. However, DNREC staff sought legal assistance in September 2019 and advised your client of this referral to its legal counsel; while waiting for legal assistance, DNREC states it did not respond to your emails in October and November 2019. DNREC asserts that you specifically threatened legal action against DNREC and attached your November 18, 2019 email stating in part:

It has now been over 4 ½ months since the application was filed to make the State Wetlands Map Amendment. That is beyond the amount of time that is reasonable under the circumstances.

We have not heard back with any information or analysis that DNREC has performed which would differ from the data and expert opinion that we submitted with the original application. The 6 lots owned by my client do not qualify under

¹ Petition.

² *Id.* (quoted in original format).

³ *Id.*

⁴ Response.

the definition of Wetlands in Title 7, Section 6603(h). It is time to take them off the Map.

If I do not hear back from you or someone else at DNREC on this subject, then I will advise my client that it is necessary to take legal action to require DNREC to act.⁵

Approximately two weeks later, you sent your FOIA request seeking DNREC's internal communications regarding the handling of this same application. Applying the two-prong test for the potential litigation exemption, DNREC argues that these circumstances meet both factors: 1) litigation must be likely or reasonably foreseeable; and 2) a clear nexus exists between the requested documents and the subject matter of the litigation. DNREC asserts that litigation is likely or reasonably foreseeable, as your client has retained your counsel and you have expressly threatened to sue. DNREC further alleges that the second prong is met, as the subject of your FOIA request is the same application as the application that is the subject of your threatened legal action.

Our Office accepted for consideration your additional submission dated January 6, 2020. This submission attached copies of emails preceding your November 18, 2019 email, including a September 20, 2019 email from you to DNREC staff. In addition, the submission presents four arguments why you believe DNREC's denial based on the November 18, 2019 email was improper. First, you argue that DNREC's initial response to your request did not reference or attach this email. DNREC's response referenced pending or potential litigation, and you contend that the excuse was unfounded at the time DNREC denied the petition: a "lawyer-created, after-the-fact excuse cannot be relied upon to justify DNREC's December 11, 2019 violation of FOIA."⁶ Second, you contend that instead of ignoring your correspondence, DNREC should have simply replied that a legal referral had been made. Third, you argue that DNREC's reliance on this threat of litigation is without merit, as "a mere statement of what an attorney may advise his client does not constitute a threat of potential litigation."⁷ Instead, you assert the statement is an expression of "exasperation and frustration" after DNREC's lack of response.⁸ Fourth, even if your statement constitutes a threat of litigation, the threatened litigation would be a mandamus action which "would require no discovery at all, thereby precluding the possibility that the information that was sought in the FOIA request would have anything to do with the litigation."⁹

⁵ *Id.*

⁶ Petitioner's Letter to this Office dated Jan. 6, 2020.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

DISCUSSION

The Petition raises two allegations for consideration. First, the Petition alleges that DNREC's response to your FOIA request is merely a conclusory statement and DNREC violated FOIA by failing to explain how the potential litigation exemption applies in these circumstances. FOIA requires that a public body to provide a reason for denying access to records.¹⁰ Although we encourage public bodies to include detailed reasons when practicable, DNREC satisfied the statutory requirement in this instance by citing to the pending or potential litigation exemption as its reason for denying the request.¹¹ Therefore, we determine no violation occurred in this regard.

Second, the Petition alleges that DNREC improperly relied on 29 *Del. C.* § 10002(l)(9) to deny the requested records. This provision exempts "records pertaining to pending or potential litigation which are not records of any court."¹² DNREC argues that you seek these records for potential litigation, as threatened in your email of November 18, 2019. This exemption applies when "litigators or litigants are seeking information that might help them in court."¹³ However, governments always face some threat of suit, and construing "potential litigation" to include "an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA]."¹⁴ To address this dynamic, the Superior Court of Delaware has adopted this Office's two-prong test for the potential litigation exemption: "(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."¹⁵ "When determining whether litigation is 'likely or reasonably foreseeable,' the public body should look for objective signs that litigation is coming."¹⁶ These signs may include 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."¹⁷ Other indicators may include prior

¹⁰ 29 *Del. C.* § 10003(h)(2) ("If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial.").

¹¹ See also *Del. Op. Att'y Gen.* 16-IB02, 2016 WL 1072888, at * 2 (Jan. 14, 2016) ("While section 10003(h)(2) does not require a public body to cite a specific exemption, Delaware courts have determined that records must be made available for public inspection unless FOIA provides an exception to the public right of access.").

¹² 29 *Del. C.* § 10002(l)(9).

¹³ *Office of the Pub. Def. v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

¹⁴ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (citation omitted).

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.

DNREC asserts that the denial is appropriate in these circumstances. Your client retained your legal services in this matter. After several of your emails went unanswered, you advised DNREC that the time this process was taking was unreasonable in your opinion; and if a response was not forthcoming, you would “advise [your] client that it is necessary to take legal action to require DNREC to act.”¹⁸ Approximately two weeks later, you submitted a FOIA request seeking all documents regarding your client’s application, including documents related to DNREC’s internal consideration of this application and documents supporting DNREC’s inclusion of your client’s property on the State Wetlands Map. These requests directly pertain to the potential litigation involving your client’s application threatened a few weeks before.

In these circumstances, we believe that the two-pronged test for asserting the potential litigation exemption is met and DNREC appropriately denied your request.

CONCLUSION

Based on the above reasoning, we find that DNREC has not violated FOIA as alleged.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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

¹⁸ Response.