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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB09

February 27, 2020

VIA EMAIL

James W. Owen, Esquire
jowen@jowenlaw.com

RE: FOIA Petition Regarding New Castle County

Dear Mr. Owen:

We write in response to your correspondence alleging that New Castle County (“County”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). 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 with regard to your records request. For the reasons set forth below, we conclude that the County violated FOIA by failing to give a reason for its delay in responding to your request and a good faith estimate of time needed to respond to your request. However, as we determine that access to the requested records was ultimately properly denied, we recommend no remediation for this violation.

BACKGROUND

According to the Petition, you received correspondence in December 2019 entitled “Notice of Assessment Change” indicating the County increased the assessment value of your home and the property taxes owed. This notice also stated that an appeal of this determination may be filed no later than January 31, 2020. You contacted the County’s Office of Assessment to learn why this reassessment was initiated and were informed that an anonymous caller reported your basement had been recently finished.

By letter dated January 2, 2020, you submitted a FOIA request to the County via certified mail, seeking all information and documents related to the change in your property’s assessment “regardless of the physical form or characteristic by which such requested information is stored, recorded, or produced,” including all correspondence between the County assessor and her supervisor or any other County employee or Board of Assessment member, the assessor’s or any employee’s file for this matter, and the telephone records for all calls pertaining to the assessment

change, including the telephone numbers.¹ By email dated January 24, 2020, the County responded that “[t]o the extent you are seeking information for potential litigation, including an appeal of the assessment change or any action against the County, your request is denied.”² The response also offered you the opportunity to visit the County offices to review the assessment system records for your property and to speak with an assessor regarding the assessment change. Finally, the January 24, 2020 email stated that the County needed “more time to determine whether any other responsive, non-privileged, public records exist and to calculate the costs of reproducing such records.”³

Responding the same day, you accepted the County’s offer to meet and also asked the County to reconsider its position, asserting it was premature to think about litigation. Also later on January 24, 2020, the County received your certified letter asking the Office of Assessment for a sixty-day extension to file an appeal of the assessment change because you needed to first obtain the information from your FOIA request “in order to properly and completely present [your] opposition to the Notice.”⁴ On January 27, 2020, you met with an assessment supervisor and the County’s legal counsel to discuss this matter. You followed up that day with a confirmatory email summarizing your understanding from the meeting. Due to a spelling error in the email address, your email was not received by the County’s legal counsel until January 29, 2020, and the next day, he responded. The parties present divergent accounts of the discussions in this meeting. You allege the County’s legal counsel denied your request in its entirety without stating the basis for the decision and refused to provide the response in writing. In his January 30, 2020 email, the County’s legal counsel alleges that he denied “the majority of your FOIA request . . . based on your representation that you were seeking information for potential litigation” and that he informed you a written response “would be, and still is, forthcoming.”⁵ This Petition was sent to our Office on January 29, 2020, and your appeal of the assessment change to the County followed two days later, on January 31, 2020.

The Petition challenges the County’s response on two grounds. First, it asserts that the County legal counsel’s denial of your FOIA request was improper because according to the January 24, 2020 email, the assessor was still looking for “responsive, non-privileged, public records” in response to your FOIA request received on January 6, 2020.⁶ Second, the Petition alleges that the County improperly invoked the pending or potential litigation exemption in

¹ Petition, Ex. B.

² Petition, Ex. C.

³ *Id.*

⁴ Response, Ex. 2.

⁵ Response, Ex. 3. In its Response, the County only referenced two emails responding to your request dated January 24, 2020 and January 30, 2020. We have no evidence of the County’s transmission of a separate response following the January 30, 2020 email.

⁶ Petition, Ex. C.

response to your request, as no litigation was threatened and the available appeal option may not have been pursued if satisfactory information had been submitted in response to your request. You assert the County violated FOIA by not completing the search of its records as set out in the County's response and that the County's assertion of the pending or potential litigation exemption is "unfounded; presumptive; premature; and therefore, not applicable."⁷

On February 7, 2020, the County, through its counsel, responded to the Petition ("Response"). The County argues that it properly denied your FOIA request, as you requested records for use in potential litigation. The County asserts that the administrative appeal process for assessments is considered litigation for purposes of the pending or potential litigation exemption. The County states that your FOIA request included your law firm's email address, and the attachment "more resembled a discovery request than a request for public records."⁸ The County states the Assessment Office received your request on January 10, 2020, and the response was due on February 4, 2020. As such, the County contends that this initial response on January 24, 2020 was not a final resolution of this request. It merely put you on notice that FOIA could not be used to obtain information to be used in litigation with the County; the response did not deny access to records, but instead offered access to some documents and noted additional time was needed to locate responsive records. After sending its initial response, the County received your extension request, and the County claims it knew at that point that you sought the requested records for use in potential litigation, as the extension request states you need the requested records for presenting your opposition to assessment in the appeal. The County also points to multiple indicia of your intent to file an appeal and the nexus between the request and the potential litigation, including repeated references that you sought "evidence."

Finally, the County asserts that your intent to file litigation was actually realized after the appeal was filed on January 31, 2020 and that this request could also be denied pursuant to the exemption for pending litigation.

DISCUSSION

The Petition alleges the County's response is deficient for failing to complete the search of records as promised in the County's January 24, 2020 response. In its initial response, the County noted the potential litigation exemption based on its suspicion that the records were requested for that purpose, but the County did not deny access to any records. Rather, the County advised that additional time was needed to search for records responsive to your request but did not provide you with a permissible reason for the delay or an estimate of the time needed.

Section 10003(h)(1) permits a public body to inform a requestor that a response will take more than the statutory requisite fifteen days when the request is for voluminous records, requires

⁷ Petition.

⁸ Response.

legal advice, or a record is in storage or archived.⁹ This Section also requires that a notice advising of one of these three reasons for a delayed response include a good faith estimate of how much additional time is needed.¹⁰ The County's January 24, 2020 email, while perhaps intended to suggest that it was seeking legal advice or that it was having difficulty locating responsive records, did not specifically reference one of the three permissible bases to deviate from the time period required by FOIA. The County's January 24, 2020 email also did not contain any estimation of the additional time needed to fully respond to your request. In our view, the General Assembly did not intend that a requesting party should be placed in the position of guessing about why a public body seeks additional time to respond. For these reasons, the County's January 24, 2020 email failed to comply with Section 10003(h)(1). Without a properly noticed extension, the County was required to respond to your request by January 28, 2020 but failed to do so.¹¹ If a public body denies access to records, it is required to "indicate the reasons for the denial."¹² This explanation was delivered by email two days later, in which the County advised of its decision to deny access to the records based on the evidence of your intent to use the records to file potential litigation. As the County issued a delayed response without properly advising the requesting party in compliance with Section 10003(h)(1), we find the County did technically violate FOIA.

Although we find a violation in the County's failure to appropriately inform you of the need for an extension, we do not recommend remediation, as we determine the County ultimately properly denied access to the requested records under the potential litigation exemption. Pursuant to 29 *Del. C.* § 10002(1)(9), "any records pertaining to pending or potential litigation which are not records of any court" are not public records required to be disclosed under FOIA. Administrative appeals are considered "litigation" for purposes of this exemption.¹³ The test for applying the exemption for potential litigation is as follows: "(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."¹⁴ Indicators of potential litigation "might include 'previous or preexisting

⁹ 29 *Del. C.* § 10003(h)(1).

¹⁰ *Id.*; see also *Del. Op. Att'y Gen.* 16-IB15, 2016 WL 3462346, at *4 (Jun. 10, 2016).

¹¹ Although the County claims the Assessment Office received your request on January 10, 2020, the actual date of receipt was January 6, 2020, as confirmed by the certified mail receipt attached to the Petition. Petition, Ex. B. Based on the statutory requirement of fifteen business days, the County's response to the request was required by January 28, 2020.

¹² 29 *Del. C.* § 10003(h)(2).

¹³ *Del. Op. Att'y Gen.* 19-IB65, 2019 WL 6839916, at *3 (Nov. 25, 2019) (finding an appeal to the Personnel Board is considered "litigation" and stating "[t]his Office has recognized quasi-judicial proceedings, including those before an administrative body, constitute 'litigation' for purposes of FOIA.") (citations omitted).

¹⁴ *Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007).

litigation between the parties or proof of ongoing litigation concerning similar claims or proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.”¹⁵

These circumstances meet the two-prong test for potential litigation. The first prong is satisfied, as your January 24, 2020 extension request alerted the County of your intent to file an appeal of the assessment change. The second prong is also met, as the requested records have a clear nexus to the subject matter of your appeal. Your FOIA request sought all records regarding the County’s determination of a change to your assessment, including the evidentiary basis of this change, and your extension request explicitly states that you need additional time to file an appeal to challenge this assessment change because you were waiting to receive documents from your FOIA request “in order to properly and completely present [your] opposition to the Notice.”¹⁶ As such, we find that your FOIA request was properly denied under the potential litigation exemption.

CONCLUSION

Based on the foregoing, it is our determination that the County violated FOIA by failing to timely give a reason for its delay and a good faith estimate of time needed to respond to your request. However, as we determine that access to the requested records was ultimately properly denied, we recommend no remediation for this violation.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Randolph M. Vesprey, Assistant County Attorney

¹⁵ *Id.* (citation omitted).

¹⁶ Response, Ex. 2.