



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB11

March 13, 2020

VIA EMAIL

Gary A. Myers
garyamyers@yahoo.com

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

Dear Mr. Myers:

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”). 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 DNREC has not violated FOIA as alleged.

BACKGROUND

This matter involves a protracted dispute between two state bodies, the Public Service Commission (“PSC”) and DNREC, regarding their respective rights and responsibilities under the Renewable Energy Portfolio Standards Act (“REPSA”).¹ REPSA requires that an increasing percentage of electricity come from renewable sources each year; however, if a certain threshold is exceeded, a freeze may be placed on this increase as a cost containment mechanism. DNREC allegedly is required to collect cost data from electric supplier, Delmarva Power and Light Company (“Delmarva Power”), and to make a yearly cost determination using this data.²

This dispute began in November 2018 when, over DNREC’s objections, the PSC promulgated regulations under REPSA determining how to calculate the cost threshold. DNREC then filed suit in Superior Court against the PSC challenging these regulations. The Superior Court case has since been dismissed. You initially filed a motion to intervene in that case, but you later

¹ 26 *Del. C.* §§ 351 - 364.

² Petition.

withdrew. DNREC represents that the appeal period for the Superior Court’s decision had not yet expired as of the date of its Response.

During the pendency of the Superior Court lawsuit, the PSC continued implementing the contested regulations. Pursuant to the court’s request, the PSC set a November 13, 2019 deadline for DNREC to provide it with requested information; DNREC did not meet this deadline. The PSC notified DNREC of a December 5, 2019 public meeting to discuss possible courses of action to address DNREC’s noncompliance, including a rule to show cause hearing for DNREC’s failure to meet the deadline. DNREC asked to stay these proceedings, and you filed an objection with the PSC. On December 4, 2019, you submitted written argument to the PSC, requesting that it: 1) direct Delmarva Power to provide the cost information it was required to send to DNREC directly to the PSC; 2) direct DNREC to submit the cost determination to the PSC it was required to submit under the regulations; and 3) direct Delmarva Power to submit to the PSC a report of “the actual dollar amount of the ‘Total Retail Costs of Electricity’ for compliance year 2018-19.”³ For each category, you requested the submission to the PSC “so as to make the information available for public review.”⁴ At the December 5, 2019 meeting, the PSC denied DNREC’s request for a stay and set another compliance deadline for DNREC to submit the requested materials. This ruling was memorialized in Order No. 9522 issued on December 12, 2019.

Ten days later, you sent DNREC a records request for the following:

A. Under the provisions of 26 DE Admin. Code Part 3008 § 3.2.21.1 (adopted by the Public Service Commission), Delmarva Power & Light Company (as the “Commission-regulated electric company”) was required to submit to the Division by September 30, 2019 certain cost information pertaining to the yearly determinations and enforcement of the provisions of 26 *Del. C.* §§ 354(i) & (j). I request to review: (1) the report and its information and all supporting material (in any format) submitted to the Division by Delmarva Power & Light Company (DP&L) to fulfill DP&L's obligation under Part 3008 § 3.2.21.1 for the 2018-19 REPSA compliance year; and (2) all other documents held, received, created, maintained, or solicited by the Division that relate to the information required to be submitted to the Division by DP&L under Part 3008 § 3.2.21.1 for the 2018-19 REPSA compliance year.

B. Under the provisions of 26 DE Admin. Code Part 3008 § 3.2.21.2 (adopted by the Public Service Commission), the Division is directed to determine – by September 30, 2019 - certain cost information relating to "the total costs associated with any ratepayer funded state renewable energy [or solar] rebate program.” See also 26 *Del. C.* § 354(i) & (j) (ratepayer funded rebate programs specifically included in listing of total cost of compliance). I request to review: (1) all documents worksheets, cost data, or other materials (in any format) that represent the determinations made by the Division under Part 3008 § 3.2.21.2 and under 26

³ Response, Ex. F.

⁴ *Id.*

Del. C. § 354(i) & (j) for the 2018-19 REPSA compliance year (2) all documents, worksheets, cost data, or other materials (in any format) that represent, or relate to, the cost information determination that the Division was charged to make under Part 3008 § 3.2.21.2 and under 26 *Del. C. § 354(i) & (j)* for the 2018-19 REPSA compliance year; and (3) all documents, worksheets, cost data, or other materials (in any format) that reflect: (a) “the costs associated with any ratepayer funded state renewable energy rebate program” and (b) “the costs associated with any ratepayer funded state solar rebate program,” for the 2018-19 REPSA compliance year.⁵

On January 31, 2020, DNREC denied this request pursuant to 29 *Del. C. § 10002(l)(9)*, which exempts “records pertaining to pending or potential litigation which are not records of any court” and pursuant to 29 *Del. C. § 10002(l)(6)*, which exempts “records specifically exempted from public disclosure by statute or common law.”

While you petitioned DNREC for this information, the PSC proceedings continued. DNREC did not submit the requested information to the PSC as directed by Order No. 9522. You submitted another request to the PSC suggesting that it move forward with the process of calculating the cost thresholds with or without DNREC’s participation, urging the PSC to “collect the cost cap information for the 2018-19 year,” “do the calculations,” and “report to the Executive and Legislative Branches.”⁶ To collect the cost information, you suggested the PSC order Delmarva Power to provide the information it submitted to DNREC directly to the PSC and to prepare a *pro forma* report with the information it would have submitted under the now-repealed DNREC regulations and to direct DNREC to provide the cost determinations. You suggested that the underlying data from Delmarva Power and the cost determination calculations all be made public. The PSC considered your comments in addition to the other comment presented and issued Order No. 9542 adopting several of your suggestions, including directions to Delmarva Power to provide the cost data for 2018-19 directly to the PSC and to the PSC staff to calculate the cost determination and present those numbers at the February 19, 2020 regular meeting for consideration and consultation with DNREC regarding the decision to implement a freeze.

Between the time of your Petition filing and DNREC’s Response, the PSC held a public hearing, in which you and DNREC participated. By written submission, you asked the PSC to unilaterally institute the freeze and included a proposed form of an order for the freeze. DNREC alleges that at the hearing, you argued for making the cost determination and the underlying data from Delmarva Power publicly available. DNREC states that at this February 19, 2020 meeting, the PSC verbally decided to implement the freeze and make the final results of the cost determination public but refused to adopt your suggestion to publicly disclose the underlying data from Delmarva Power. As of the date of DNREC’s Response, the PSC had not issued a written order.

⁵ Petition.

⁶ Response, Ex. H.

POSITIONS OF THE PARTIES

You filed a Petition with this Office challenging the denial of the FOIA request. Primarily, you argue that DNREC’s assertion of the pending or potential litigation exemption under 29 *Del. C.* § 10002(1)(9) is improper. As DNREC’s response did not specify which portion of the on-going dispute prompted its decision to deny access, you addressed several aspects of this dispute. You argue that the Superior Court action challenging the rules is not an appropriate basis to assert the exemption, as you were not a party to that litigation and thus are not performing an “end run” around the discovery rules. You allege that even the actual parties may not have access to discovery in a facial challenge to the regulations and that information you seek was provided to DNREC before this “pre-enforcement facial challenge” was instituted, so it cannot shield “the numbers that those rules might later generate.”⁷ In addition, you allege that the PSC proceedings involve a rulemaking process, and it is not a quasi-judicial proceeding or a “case decision” under the Administrative Procedures Act, and neither you, nor any member of the public submitting comments, would be considered parties in this process. You argue a rulemaking process should not be permitted to preclude disclosure of the relevant documents.

Furthermore, you contend that the PSC proceedings resulting in Orders No. 9522 and 9542 should not be considered pending litigation, explaining that PSC had to “find a way to have the statutorily-required cost containment process continue, despite DNREC’s non-acquiescence.”⁸ You argue that the PSC is not making a “case decision” under the Administrative Procedures Act in this context either, noting the PSC expressly declined to bring an enforcement action against DNREC. You also argue that this proceeding is not a “quasi-judicial proceeding” under this Office’s precedent; you offered comments as a member of the public and the PSC does not “think that it was sitting as some ‘neutral adjudicator’ in a trial pitting [you] against DNREC over . . . respective rights and responsibilities.”⁹ Although you acknowledge this Office first found administrative proceedings to be quasi-judicial when they had “all the accoutrements of litigation,” you contend that this Office shifted its view of quasi-judicial proceedings in Attorney General Opinion 10-IB06, determining that in an administrative quasi-judicial proceeding without access to discovery, the public’s right to the pending litigation exception should be balanced with the public nature of the records requested. That opinion found this balance tipped in favor of disclosure, as the records sought pertained to the expenditure of public funds. You argue that your request meets this modified standard and the balance here also tips towards disclosure, as your request seeks documents of a public nature, despite the fact that they are not public fund expenditure records “in a highly technical sense.”¹⁰

⁷ Petition.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Finally, you allege that DNREC improperly asserted 29 *Del. C.* § 10002(1)(6), as the records you request do not qualify as attorney client privileged or attorney work product materials. You question how third-party submissions from Delmarva Power would fall under these exemptions and how cost determinations or State agency grant payouts can be construed as the work product or a communication between DNREC and its attorneys. For these reasons, you asked this Office to find that DNREC violated FOIA by denying the records request.

On February 24, 2020, DNREC submitted a letter (“Response”) through its counsel. DNREC states that you and DNREC are both parties to “long-running litigation” before the PSC. Specifically, DNREC emphasizes that the central dispute in this litigation concerns REPSA’s cost containment mechanisms. You and DNREC have advanced adverse positions regarding the “promulgation of Regulations, the substance of those Regulations, the calculation of costs to determine whether a freeze could be implemented, and ultimately the PSC’s decision to unilaterally order a freeze of the RPS percentage.”¹¹ DNREC emphasizes the PSC’s most recent verbal order at the February meeting accepting your recommendations to publicize the cost calculations its staff made and to unilaterally order a freeze but declining to follow your suggestion of publicizing Delmarva Power’s underlying data. DNREC asserts you are attempting to use FOIA to advantage your position in this litigation, which is exactly what the pending litigation exemption was intended to prevent. DNREC highlights more recent Attorney General opinions that determine the applicable standard is whether the requested documents pertain to the litigation, not whether the records are otherwise confidential. DNREC maintains that the PSC proceedings are quasi-judicial in nature, bearing the accoutrements of litigation; both you and DNREC presented adversarial positions to the PSC and the PSC issued several orders applying its determinations of the law to the facts. DNREC alleges the PSC made a “determination of what the law is and what the rights of the parties are.”¹² In addition, DNREC argues that the Superior Court case between DNREC and the PSC also constitutes pending litigation, and the requested records pertain to this case in which you initially attempted to intervene, noting that the appeal period has not expired. Finally, DNREC alleges that your request is broad and seeks more than merely cost data; in DNREC’s view, many of the materials sought by your request are covered by the attorney-client privilege and the attorney work product doctrine.

DISCUSSION

DNREC cited the pending litigation exemption in 29 *Del. C.* § 10002(1)(9) to deny access to the requested documents. Pursuant to that section, any records pertaining to pending litigation which are not records of any court are exempted from the definition of public record. “[W]hen parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in

¹¹ *Id.*

¹² *Id.*

the litigation.”¹³ “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”¹⁴ The exemption applies where litigators or litigants are seeking information that might help them in litigation.¹⁵ For the exemption to apply, we must determine whether the records requested under FOIA relate to the litigation.¹⁶

For this inquiry, we must first determine whether the PSC proceedings qualify as “litigation” for purposes of the pending litigation exemption. This Office considers quasi-judicial proceedings “litigation” for the purposes of applying 29 *Del. C.* § 10002(1)(9).¹⁷ This term includes the “proceedings of administrative bodies that in essence determine legal rights outside the traditional court of law,” and includes those contested proceedings with “all of the accoutrements of litigation.”¹⁸ A judicial act “involves exercise of discretion or judgment” such as “an act of an administrative board if it goes to the determination of some right,” and “[t]he act of an administrative board is judicial ‘when there is an opportunity to be heard, and the production and weighing of evidence and a decision thereon.’”¹⁹ Under this standard, this Office has determined that various administrative proceedings constitute quasi-judicial proceedings, including the arbitration process and appeals to a planning board, proceedings before an environmental appeals board, appeals to a personnel board, and this FOIA petition process itself.²⁰ We do not find merit in the Petition’s reliance on Attorney General Opinion 10-IB06, as the circumstances here differ significantly. The records in that case related to the expenditure of public funds which FOIA considers vital in assuring government accountability. The records here are based on data mostly obtained from a third party and the resulting calculations; the significance of those records to the

¹³ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (citation omitted).

¹⁴ *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

¹⁵ *Office of the Pub. Def. v. Del. State Police*, 2003 WL 1769758, at *2-3 (Del. Super. Mar. 31, 2003).

¹⁶ *Grimaldi*, 2016 WL 4411329, at *9-10.

¹⁷ *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *4-5 (May 6, 2003).

¹⁸ *Del. Op. Att’y Gen.* 03-IB26, 2003 WL 22931613, at *1-2 (Nov. 13, 2003) (citation omitted).

¹⁹ *Id.* at *1 (quoting *Black’s Law Dictionary* 984 (4th ed. 1968)).

²⁰ See *Del. Op. Att’y Gen.* 19-IB65, 2019 WL 6839916 (Nov. 25, 2019) (personnel board); *Del. Op. Att’y Gen.* 19-IB16, 2019 WL 4538301 (Mar. 22, 2019) (FOIA petition process under 29 *Del. C.* § 10005); *Del. Op. Att’y Gen.* 18-IB52, 2018 WL 6591817 (Nov. 29, 2018) (environmental appeals board); *Del. Op. Att’y Gen.* 04-IB04, 2004 WL 335476 (Feb. 5, 2004) (arbitration); *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612 (planning board).

public are contested and depend on how the disputes are ultimately resolved by either the PSC or the courts. Additionally, more recent opinions do not focus on the lack of discovery in a quasi-judicial proceeding as the determinative factor.²¹

In this instance, you and DNREC are involved in an administrative proceeding in front of the PSC. The PSC is a statutorily-authorized commission of the State of Delaware.²² In this proceeding, PSC presides as a neutral arbiter to take evidence and hear arguments about DNREC's alleged noncompliance, and you and DNREC appeared as adversarial parties in these proceedings. The parties were given the opportunity to file and present written and oral arguments to the PSC, and the PSC issued orders making decisions about the application of the law to the facts and determining the parties' legal rights. Thus, we find that these proceedings qualify as litigation for purposes of the pending litigation exemption.

Second, we must determine whether these records pertain to this pending litigation.²³ To do so, we consider the timing and nature of your request in regard to this pending litigation.²⁴ In the midst of these proceedings in which you advocate for the PSC to obtain Delmarva Power's cost data and DNREC's cost determination to determine whether a freeze is appropriate, your request seeks broad categories of records related to essentially the same matters. Indeed, the Petition indicates that the express purpose for this request is to obtain the information that PSC was seeking from DNREC, make your own calculations, and disclose this information to the public.²⁵ On this record, we find a sufficient basis to conclude that your FOIA request pertains to the pending PSC proceedings.

Overall, the record reflects your FOIA request is aimed at advancing your position in the aforementioned litigation, and it is well-settled in Delaware that using FOIA for this purpose is contrary to the objectives of FOIA.²⁶ Considering the totality of these circumstances, we find that

²¹ See, e.g., *Del. Op. Att'y Gen.* 19-IB16, 2019 WL 4538301, at *3; *Del. Op. Att'y Gen.* 18-IB52, 2018 WL 6591817, at *3.

²² 26 *Del. C.* ch. 1.

²³ See 29 *Del. C.* § 10002(1)(9).

²⁴ *Del. Op. Att'y Gen.* 03-IB10, 2003 WL 22931612, at *5 (“We determine that there is a sufficient nexus based both on the timing of your FOIA request and the nature of the documents requested.”).

²⁵ Petition. (“Once I had the raw cost numbers, I could – on my own – do the cost cap calculations called for by the PSC’s rules. Then the public could be made aware whether the current statutory cost caps had been breached in yet another year. . .”).

²⁶ See *Office of the Pub. Def.*, 2003 WL 1769758, at *2 (in concluding that pending or potential litigation exemption was appropriately asserted, stating “[t]here is no reason why the Public Defender needs the State Police materials except to the extent that they might help the office’s clients directly in court. . . [o]r, they could be indirectly helpful as training materials for

DNREC has sufficiently demonstrated that the PSC proceedings in this case constitute litigation and the requested records pertain to the pending litigation. Therefore, DNREC appropriately withheld the documents pursuant to the pending litigation exemption in 29 *Del. C.* § 10002(1)(9).

CONCLUSION

Thus, it is our determination that DNREC has not violated FOIA as alleged.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Jameson A. L. Tweedie, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

assistant public defenders”); *Del. Op. Att’y Gen.* 17-IB24, 2017 WL 3426264, at *2 (July 14, 2017) (“What is well-settled, however, is the Delaware courts’ strong opposition to allowing litigants to use FOIA as a means to advance their existing litigation position.”).