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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB02

January 21, 2021

VIA EMAIL

Warren Rosenkranz
wrosenk@yahoo.com

RE: FOIA Petition Regarding Village of Arden

Dear Mr. Rosenkranz:

We write in response to your correspondence alleging that the elected officials of the Town Assembly of the Village of Arden (“Village”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. 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. As set forth below, we determine that the pending or potential litigation exemption applies and the Village appropriately denied your request on this basis.

BACKGROUND

The Village of Arden is an incorporated municipality established by the State of Delaware and charged with the ownership and governance of the Village’s public lands.¹ Arden’s private residential lots are administered by a separate body, the Trustees of Arden.² The Town Assembly consists of all residents, over eighteen years of age who have met a six-month residency requirement, and the Town Assembly elects officers, including a Chair.³ The Village is involved

¹ Response.

² *Id.*

³ Petition.

in litigation regarding its use of an estate's bequest. In partial settlement of this case, the parties agreed to the creation of a trust.⁴ You submitted a request for records dated October 25, 2020 for "communications written and verbal between the Village of Arden, its representatives and Mr. Rosenthal regarding the establishment of the Trust."⁵ You also noted that the Chair of the Town Assembly and other Village representatives have had meetings with the Village counsel regarding the trust. The Village denied your request on November 12, 2020, stating that the documents are "part of an ongoing court case" and the communications between the Chair of the Town Assembly and its attorney are privileged communications.⁶ The Response concluded by referring you to several litigation documents publicly available for your perusal on the Village's website.

You then filed this Petition, challenging the denial of access to the Village's records and exclusion from the litigation process, despite your standing as a member of the Town Assembly. You argue that as a member of the Town Assembly, you are one of the defendants in the case and are entitled to access to these records, and you should be aware of and included in all discussions regarding the case. You allege that Mr. Rosenthal, the Town Assembly's attorney, has not directly consulted with you about the litigation, including the trust formation currently under negotiation, and "[b]eing left out of the process violates [your] rights as a defendant."⁷ The Petition maintains that this failure to correspond with you and all members of the Town Assembly and the denial of access to the requested communications constitute violations of FOIA.

On December 30, 2020, the Town Assembly's attorney responded on behalf of the Town Assembly's Chair ("Response"). The attorney states that the ongoing litigation involves the question of the propriety of the Village's use of the bequest, more specifically: 1) the use of the funds, and 2) the process by which the Village arrived at its decision. He notes that "the parties reached a partial settlement concerning the 'process' aspects of the case in exchange for an agreement that [the bequest] would be held in trust," and enclosed a copy of the court's decision on a motion for summary judgment mentioning this trust.⁸ The Town Assembly's attorney affirms that the parties' attorneys are continuing to negotiate the trust in partial settlement of the case, and as such, "[u]ntil the resulting trust is fully formed, the litigation remains open and not merely pending."⁹ Therefore, he argues that the communications requested are barred from disclosure pursuant to 29 Del. C. § 10002(l)(9) which excepts any records "pertaining to pending or potential litigation which are not records of any court" and 29 Del. C. § 10004(b)(4) which excepts strategy

⁴ Response.

⁵ Petition.

⁶ *Id.*

⁷ *Id.*

⁸ Response.

⁹ *Id.*

sessions involving legal advice with respect to pending or potential litigation when an open meeting “would have an adverse effect on the bargaining or litigation position of the public body.”

DISCUSSION

The main contention of your Petition is that as a member of the Town Assembly, you are not a third party requesting information from a government entity; you are part of the governing entity and have been improperly denied the right to participate in the governing entity. Your standing as a member of the Town Assembly with the right to participate in the activities of the governing entity of the Village is a question concerning municipal law, which is outside the scope of this Office’s authority to decide.¹⁰

FOIA excludes certain categories of records from the definition of “public record,” and the public body bears the burden of justifying its denial of access to records.¹¹ In its response to your request, the Town Assembly asserted the exemption under 29 *Del. C.* § 10002(l)(9) for “records pertaining to pending or potential litigation which are not records of any court.” As emphasized in the *Flowers v. Office of Governor* case, when a statute is unambiguous, the plain meaning of the statute controls, even though FOIA’s “exemptions are to be narrowly construed and . . . FOIA is to be construed to further open access to records.”¹² Instead, the court “must resist the temptation to construe statutory provisions against their plain meaning.”¹³ Although Delaware courts have often repeated the same rationale for this exemption in cases involving litigants - that to ensure an even playing field in litigation, litigants cannot use FOIA to circumvent the discovery rules - it does not follow that, contrary to the plain language of statute, these are the only circumstances in which the exemption may be used. The identity of the requesting party has no bearing on the merits of a FOIA request.¹⁴ Accordingly, we find that a public body is not required to determine

¹⁰ See, e.g., *Del. Op. Att’y Gen.* 20-IB28, 2020 WL 7663557, at *2 (Nov. 9, 2020); *Del. Op. Att’y Gen.* 16-IB13, 2016 WL 3462344, at *6 (Jun. 8, 2016); *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, at *10 (Aug. 19, 2015); *Del. Op. Att’y Gen.* 07-IB25, 2007 WL 4941957, at *2 (Dec. 27, 2007).

¹¹ 29 *Del. C.* §§ 10002(l), 10005(c).

¹² 167 A.3d 530, 545 (Del. Super. 2017).

¹³ *Id.*; see also *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) (“[W]e do not sit as an überlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.”).

¹⁴ “Under FOIA, a record is public, or it is not.” *State v. Camden-Wyoming Sewer and Water Auth.*, 2012 WL 5431035, at *7 (Del. Super. Nov. 7, 2012) (citation omitted); but see, e.g., *Koyste v. Del State Police*, 2001 WL 1198950, at *2-3 (Del. Super. Sept. 18, 2001) (concluding that the State Police may assert the pending or potential litigation exemption when a federal criminal defendant’s attorney sought records that had been denied in discovery). We note, however, this

that the requesting party is a litigant in pending litigation in order to assert the pending litigation exemption. Instead, we believe that the application of this exemption should be limited to determining whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.

We now turn to examine these principles in this case. The Town Assembly's attorney represents that litigation is ongoing; only a partial settlement has been reached, and that settlement is not effectuated until the trust is established.¹⁵ As such, we find that the Town Assembly properly asserted the pending or potential litigation exemption because it has demonstrated pending litigation and the records you seek, communications about a trust being formed, pertain to this pending litigation and are not records of any court.

CONCLUSION

Based on the foregoing, we determine that the that the Town Assembly of the Village properly denied this request pursuant to 29 *Del. C.* § 10002(1)(9).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved by:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Edward Rosenthal, Attorney for the Village of Arden Town Assembly

principle does not apply uniformly. For example, the identity is relevant if the exemption itself explicitly bars certain requesting parties. 29 *Del. C.* § 10002(1)(13) (exempting Department of Corrections records when disclosure is sought by an inmate).

¹⁵ *Judicial Watch, Inc. v. Del. Dep't of Justice*, 2021 WL 22550, at *5 (Del. Super. Jan. 4, 2021) (accepting the representations of the public body's attorney to meet the public body's burden of proof under FOIA, in light of the lawyer's duty of candor).