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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 21-IB12**

**May 18, 2021**

**VIA EMAIL**

Kenneth T. Kristl, Esquire  
Widener University, Delaware Law School  
Environmental & Natural Resources Law Clinic  
[ktkristl@widener.edu](mailto:ktkristl@widener.edu)

**RE: FOIA Petition Regarding the Delaware Department of Agriculture**

Dear Mr. Kristl:

We write in response to your correspondence submitted on behalf of your client, Maria Payan, alleging that the Delaware Department of Agriculture (“DDA”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with her 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 discussed below, we find that the DDA violated FOIA by failing to adequately justify its bases for denying the request for certain requested records, and we recommend that the DDA provide a supplemental response as indicated herein.

**BACKGROUND**

On March 29, 2021, Ms. Payan sent a FOIA request to the DDA for “the [Notice of Intent] and any current permits on [a farm in Townsend, Delaware].”<sup>1</sup> The FOIA coordinator provided a response to your client that same day, stating as follows:

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<sup>1</sup> Petition.

Under 3 *Del. C. § 2247(c)(5)*, [a]ll animal waste management plans, nutrient management plans and records of implementation shall be kept by the land owner or person responsible for the plans or records. Animal waste management plans, nutrient management plans and records of implementation shall not be considered as public records under the Freedom of Information Act and shall not be disclosed, except, however, that they shall be made available for inspection by the Delaware Department of Agriculture and the Commission. Records of implementation shall include:

(5) Certification statement signed by the operator to document the intention of nutrient management and/or animal waste management plan implementation[.]

As I said in the voicemail I left you on March 26, 2021, you may make an appointment to review this document with the Nutrient Management Program. The number to call to make an appointment is . . . . Please note that you may not take notes while reviewing this document or make copies or photograph the Notice of Intent.<sup>2</sup>

After receiving this response, the parties exchanged several more emails that day. Ms. Payan asked whether the notice of intent would include the nutrient management plan or animal waste management plan and whether copying or photography was permitted for those records. The DDA’s FOIA coordinator replied that because this farm has not been publicly noticed, the nutrient management plan and animal waste management plan for this farm were not considered public; only the notice of intent for this farm would be available. Ms. Payan then asked to review and copy more records, including the “farms that went out for notice of [i]ntent publicly their [nutrient management plan] or [animal waste management plan] from before that we were trying to resolve.”<sup>3</sup> The FOIA coordinator replied that “[t]he files from the 2019 publicly noticed CAFO permits are available for review only; no copies, recording, or note-taking at all,” and that “any CAFO permitted farm application materials ([notices of intent] and [animal waste management plans]) can be available for review upon request.”<sup>4</sup>

This Petition followed, alleging that the DDA violated FOIA by restricting Ms. Payan’s access to the notice of intent and the 2019 records in violation of FOIA by refusing to allow note-taking or copying. As the DDA indicated that the notices of intent and other records are available to inspect, you argue that the “DDA concedes they are public records subject to FOIA,” and is thereby required to permit “reasonable access to and reasonable facilities for copying” these records pursuant to 29 *Del. C. § 10003(a)*.<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

On April 28, 2021, the DDA’s counsel replied to your Petition by letter (“Response”). DDA argues that consistent with previous Attorney General Opinion precedent on this issue, its Response will not address any matter outside the scope of the FOIA statute. The DDA contends that it fulfilled its obligations under FOIA by providing a response to Ms. Payan’s request for the notice of intent and current permits for the farm in Townsend within two hours and advising that the records were not “public records” as defined by FOIA. Pursuant to 29 *Del. C.* § 10002(1)(6), any records exempt from disclosure by statute may be withheld and in this case, the DDA asserts that it properly withheld these records, as the requested records are not public pursuant to 3 *Del. C.* § 2247(c). The DDA asserts that it remains willing to provide access to some records, but such access is not offered under FOIA.

### **DISCUSSION**

FOIA requires the public body to justify its denial of access to records.<sup>6</sup> Ms. Payan requested three different types of records from the DDA in the course of her communications on March 29, 2021: the notices of intent related to the Townsend farm and the 2019 records; the “current permits” for the Townsend farm, and the 2019 nutrient management and animal waste management plans. Pursuant to 29 *Del. C.* § 10002(1)(6), any records exempt from disclosure by statute or common law may be withheld. The only basis asserted for refusing access to these records in the DDA’s responses to both the request and petition is a reference to 3 *Del. C.* § 2247(c), which states that nutrient management plans, animal waste management plans, and records of implementation, including a “certification statement signed by the operator to document the intention of nutrient management and/or animal waste management plan implementation” are not public records under FOIA. Although the DDA provides a clear statutory basis for asserting animal waste management and nutrient management plans are not public records pursuant to 29 *Del. C.* § 10002(1)(6) and 3 *Del. C.* § 2247(c), the DDA does not specifically address the request for current permits of the Townsend farm, nor does the DDA explain how 3 *Del. C.* § 2247(c) exempts the notice of intent.<sup>7</sup>

Accordingly, we find that the DDA violated FOIA by failing to meet its burden to justify denying access to these records, and as remediation, we recommend that DDA provide a supplemental response to Ms. Payan within fifteen business days consistent with 29 *Del. C.* §

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<sup>6</sup> 29 *Del. C.* § 10005(c) (stating that “[i]n any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records”).

<sup>7</sup> The DDA cited to Attorney General Opinion No. 19-IB30 in its Response but does not explain how Ms. Payan’s FOIA request for a notice of intent in that instance differs from her requests here. *Del. Op. Att’y Gen.*, 2019 WL 4538316, at \*1 (Jun. 20, 2019). In Attorney General Opinion No. 19-IB30, the DDA treated Ms. Payan’s request for nutrient management plans, animal waste management plans, and notices of intent as a FOIA request and provided access to redacted records in response.

10003, specifically addressing the requests for the current permits for the Townsend farm and the notices of intent for the Townsend farm and the 2019 records. The Petition's allegations regarding the propriety of any inspection offered under 3 *Del. C.* § 2247 or an attendant statute is outside the scope of FOIA and not addressed herein.<sup>8</sup>

### CONCLUSION

Based on the foregoing, we conclude that the DDA violated FOIA by failing to meet its burden to justify its denial of access to certain requested records but recommend that the DDA provide a supplemental response to Ms. Payan as outlined above.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Andrew G. Kerber, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>8</sup> 29 *Del. C.* § 10005(e); *see, e.g., Del. Op. Att'y Gen.* 21-IB11 (May 12, 2021); *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at \*2 (Oct. 12, 2018) (finding that this Office has “no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute”); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at \*2 (Aug. 8, 1996) (“To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* § 6921, that matter is beyond the jurisdiction of this office and is not addressed here.”).